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VOL. VIII. TORONTO, APRIL, 1861. No. 4.

THE UPPER CANADA LAW JOURNAL

AND MUNICIPAL AND LOCAL COUT S' GAZETTE.

CONDUCTED BY

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

PRINTED AND PUBLISHED BY MACLEAR & CO., 17 & 19 KING STREET EAST, TORONTO.

FOUR DOLLARS A YEAR, IN ADVANCE. FIVE DOLLARS OTHERWISE.

Business Card of Non-subscribers, not exceeding four lines, $4 a year; Business Card *and* Subscription for one year only, $6.

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REMITTANCES.

Judge B., Toronto, $4, W. M., Galt, $4, F. F. W., Owen Sound, $4, S. P. M., Port Rowan, $4, T. J., Rolph, $5, G. S. B., Cramahe, $4, G. M., New Hamburg, $5, T. T., Exeter. $4, J T., Perth, $10, R. W., Tuscarora, $4, W. S., Spencerville, $4, H. McC., Galt, $9, G. S. M., Kingston, $1, G. McP., Carleton Place, $4, Mr. C., Bowmanville, $8, M. P. E., Hawkesville, $4, J. B., Whitby, $4, A. S. St. J., St. Catherines, $4, S. N., Vienna, $4, J. A., New Hamburg, $4, L. W. S., Toronto, $4, J. P. Weston, $4, T. C., Houghton, $4, D. C., Ingersoll, $6, D B., Brantford, $4, J. K., Galt, $4, S. & S, Kincardine, $4, T. W. P., M.D., Norwood, $4, J. F., Peterboro', $4, H W. D., Trenton, $4, W. W., Florence, $9, A. M. M., Alexandria, $4, B. M. B., Kingston, $4, J. C. K., Beamsville, $4, D. B., Brantford, 70c. H. P., Wilton, $4, Sheriff D., Berlin, $4.

LAW SOCIETY OF UPPER CANADA.

(OSGOODE HALL.)

Hilary Term, 24th Victoria, 1861.

During this Term of Hilary the following Gentlemen were called to the Degree of Barrister-at-Law:—

Peter O'Brian, Esquire.
Timothy Blair Pardee, Esquire.
William Hepburne Scott, Esquire.
Charles Frederick Goodhue, Esquire.
Alexander Bruce, Esquire.
John Alexander MacKenzie, Esquire.
George William Des Vœux, Esquire.
George Sudlow Pappa, Esquire.
Cornelius Danford Paul, Esquire.
Charles Ingersoll Benson, Esquire.

James Windeat, Esquire.

On Tuesday, the 12th day of February, in this Term, the following Gentlemen were admitted into the Society as members thereof, and entered in the following order as Students of the Laws, their examinations having been classed as follows, viz.:—

University Class:

Mr. Andrew Thomas Drummond, B.A.
" George Macdonell, B.A.
Mr. Stephen Franklin Lazier, B.A.
" John Douglas, B.A.

Mr. Charles Mercer Jones, B.A.

Junior Class:

Mr. William Frederick Read.
" Alfred Frost.
" Henry Harcourt Naters.
" John Bain.
" Joshua Brown.
" James Harshand Fraser.
" Louis Croydon Moore.
" Walter Henry Morden.
" Lewis George Marsh.
" Gilbert Wellington Ostrom.
" Robert Charles Smyth.
Mr. Thomas Phillips Thompson.
" Allan Ramsay
" Francis Collin Draper.
" Thomas Griffith, Jun.
" Adam Graham Peden.
" William Lees.
" Robert Walker Smith.
" Edward Burns.
" George Lefroy McCaul.
Hon. Michael Hamilton Foley.
Mr. Walter Brougham Osterhout.

Mr. Alexander Goforth.

NOTE.—Gentlemen admitted in the "University Class" are arranged according to their University rank; in the other classes, according to the relative merit of the examination passed before the Society.

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

For the University Class:

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

For the Senior Class:

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

For the Junior Class:

In the 1st and 3rd books of the Odes of Horace; Euclid, 1st, 2nd, and 3rd books or Legendre's Geometrie, by Davies, 1st and 3rd books, with the problems; and such works in English History and Modern Geography as the candidates may have read and that this Order be published every Term, with the admission of such Term.

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

Ordered—That in future, Candidates for Call *with honours*, shall attend a Osgoode Hall, under the 4th Order of Hil Term, 18 Vic, on the last Thursday and also on the last Friday of Vacation, and those for Call, merely, on the last Thursday thereof.

Ordered—That the examination of candidates for certificates of fitness for admission as Attorneys or Solicitors under the Act of Parliament, 20 Vic chap. 63 and the Rule of this Society of Trinity Term, 21 Vic. chap. 1, made under authority and by direction of the said Act, shall, until further order, be in the following books and subjects, with which such candidates will be expected to be thoroughly familiar, that is to say:

Blackstone's Commentaries, 1st Vol.; Smith's Mercantile Law; Williams on Real Property; Story's Equity Jurisprudence; the Statute Law, and the Pleadings and Practice of the Courts.

NOTICE.—A thorough familiarity with the prescribed subjects and books will in future, be required from Candidates for admission as Students; and gentlemen are strongly recommended to postpone presenting themselves for examination until fully prepared.

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

Ordered, That the subjects of the Lectures for Easter Term, be as follows:—

Mr. Crooks, "On Equitable Jurisdiction."

Mr. Anderson, "On Pleadings."

J. HILLYARD CAMERON,
Hilary Term, 24th Victoria, 1861. *Treasurer.*

OPINIONS OF THE PRESS.

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

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

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

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

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

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

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

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

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

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

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

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

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

LAW JOURNAL, for November has arrived, and we have with pleasure its invaluable contents. In our humble opinion, the publication of this Journal is an inestimable boon to the legal profession. We are not aware of the extent of its circulation in Brantford; it *should be taken*, however by every member of the Bar, in town, as well every Majistrate and Municipal Officer. or would politicians find it unprofitable, to pursue its highly instru ive pages. This journal is admitted by Trans-Atlantic writers to be the most ably conducted Journal of the profession in America. The Publishers have our sincere thanks for the present number.—*Brant Herald*, Nov. 16th., 1858.

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

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

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

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

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

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

THE UPPER CANADA LAW JOURNAL, &C.

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

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

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

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

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

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

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

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

DIARY FOR APRIL.

1	Monday	*Easter Monday* County Court and Surrogate Court Terms begin. Recorder's Court sits.
2	Tuesday	Chancery Examination Term, Barrie and Ottawa commences.
6	Saturday	County Court and Surrogate Court Terms end.
7	SUNDAY	*1st Sunday after Easter*
8	Monday	Toronto Spring Assizes.
9	Tuesday	Chancery Examination Term, Goderich and Cornwall com
12	Friday	Last day for setting down for hearing Chancery.
14	SUNDAY	*2nd Sunday after Easter,*
15	Monday	Last day for notice of hearing Chancery.
21	SUNDAY	*3rd Sunday after Easter*
22	Monday	Chancery Hearing Term commences.
28	SUNDAY	*4th Sunday after Easter*
30	Tuesday	Last day for completing Assessment Rolls. Last day for Non-residents to give lists of their lands

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

APRIL, 1861.

COURTS OF APPEAL.

Human law is ranked among the sciences, but is not by any means a perfect science, or at all events is not perfectly understood as a science. Although it contains some well understood principles much difficulty arises in their application to the various and ever changing circumstances of man.

We know that winter follows summer, that night succeeds day,—that the sun gives light by day, and the moon by night,—because these are fixed by the immutable law of nature; but widely different are the laws which regulate, or are supposed to regulate human conduct, even in the most civilized community.

Though human law is a rule for human conduct, yet, as it is impossible for man to foresee all the contingencies that may arise in the application of a given law, the law, or at least its application, must of necessity be imperfect.

Law is not enacted to meet a single state of circumstances past and known, but as far as possible is general, and designed as a rule for all cases likely to arise; but when future cases do arise, men, owing to various causes, will be found to differ as to the application of the law to the new state of facts. For this reason there must be in every civilized state some authority empowered to interpret laws, and whose judgment will be binding on parties concerned.

No two men can be found exactly to correspond in physical appearance. So it is with the mind. No two men can be found to be precisely equal in point of intellectual ability. Different men have different minds, and such will be human experience till the end of time.

One man has clearer perceptive faculties than another; one is better educated than another; one more logical than another; one more industrious than another, and so we might enumerate many other points of difference. But no matter what the cause the fact cannot be disputed, men differ in their minds and at the same time are prone to take different views of the same subject matter.

Judges are no more than men. To err is human. So it may be said, to differ is human. Then when Judges differ as to the law what is to be done? There must be some plan adopted by which the decision of the majority is to govern.

In modern times the affairs of men in a civilized community are not only numberless but of different degrees of importance, and, as a consequence, a division of judicial labor is necessary. There must be one set of judges for cases of considerable importance, and another set of judges for cases of lesser importance, the latter being by far the more numerous, and therefore requiring the greatest number of judges. This is in truth the cause of the institution of Superior and County Judges in the mother country and here.

In Upper Canada there is a very accurate division of judicial labor in matters of civil right. There are the County Judges, thirty-one in number, corresponding with the different divisions of the Province,—each judge supreme in his own county. Next there are two Superior Courts of Common Law exercising an original jurisdiction as to claims of a certain amount, and at the same time exercising an appellate jurisdiction from decisions of county judges, by means whereof to secure as far as possible uniformity in the decisions of the later. Then there is the Court of Chancery, in matters of equity exercising an original jurisdiction, and at the same time an appellate jurisdiction from the equity side of County Courts. Lastly there is the Court of Error and Appeal, consisting of the judges of the two Superior Courts of Common Law and the judges of the Court of Chancery,—in all nine judges, having simply an appellate jurisdiction over the courts to which the judges respectively belong.

Accurate as this division of labor undoubtedly is it needs improvement. The two superior courts of common law are of co-ordinate jurisdiction. If each decides without reference to the other there is a danger of conflict of decisions. A conflict of decisions is not seemly and ought to be avoided; besides it is a positive evil, as having a tendency to accumulate law costs to the loss of suitors. So far as the original jurisdiction of the Courts is concerned,

an understanding has been come to which prevents a conflict of decisions. It is usual for counsel in argument before either court to state whether or not the same question is before the other Court, and the usual result is, that the two courts consult and probably pronounce similar judgments. If through counsel or otherwise either court learns that the other has already determined the question raised, it is the practice of the former, to pronounce a *pro forma* judgment in accordance with the decision of the latter court. In this way conflict is avoided, and by an appeal to the Court of Error and Appeal, error, if any, is corrected. So far no difficulty is experienced.

But it is to be remembered that each of the superior courts of common law exercises, besides an original, an appellate jurisdiction. Here it is that a difficulty of some consequence arises. An appeal lies from any of the county courts to one or other of the superior courts of common law, (the party dissatisfied having the choice of courts,) and the decision of the latter is conclusive upon the parties. If the question involved in the appeal is one about which the courts are at conflict, the party dissatisfied chooses the court which is certain to favor his view of the law and to decide accordingly. Thus in fact the party against whom the decision is delivered in the County Court has an immense advantage over the party successful in that court. Neither party cares much which way the county judge decides. Each, hopes that the decision may be against him in order that he may while appealing so direct his appeal that the decision will be reversed without further or other appeal. Under such circumstances the party who fails in the County Court is really the successful party. This, though apparently a paradox in sentiment, is an abomination in practice.

Take an illustration. It is provided by sec. 4 of Consol. Stat. U. C. cap. 45, that "Every sale of goods and chattels not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods and chattels sold shall be in writing, and such writing shall be a conveyance under the provisions of this Act, and shall be accompanied by an affidavit of a witness thereto of the due execution thereof, and an affidavit of the bargainee, &c., that the sale is *bona fide*, &c., and such conveyance, &c., shall be registered as hereinafter provided, *within five days from the executing thereof, otherwise* the sale shall be absolutely void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith." The question arises as to the effect of the five days within which the instrument is required to be registered as against a writ of *fieri facias* placed in the Sheriff's hands between the day of execution and the day of registry. The Court of Queen's Bench holds that the instrument must prevail as against the writ, if registered within the five days, (*Feehan* v. *The Bank of Toronto*, 19 U. C. Q. B. 474,) and the Court of Common Pleas in a suit between the very same parties on the very same question, has arrived at a contrary conclusion (*Feehan* v. *The Bank of Toronto*, 10 U. C. C. P. 32). The Judge of the County Court of Elgin, in an elaborate judgment, (*McInnes* v. *Haight*, published in other columns,) coincides with the ruling of the Court of Queen's Bench. The suitor against whom the County Judge rules has it in his power to appeal, and will probably do so, to the Court of Common Pleas, which court will reverse the decision. If the decision of the County Judge had been different the appeal would have been to the Court of Queen's Bench with an opposite result.

In view of such facts as these the practice of law becomes a species of gambling, and the sooner the difficulty suggested is adjusted by the Legislatuse the better for suitors, the better for the profession, and the better for the reputation of our law and its administration.

It may, however, be said, how is it that the two superior courts of common law are at conflict on such a question? Why is it that the one did not deliver a *pro forma* judgment, in accordance with the decision of the other, and leave the parties to their remedy in Error and Appeal? We cannot answer the questions, but do not see that a *pro forma* judgment would have improved the matter, so long as the decision of either of the superior courts is final on an appeal from a County Court. Let us suppose that the Court of Common Pleas had, though differing in opinion from the Court of Queen's Bench, given a *pro forma* judgment, contrary to their own convictions, but in accordance with the Queen's Bench decision, that course would have been, we admit, very proper and very reasonable, but only so long as the unsuccessful party could carry his plaint into the Court of Error and Appeal. It is of little consequence which way a court decides, if the decision is given merely to enable the unsuccessful party to appeal to the highest tribunal in the colony. But the case is very different where one of the co-ordinate courts between which the conflict exists is sitting as a court of appeal from a decision pronounced by a county judge. To ask the court, under these circumstances, to deliver a *pro forma* judgment contrary to their own convictions, which would have the effect of concluding the parties, would be to ask it to perpetrate a legal farce. Hence it was that the Court of Common Pleas during last term, in the case of *Dickson* v. *Pinch*, (reported among the list of judgments elsewhere) laid down the rule, that, where a Court sits in the exercise of an appellate jurisdiction, it will not consider itself bound by the decision of a Court of co-ordinate jurisdiction, but express its own judgment on the question submitted.

This rule is a very proper one under the circumstances, and good so far as it goes, but yet has not the effect of surmounting the difficulty to which in the previous part of this paper we alluded. The parties are concluded by the judgment of the Superior Court. It may be that the leaning of the Courts as on the question of registry of bills of sale, is well known beforehand. The party unsuccessful in the Court below, avails himself of that knowledge to choose his court of appeal, and has his case decided just as he pleases The triumph in the Court below is converted into signal and inevitable defeat in the Court above, and thus effect is given to a despicable dodge. This is a species of legal jugglery which we desire to see abolished.

It is not for us to suggest the precise remedy. We have exposed the abuse, and must leave the remedy in the hands of those who have the ability to apply it. The nature of it must entirely depend upon the extent to which reform is to be carried. If a re-construction of the appellate jurisdiction of the Courts be intended, the remedy could be applied so as to harmonize with the altered plan and to form a part and parcel of it. If something less be intended, then a simple remedy would be to provide in some form that litigants from a County Court shall not be concluded by the judgment of either of the Superior Courts of Common Law where upon the question involved a conflict of decision between it and the other Court exists, but be at liberty to carry the appeal into the Court of Error and Appeal, and there have it determined. A less expensive and more expeditious proceeding would be in such a case, under given regulations, to allow the parties at once, as if by writ of error, to carry the case direct from the County Court to the Court of Error and Appeal. Either the one or the other would be a decided improvement upon the present anomalous, unsatisfactory, and most pernicious system.

EVIDENCE OF PARTIES TO THE CAUSE.

Justice is usually personified as a blindfolded but amiable looking lady in a sitting posture, holding in one hand a sword and in the other poising scales.

Varied qualities are attributed to her. She is said to be severe, stern, impartial, and merciful; but no one attributes to her the quality of omniscience. While in search of truth she is constrained to make use of witnesses, who, being fallible creatures, are as likely to take advantage of her blindfold state as to direct her in the paths of truth.

Bentham describes witnesses as being the eyes and ears of Justice. As with the natural eye or ear when in a diseased state, it is possible to receive a wrong impression, so with these artificial eyes and ears, it is possible to be deceived.

One object of every judicial investigation is the pursuit of truth. Were all men reliable the pursuit would be in most cases direct and satisfactory. But when we reflect that a man may be mistaken in his narration of what he saw or heard, or owing to interest, or some venal motive, may not choose to narrate what he saw or heard, but the contrary, the pursuit by such means, so far from being direct may be tortuous, and so far from being satisfactory may be impossible.

The tempter is not idle in the affairs of this life. The temptations to deceit and falsehood are many. It is not every man who yields to the temptation, but while conscious that some men do so, it behoves all connected with the administration of justice to be circumspect. Taylor in his work on Evidence well says, that "in judicial investigations the motives to pervert the truth and to perpetuate falsehood and fraud are so multiplied, that if statements were believed in courts of justice with the same undiscriminative credulity as in private life, much wrong would be unquestionably done."

Considerations such as these have for a long time operated so powerfully in the administration of British Jurisprudence as entirely to exclude the testimony of particular classes of persons. Rather than allow the evidence to be given and its credibility to be weighed by those whose duty it may be to hear and determine, the legislature preferred to exclude the testimony in *toto*. Of late a different rule has gained strength both in Great Britain and in Canada; the grounds of incompetency are being gradually removed.

From the earliest time the testimony of parties to a cause has been excluded on the ground of interest. Their interest in the result of the cause has been deemed an insuperable bar to the reception of their testimony. Of late years the English legislature has weakened the obstruction by the creation of numerous exceptions to the rule of exclusion, and finally has removed the obstruction itself.

On 22nd August, 1843, the English Act 6 & 7 Vic. cap. 85, was passed. It recited that enquiry after truth in courts of justice was often obstructed by incapacities created by the then existing law, and that it was desirable that full information as to the facts in issue should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony. It then enacted as a general rule, "that *no person* offered as a witness shall hereafter be excluded by reason of incapacity, for crime or interest, from giving evidence." To this Rule an exception was created in these words, "Provided, that this Act shall not render competent any party to any suit, &c., individually named in the Record, or any lessor of the plaintiff, or tenant of premises

sought to be recovered in ejectment, or the landlord or other person in whose right any defendent in replevin may make cognizance, or any person in whose immediate or individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively."

In 1846 the English Legislature while establishing County Courts went still further, by enacting in regard to these Courts, "that on the hearing or trial of any action, or on any other proceeding under this Act, the parties thereto, their wives and all other persons, may be examined either on behalf of the plaintiff or defendant, upon oath or solemn affirmation" (9 & 10 Vic. c. 95).

The experiment of universal competency having been found satisfactory as to County Courts, the English Legislature in 1851, except as to husbands and wives, repealed the Proviso to the Act of 1846, and thus in effect rendered all persons, plaintiffs or defendants, in any court, superior or inferior, in England competent and compellable to give evidence for and against themselves (14 & 15 Vic. cap. 99).

In Upper Canada we followed the footsteps of the English Legislature, but in course of time found it prudent in some measure to retrace our steps.

In 1849 the Canadian Legislature passed an Act (12 Vic. cap. 70), which may be shortly described as a transcript of the English Statute 6 & 7 Vic. cap. 43, containing both the Rule and the exceptions created by that Statute.

In 1851 the Canadian Legislature passed a second Act, in effect the same as the English Act of 14 & 15 Vic. cap. 99, our Act being 14 & 15 Vic. cap. 66; the English Act was passed on 7th August, 1851, and our Act on 30th August, 1851.

The admissibility of parties to a cause to give evidence on their own behalf was not in Upper Canada found to be conducive to the ends of public morality, and the Canadian Legislature at its next session repealed the Act of 14 & 15 Vic. cap. 66, and re-enacted the 12 Vic. cap. 70 (16 Vic. cap. 19). The result is, that our law of evidence is on the same footing as was the English law in 1846. Parties to a cause are not now competent to give evidence on their own behalf, but are compellable to give evidence at the instance of their opponents (Consol. Stat. U. C., chap. 32, ss. 3 & 4).

In the Canadian Act of 1851 a provision was made to the effect, that any party to a suit, &c. might be examined at the instance of the opposite party, provided that a subpœna were served, or at least eight days notice given prior to the time of the examination. It was also provided, that if the party should not attend the non-attendance might be taken as an admission *pro confesso* against him (14 & 14 Vic. cap. 66, s. 2).

The latter provision is still the law, and as we propose to make some practical observations upon it, we publish the clause in words at length :—

"Whenever any party in such proceeding desires to call the opposite party as a witness, he shall either subpœna such party, or give to him or his attorney at least eight days notice of the intention to examine him as a witness in the cause, and if such party does not attend on such notice or subpœna, such non-attendance shall be taken as an admission *pro confesso* against him in any such suit or action, unless otherwise ordered by the Court or Judge in which or before whom such examination is pending, and a general finding or judgment may be had against the party thereon, or the plaintiff may be non-suited, or the proceedings in the action, or such suit may be postponed by the Court or Judge on such terms as the Court or Judge see fit." (Con. Stat. U. C. cap. 32, sec. 15.)

The reading of this enactment suggests the propriety of some remarks on the enactment itself. It provides that a party to a suit may call his opponent as a witness,—it prescribes the means by which that object is to be effected,—it describes the effect of non-attendance,—it raises the question as to relief, if any, from the effect of non-attendance, and suggests an enquiry as to the effect of attendance.

It has been held that the operation of the section is restricted to parties to an action or suit resident within the jurisdiction of the court. (See *Patchin* v. *Davis*, 10 U.C. Q.B. 639; *Tyre* v. *Wilkes*, 18 U.C. Q.B. 46.) Where a party is resident without the jurisdiction, the only course to be taken would seem to be the ordinary one of issuing a commission to examine him. (*Ib.*)

The object of the enactment may be attained by either one of two courses—either to subpœna the party, or to cause a notice to examine to be served at least eight days before the time appointed for the examination. The subpœna must be personally served, but the notice to examine may be either served on the party himself or his attorney. Though the statute is silent on the point, it is only proper that at the time of service, expenses should be tendered. A suitor is under no obligation to be in court when his cause is tried. He may be living at a distance, and may be poor, or infirm, and unable to travel on foot. It is now very much a matter of course for one party to give a notice to the opposite party to attend and be examined, though in many cases, when he attends, he is not put in the box. In cases in which the party who has brought his opponent to court does not call him at the trial, the party attending has no opportunity of exacting his expenses, as he might do if called to the book to be sworn. It should therefore be understood that when the tender of expenses is omitted, the party giving the notice

is not likely to gain any advantage from it if his opponent fail to attend. (Per Robinson, C. J., in *Steer* v. *Faulkner*, 15 U.C. Q.B. 116.)

If the party do not attend, the non-attendance does not of necessity entitle his opponent to judgment *pro confesso*. The court or judge before whom the cause is entered for trial, has a discretion in the matter, and may order that the non-attendance shall not have that effect. The statute provides that the non-attendance *shall* be taken as an admission *pro confesso*, &c., *unless* otherwise ordered by the court or judge in which or before whom such examination is pending. The court or judge, under the act, may, instead of allowing judgment *pro confesso*, postpone the proceedings on terms of payment of costs &c. Unless, however, otherwise ordered, a general finding of judgment may be had against the party absent, or the plaintiff, if the party, may be nonsuited. If no order to the contrary is made, the statute is imperative, as a consequence, that the case shall be taken *pro confesso* against the party failing to attend. It is however no ground for setting aside a verdict for the plaintiff, that he, though notified to attend, failed to do so, where he is not called at the trial, and where the counsel for defendant at the time of the trial is absent. (*Pegg et al.* v. *Plank*, 3 U.C. C.P. 396.) If the party failing to attend be the defendant, and the plaintiff's cause is of a specific determinate character, by the nature of the contract between the parties, and the defendant by his pleading admits the cause of action as stated, and only relies on proving it to be discharged and satisfied, it is not clear that the plaintiff has a right to stop the defendant's counsel from entering into his evidence and endeavoring to prove his plea. It may be asked, *cui bono*, to allow the defendant to go into his evidence, when, after it is concluded, no matter how clear the proof, the plaintiff would be entitled to a verdict *pro confesso*, because the defendant did not appear when called upon by the plaintiff to give evidence on the plaintiff's case in reply. This objection does not appear to be insuperable. The court or judge before whom the cause is tried has a discretion to exercise, and the exercise of that discretion might materially depend on what might, under the circumstances, be proved. (Per Draper, J., in *McGann* v. *Keyes*, 12 U.C. Q.B. 429.)

On general principles, the manner in which discretion is exercised by a judge on whom a discretionary power is imposed, is not subject to revision. The effect is analogous to that which takes place when a party loses costs, unless the judge certify. The statutes there determine the right of the party when the judge declines to certify, and so it may be argued that this statute settles the position of the parties, where the judge has not interposed to relieve against its imperative operation. "The court or judge in which or before whom such examination is pending," evidently means only the court or judge in which or before whom the party would have been examined if he had attended, not the court in which merely the action happens to be pending. This is an important point. It may happen that a party meaning to attend is prevented, from some good cause, which cannot be made to appear, when the suit is called. So it may happen that a party is really ignorant of the notice served on his attorney, and this possibly without any fault of the attorney, who may take the usual and proper means of sending information to his client, which by some accident fails. If the judge, having all the facts before him, takes, as may be afterwards thought, too rigorous a course at the trial, or if he decides quite reasonably upon the facts as they appear before him, but something is afterwards shown which wholly excuses the non-attendance, and would have led to a different course if known at the trial, can the court in *banc* in either case give relief by granting a new trial? The court would certainly pause before giving relief in the first case supposed, even if the power to do so were clear, but might feel compelled to grant a new trial in the second case supposed. (Per Robinson, C. J., in *McGann* v. *Keyes*, 12 U.C. B.B. 429.)

Suppose, however, that the party attends; suppose he is called and sworn as a witness, and examined by his opponent, must his cross-examination be restricted to his examination in chief? The Court of Queen's Bench (Burns, J., *dissentiente*) held the affirmative (see *Lamb* v. *Ward et al.*, 18 U.C. Q.B. 304), and the Court of Common Pleas unanimously held the negative. (*Dickson* v. *Finch*, H. T. 1861, M. S.) The question is one of the greatest importance, and unless at once settled by legislative declaration must lead to great inconvenience. The conflict of the two courts of co-ordinate jurisdiction enables each judge of either of the courts to follow his own conviction, and leaves judges of county courts to sit in judgment on, instead of following the decisions of the judges of the superior courts. Look at the actual effect of "this glorious uncertainty in the law." During the present spring, the judges of the superior courts are on circuit. A judge of the Queen's Bench is asked, in a Common Pleas cause, to rule that a party called by his opponent is a witness in the cause for all purposes, and declines; the party against whom he rules is certain to obtain a new trial, on the ground of rejection of evidence. So the reverse. A judge of the Common Pleas is asked, in a Queen's Bench cause, to rule that a party called by his opponent cannot be cross-examined except as to the subject matter of his examination in chief, and declines. The party against whom he rules must obtain a new trial, on the ground of rejection of evidence. So as to county judges. A county judge rules with the

decision of the Queen's Bench; the party dissatisfied appeals; has the choice of his court of appeal; appeals to the Common Pleas, who reverse the decision of the judge of the County Court. So if a county judge rules with the Common Pleas, the party dissatisfied appeals to the Queen's Bench, and has the decision reversed. But somebody says, why not carry the question into the Court of Error and Appeal, and have it determined there? This is easier said than done. The two vice-chancellors are known to be of the same opinion as the two senior judges of the Queen's Bench—in all, four. Then there are the three judges of the Common Pleas, and the dissenting judge of the Queen's Bench—in all, four. Hence the probability is strong, that the judges of the Court of Error and Appeal would be equally divided on the question. The fact is that the Legislature, and the Legislature alone must settle this vexed question. It really matters little in which way it is settled, so long as it be settled. It should therefore be settled without loss of time. We hope that some member, with an eye to practical legislation, will not lose the opportunity of enacting a very simple but most urgent piece of legislation.

PAY PROPER POSTAGE.

It is, we presume, known to most of our correspondents, that in Canada, as well as in other countries, the postal department is not only a great convenience to the public, but designed to be a source of revenue to the Government.

It is also, we presume, known that the postage on a letter exceeds that on a newspaper or other printed matter.

It should also be known that to enclose a letter, or to make any written marks to serve the purpose of a letter, in a newspaper, is not only a fraud upon the Government, but a misdemeanor, punishable as such.

These remarks have been caused in consequence of the receipt by us from the Post Office Department, of a notice in the following form:

"Writing having been discovered fraudulently concealed in a newspaper addressed to you, under the within envelope, the Postmaster-General requests that you will be good enough to warn your correspondent to desist from a practice so improper and illegal. An offence of the nature in question is declared by statute to be a misdemeanor, and is punishable as such.

"Post Office Department, Quebec, 21st March, 1861."

We are pained to think that any correspondent fraudulently concealed writing in a newspaper addressed to us, and should most certainly do as the Postmaster-General requests—warn our correspondent "to desist from a practice so improper and illegal"—were it not for one thing, which is, that we know no more of the correspondent than does the Postmaster-General himself.

If we had only *one* correspondent, we admit that the "within envelope" would in all probability have enabled us to "warn" him, &c.; but as our correspondents are many and far between, we must plead our inability to do what is requested of us.

For the information of all concerned (including the unknown one, if this number meets his eye), we publish the clause of the Post Office Act bearing upon the delinquency:

"To enclose a letter or any writing, or to make any written marks to serve the purpose of a letter, or to enclose any other thing in a newspaper posted to pass as a newspaper at the rate of postage applicable to a newspaper (except in the case of the accounts and receipts of newspaper publishers, which are permitted to pass folded within the newspapers sent by them to their subscribers), shall be a misdemeanor."—(Consol. Stat. Can. cap. 31, sec. 55, subsec. 10.)

To mail "a newspaper posted to pass as a newspaper at the rate of postage applicable to a newspaper," is no offence, but, so far as the Government is concerned, a very praiseworthy act, and one which, so far as we are concerned, if pre-paid, may be repeated *ad libitum;* but, in regard to the newspaper, to do any one of the three following things, is an offence within the meaning of the enactment:

1st. To enclose a letter, *or any writing.*

2nd. To make any written marks *to serve the purpose of a letter.*

3rd. To enclose *any other thing.*

The only *exception* is in favor of newspaper publishers, who are allowed to enclose accounts and receipts, which are permitted to pass folded within the newspapers sent by them to their subscribers. It is quite possible that newspaper publishers enclose to their subscribers more accounts than receipts, but that is no affair of the Government; the intention of the Government is good, whether the privilege allowed be used seldom or often.

NEW MAP OF CANADA WEST.

Messrs. Tackabury Brothers & Co., of London, C. W., have in course of preparation a new Map of Upper Canada, showing roads, concessions, lots, location of churches, school-houses, &c. This Map, we are informed, will be constructed upon the most improved principles. It is to be engraved upon copper-plate, and will manifest a very high order of workmanship. It will certainly be one of the most complete things of the kind issued in Canada, and be published at a price so low as to place it within the reach of all. We are told that it will be issued during the present year. We wish the projectors the success which their enterprise deserves.

MR. PATTON'S JURY BILL.

Mr. Patton has again brought up his bill to allow verdicts to be rendered on trial by jury in civil cases, although the jury may not be unanimous. We see the bill has passed the Upper House.

Importunity may do much, as in the case of the widow of old, but we continue to retain our opinion that the change is uncalled for, and unnecessary; and we believe that if every judge and every barrister in Upper Canada could be heard on the subject, not one in fifty would speak in favour of it.

The reason assigned in the preamble, is not correct. It is put with the double negative, that "it not unfrequently happens" that juries are unable to arrive at a unanimous decision. That is, it frequently so happens. We join issue at once with Mr. Patton, and deny the fact; and we should like to know from what source the information is derived. If we are rightly informed, not more than four such cases have occurred in the courts of the county where Mr. Patton has practised, for the last seventeen years.

We trust that the House of Assembly will require proof of the matter of fact stated in the preamble, before adopting the measure. It may find supporters among the Chancery men from Upper Canada, but we cannot think it will be favourably viewed by any member of the Common Law bar.

MR. E. S. WHIPPLE.

We published some time since, a letter from Mr. Whipple, with some remarks which appeared to be called for by the occasion. We have recently received a letter from a correspondent, but not for publication, written "to disabuse our minds with regard to what might be supposed to be a want of candor on the part of Mr. Whipple." Our correspondent gives a full and satisfactory explanation of the circumstances, and adds, "Mr. Whipple is an upright generous-hearted, honourable man, and would not stoop to a low thing. I hope, therefore, you will accept this explanation from me, even at this late period."

In view of the information now given, our readers will see that the remarks made contain no reflection on Mr. Whipple. "The cap does not fit." We willingly recur to the subject to say, we are quite satisfied. Our readers cannot, after this explanation, retain any unfavourable impression in respect to Mr. Whipple.

OFFICIAL SALARIES.

We observe that Mr. McMicken has, during the present session of the Legislature, introduced a bill intituled "An Act to provide for the attachment of official Salaries on execution for debt."

JUDGMENTS.

QUEEN'S BENCH.

Present: ROBINSON, C.J.; MCLEAN, J.; BURNS, J.

March 4, 1861.

Heck v. *Knapp.*—Rule discharged.

McDonell v. *Murphy.*—Rule to enter verdict for defendant discharged.

Rice v. *Wells*—Rule discharged.

Irvine v. *Nicholson.*—Rule *nisi* discharged.

Robinson v. *Spry.*—Rule discharged.

VanBrocklin v. *Corporation of Town of Brantford.*—Rule discharged. McLean, J., *dissentiente.*

Reed v. *Wedge.*—Rule *nisi* refused.

Executors of Baldwin v. *Foster.*—Rule *nisi* granted.

Corporation of Sullivan v. *Kelly.*—Rule *nisi* granted.

Burwell v. *Port Burwell Harbor Company.*—Rule absolute to enter nonsuit.

Smith v. *Paisley.*—Rule absolute for new trial. Costs to abide the event.

Blenkensee v. *O'Neill.*—Rule absolute for new trial. Costs to abide the event.

Lazeau v. *Leonard.*—Rule absolute for new trial, without costs.

Canada Western Assurance Company v. *Jarvis.*—Rule discharged, if plaintiffs consent to accept £6, 5s.; otherwise new trial without costs.

Armstrong v. *Little.*—Rule absolute.

Gleason v. *Ayer et al.*—Rule absolute for new trial, costs to abide the event.

Ashton v. *McMillan.*—Full costs not taxable in actions of replevin, more than in other actions, where verdict within jurisdiction of an inferior court, and no certificate.

Lavoie v. *Treadwell.*—Rule discharged.

Prosser v. *Henderson.*—Rule discharged.

In the matter of the Heirs of Mulholland.—Let the partition be recorded.

McCarty v. *Comisky.*—Rule absolute to set aside judge's order, upon payment of costs.

Pogue v. *Pogue.*—Rule absolute upon payment of costs.

Edison v. *Stevenson.*—Rule discharged.

Harrison v. *Brega.*—Rule discharged.

Kesteven v. *Gooderham et al.*—Rule discharged with costs.

Hayes v. *O'Connor.*—New trial without costs.

The Queen v. *McEvoy.*—Conviction affirmed as a conviction for assault and battery at common law.

Vidal v. *Donald.*—Rule absolute for new trial, costs to abide the event.

In re Robertson and Township of Wellesley.—Rule discharged, with costs.

March 9, 1861.

Mutual Insurance Company v. *Palmer.*—Rule *nisi* refused.

Martin v. *Clark.*—Judgment for plaintiff on demurrer.

Darling v. *McLean.*—Judgment for defendant on demurrer. Postea to defendant.

Fellowes v. *Hunter.*—Judgment for defendant on demurrer.

Drew v. *Finlayson.*—New trial upon payment of costs.

Sherman v. *The Corporation of the United Counties of Stormont, Dundas and Glengary.*—Rule *nisi* to set aside by-law discharged.

Ketchum v. *Smith et al.*—Appeal allowed.

Buck v. *Hunt.*—Appeal dismissed with costs.

Russell v. *Russell.*—Judgment for tenant.

Harvey v. *Jacques.*—Judgment for defendant on demurrer.

Abbott v. *Skinner et al.*—Appeal dismissed.

Eckhardt v. *Raby.*—Rule discharged.

Sutherland v. *McKune.*—Rule discharged.

The Queen v. *The School Trustees of Tyendinaga.*—Attachment ordered against Gillespie, one of trustees; and rule discharged as to remaining trustees upon payment of costs.

Ellis v. *The Ottawa and Prescott Railway Company and Bell.*—Rule absolute to stay all proceedings on the order for commitment, on payment of plaintiff's costs incident to the appointment, but not of application, &c.

The Queen v. *Great Western Railway Company.*—Judgment to abate nuisance and pay a fine of £20.

Scott v. *Carveth.*—Application refused, without costs.

Rutledge v. *Richardson.*—Rule absolute for new trial upon payment of costs.

Torpy v. *The Grand Trunk Railway Company.*—Judgment for plaintiff on demurrer. Rule *nisi* discharged

Great Western Railway Company v. *The Corporation of the Town of Dundas.*—Rule discharged.

Thomas v. *Wilson et al.*—Rule discharged.

COMMON PLEAS.

Present: DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

March 4, 1861.

Grant g. t. v. *McFadden.*—Rule discharged.

Wilson v. *West.*—Rule discharged, upon plaintiff amending and paying costs within a month; otherwise new trial without costs.

Harris v. *Jennings.*—Rule absolute on payment of costs.

Lundy v. *Malony.*—Rule discharged.

Hamilton v. *Holcombe.*—Rule absolute.

McKay v. *Tate.*—Rule discharged.

Blevins v. *Madden.*—Rule absolute for defendant on first count; and judgment for plaintiff on demurrer to first and second counts.

Bank v. *Livars.*—Judgment for plaintiff.

Mitchell v. *City of Toronto.*—Rule discharged with costs.

Barragan v. *Sherwood.*—Rule for new trial without costs.

In re Lount, Registrar.—Rule disharged without costs.

Taylor v. *Lamb.*—Rule discharged.

Lake v. *Biggar.*—Appeal dismissed.

Rathbourn v. *McGreery.*—Appeal allowed. Nonsuit to be entered in court below.

Smith v. *The Corporation of the City of Toronto.*—Judgment for defendants on demurrer.

Richardson and wife v. *Trinder.*—Rule discharged.

Benedict v. *Rutherford.*—Rule absolute for a non-suit.

Fraser v. *Gladstone.*—Rule discharged.

Jaffray v. *Henderson.*—Rule absolute for a new trial. Costs to abide the event.

March 9, 1861.

Hennesey v. *Weir.*—Rule absolute to reduce verdict.

VanEvery v. *Ross.*—Rule for new trial upon payment of costs in four weeks; otherwise discharged.

City of Glasgow Bank v. *Murdock.*—Judgment for plaintiff on demurrer, with leave to apply to amend within a fortnight.

Chisholm v. *Porter.*—Before ships are registered, property may be transferred as in any other chattels. Postea to plaintiff.

Foster v. *Smith.*—Appeal dismissed with costs.

Ross v. *Elliot.*—Appeal dismissed with costs.

McDonald v. *McBeth.*—Appeal dismissed with costs.

Dickson v. *Pinch.*—*Held*, that when a party to a suit is called as a witness by his opponent, he stands on the same footing as any other witness, and that his cross-examination is not to be restricted to matters as to which he was examined in chief. *Held* also, that where a court sits in the exercise of an appellate jurisdiction, it will not consider itself bound by the decision of a court of co-ordinate jurisdiction, but express its own judgment on the question submitted.

Doane v. *Warren.*—Stands.

INAUGURAL LECTURE,

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

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

(*Continued from page 61.*)

The Legislature having now created a Court, next deemed it necessary to create Lawyers to practise in it, and accordingly passed an Act on the same day authorizing the Governor to grant Licenses under his hand and seal to such and so many of his Majesty's liege subjects, not exceeding sixteen in number, as he should deem from their probity, education and condition in life, best qualified to act as Advocates and Attorneys.

The Lawyers however, did not increase in proportion as the litigation did, and this is not to be wondered at since there was not the slightest facility for the study of the Law. Consequently it became necessary in March 1803, for Parliament to authorize the Governor to create a fresh batch, and he accordingly was authorized to license six other persons to practise the profession of the Law, that is to say, six other individuals of the community who from their known integrity and standing, might safely be entrusted with the ticklish task of purveying Law for the million.

This was done solely in consequence of the great dearth of Lawyers who were only increased in number by this means to twenty-two—bearing to the population which then numbered 40,000 about the same relation as Falstaff's penny-worth of bread did to his monstrous quantity of sack. These men were the germ of the legal profession in Canada, and left behind them descendants who followed it up with signal ability and distinction. I have but to mention the names of a few such as McDonnell, Robinson, Hagerman, Sherwood, Powell, and Baldwin, to verify my remarks.

It was in the month of November of this same year (1803) that a direful accident occurred on Lake Ontario, by which Mr. Justice Cochrane, Solicitor General De Grey, and several members of the Bar, perished. They embarked on board the Government Schooner *Speedy*, Paxton, Master, and were all lost in a storm on their way from York to Presqu'ile. This further increased the scarcity of members of the profession, nor was this got over for several years afterwards.

Indeed it was not until the year 1815, that the Bar of Upper Canada obtained any real acquisition in the shape of Lawyers; but from that date it may be said to have increased in numbers and ability. In that year alone there were admitted to the Bar four gentlemen who all distinguished themselves in the profession and rose to eminence. They were Sir John Robinson, Mr. Justice McLean, Mr. Justice Jones and Mr. Justice Hagerman.

The war of 1812 retarded the progress of the profession, as it did that of everything else, and I believe all the above named gentlemen, as well as others who subsequently achieved eminence in our profession, threw aside the gown for the sword, and distinguished themselves as much in the profession of Arms as that of Law. Amongst them was the late lamented Chief Justice Sir James Macaulay.

In those days people in Canada laboured under what would be now esteemed terrible privations. There were no Railroads, no Telegraphs, scarcely means of public communication, no public Colleges, no Universities, and but few Schools, no means of obtaining a liberal education such as Canada is blessed with at the present day, communication with England, or the old country, as it was and is still fondly called, was scanty and uncertain. There were no public libraries in the country, at which the earnest aspirant after legal knowledge might slake his thirst, and it could only have been by the exescise of indomitable perseverance and application that the men above mentioned ever succeeded in attaining their rank —but then *there were giants in those days.*

As an instance of the difficulties in the way of obtaining legal education, it may not be out of place here to mention that my own father, the present Chief Justice of the Court of Common Pleas, when a student, had to walk ten miles of a morning to his office, and ten miles home again at night, and for the first two years of his apprenticeship, the only works he could obtain to study were a few musty volumes of Reports, and a volume or two on Practice, but not a single Text book. This was in 1822, and it was not until this year that the Law Society, although duly authorized in 1797, became incorporated; since which period it has gone on steadily increasing in wealth and numbers—and some idea of the progress made by the Society since that time, may be gathered from the facts that it posesses one of the handsomest buildings in Upper Canada—perhaps I might say in America—in which the highest Courts of the land hold their Sittings, that it posesses the finest library in Canada, and that the number of its members exclusive of Students, amounts to nearly 400.

Our country during the last half century has undoubtedly made vast strides forward in the march of civilization, and it may be safely asserted that the profession of the Law has kept pace with the requirements of the age.

Our Judges would be an ornament to the profession wherever their lot might be cast, whether we regard them as belonging to the superior Courts of Common Law and Chancery or to the local County Courts. They need no eulogium at my hands,—their works speak for themselves. Indeed, in this country, an incompetent Judge could not stand before the array of the Bar and the exposure and denunciation of a free and powerful Press.

As for the members of the profession themselves, stimulated by such laudable examples as the Bench affords and the ample rewards in store for them, whether in the shape of emolument or places which alone can be filled by professional men, and spurred on by that generous spirit of emulation to excel in all that is good and honorable, they hold as high and creditable a position in the land as their brethren in England and America, or as the members of any other profession in this country.

Our system of Jurisprudence has within the last few years undergone some great and beneficial changes. Amongst the great reforms which have been effected, not the least is that accomplished by the Common Law Procedure Act, 1856, and the subsequent amendments thereto; the increased Jurisdiction of our County Courts, and the re-modelling of our Municipal, Jury and Assessment Laws.

The actions of Ejectment, Dower and Replevin have also been greatly improved. The passing of the Ejectment Law, however, was the melancholy cause of putting an end to the career of two eminent legal characters and cast a deep gloom over the minds of many old practitioners. I allude to the demise of those two most respectably litigious characters, Messrs. John Doe and Richard Roe, whose apochryphal existence was by this means ruthlessly terminated.

The only Law which has been varied for the worse, *mejudice*, during the last few years is the Law of Primogeniture, by which the lands of a man instead of descending at his death to his eldest son are now equally divided amongst all his children—and I greatly fear that, unless altered, future generations will have reason to curse the name of the man who took it into his head to tinker this old settled system. A more fruitful source of litigation can scarcely be conceived.

The Common Law Procedure Act of 1856, has also effected great reforms in the way of reducing redundant pleadings, in affording speedier remedies on Notes and Bills of Exchange, in enabling parties to come before the Court with special cases without pleadings, in granting the power of Injunctions to the Superior Court, and divers other matters too numerous to mention. Indeed were I to diverge into this well beaten track, there is no knowing where I should end, so I'll turn back.

Having now cursorily discussed these various topics, let me recur to the last point of my lecture, viz., The Study of the Law, to which, in a degree, all these prior remarks have been tending.

In former years admission to the profession was gained with but little difficulty. The examinations were conducted in a loose, careless way, by the Benchers. Occasionally they were very strict, but more frequently the reverse. It is quite different now and no child's play. The enormous number of applicants has compelled great caution to be exercised in admitting Students to the Society and still more in admitting them to practise. Instead of leaving the matter of examination in the hands of the Benchers themselves, there are now Examiners who look strictly after the Student's qualifications, both on entering the study of the profession, and on entering the profession itself.

The practice of the profession was formerly carried on in a lax manner, whilst now, from the increased number of practitioners, increased strictness in practice is required.

This strictness on the part of the Law Society in admitting them, and of the Profession in their daily practice, must necessarily entail increased exertion on the part of the Student.

The benefit however corresponds to the exertion. There is no profession in this country which offers so many brilliant prizes,—if I may so term them,—for free and fair competition as that of the Law. For instance there are three Judgeships in the Queen's Bench, three Chancery Judgeships and three in the Common Pleas. There are thirty-one County Court Judgeships and as many County Attorneyships. There are four offices of Recorder, several Deputy Judgeships, besides the offices of Clerk of the peace, all of these with handsome salaries, and all must be filled by Lawyers.

Let the Student commencing to learn his Profession, and gazing upon this list of prizes, reflect strongly on the only mode by which they are attainable—industry and application.

The studies by which a man may gain the summit of legal excellence are infinitely varied. There is scarcely a subject in the world, however rare or extraordinary, which may not become matter of investigation before a Court of Law. A Lawyer ought therefore, besides being well versed in the principles and practice of his Profession, to be well read on all subjects; for it is impossible to say when his knowledge on some out of the way point may not be called for and useful.

Industry and application I need scarcely repeat, are among the chief qualities. If the Student cannot bring his mind down to habits of patient labour, he will never succeed at the Law. "To attain eminence in the Law," says Mr. Raithby, "is to achieve great honor, but the labour is proportionate."

The facilities too which are now-a-days afforded to Law Students ought to stimulate them to far greater exertions in preparing for their Profession. As I said before, fifty or sixty years ago there was scarcely a Law-book in this country. Compare that with the advantages possessed by the Student of to-day, who has all the means and appliances to boot, for perfecting himself in his studies.

Let the Student again reflect on the industry and application of the Lawyers of former days and the high and honorable position which some of them now occupy, and here is an additional incentive to exertion.

There is one qualification for the practice of Law as a Barrister which I must allude to before concluding. It is readiness,—the ability to encounter difficulty with quickness and generalship. This is a great test of fitness. An incompetent person is quickly detected, and is, as a matter of course, immediately deserted even by his most zealous friends. The Bar is a field of intense rivalry, of eagar contest for distinction. Whoever adopts it for his profession must take for his motto "*Proprio Marte*," and must rely entirely on his own mental exertions from the moment of starting till he reaches the goal.

"If you give way
Or edge aside from the direct forthright,
Like to an entered tide they all rush by
And leave you hindmost."

Patrons are of little value to a Lawyer. No Judge or friend can push him up beyond a certain point. He may rise like a rocket, but will fall like a stick, unless supported by his own inherent powers.

And now, in the words of the celebrated SIR EDWARD COKE, in his Commentary on Littleton, I will say, "And for a farewell to our Jurisprudent, I wish him the gladsome light of Jurisprudence, the lovelinesse of Temperance, the stabilitie of Fortitude, and the soliditie of Justice."

THE HABEAS CORPUS IN ANDERSON'S CASE.

(From the *Law Times*.)

Pending the return to the writ of *habeas corpus*, which the Court of Queen's Bench in this country has sent out to the Governor of Canada and sheriff of Toronto, commanding them to bring up the body of John Anderson, together with the cause of his detention, we may conveniently consider many of the topics which must inevitably be discussed when the return is made to the court. And as in some cases—for instance *Dodd's* case—the court has held that such writs have been issued improvidentially, we may consider both whether the court was bound to issue the writ, and also whether it was in accordance with the usual practice.

Now there is a very common, but very unfounded notion, that a British subject, when imprisoned, is entitled to his *Habeas Corpus* as of right. Such is not the case. In 3 Black. Com. p. 132. 21st edit. 1844, it is stated that such writs "do not issue as of course, without showing some probable cause why the extraordinary power of the Crown is called in to the party's assistance. For, as was argued by Lord Chief Justice Vaughan, it is granted on motion because it cannot be had of course; and there is, therefore, no necessity to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered. And this seems the more reasonable, because, when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner." In accordance with these principles, the 56 Geo. III c. 100, enacts that a judge of any of the courts, "if it shall appear by affidavit or affirmation (when allowed by law) that there is a *probable* or *reasonable* cause, shall award a writ of *habeas corpus* in vacation returnable immediately before himself or any other judge of the same court." In all the cases which were cited in *ex parte Anderson*, 3 L. T. Rep. N. S. 622, the affidavits were full, and on the face containing *primâ facie* cases of unlawful imprisonment. In the affidavits on which the Court of Queen's Bench granted a peremptory writ for a *habeas corpus* in Anderson's case, a secretary of the Anti-Slavery Society, who must have been fully cognisant of the omitted fact that Anderson was imprisoned under a deliberate judgment of the Canadian Supreme Court, swore that he believed that Anderson was "illegally detained in Gaol at Toronto, not for any offence recognised by the laws in the said province, and that he believed his life to be in danger." On this meagre and general, as well as incorrect, statement of facts the Court of Queen's Bench have granted the writ. Yet, in point of fact, Anderson then was lawfully imprisoned according to the laws of Canada, as expounded in the Supreme Court of Canada. The deponent denied, and the English Court of Queen's Bench ignored that law.

This consideration becomes the more important when we refer to the statutes which embody the Ashburton Treaty. From the wording of them it would seem that the Home Legislature had conceded absolutely and distinctly to the Canadian local Legislature, and consequently to its executive the Canadian courts of law, the chief, if not the exclusive right, to deal with all extradition questions between the colony and the United States.

For the 6 & 7 Vict. c. 76, s. 5, authorises the local Legislature of any colony to substitute, with the consent of her Majesty and Privy Council, other enactments for carrying the Ashburton Treaty into complete effect in such colony. Accordingly, by 22 Vict. c 89, of the Consolidated Statutes of Canada, p. 943, after reciting the expediency of making such further statutory provisions in order to carry the treaty into complete effect in Canada, it is enacted by sect. 1, that "upon complaint made under oath or affirmation, charging any person found in the limits of the province with having committed within the jurisdiction of the United States of America, or of *any of such States*, any of the crimes enumerated or provided for by the said treaty," such person may be apprehended and "brought before such judge or such justice of the peace, to the end that the *evidence* of criminality may be heard and considered; and if on such hearing the evidence be *deemed sufficient* to sustain the charge *according to the laws of this province* if the offence alleged had been committed therein, he shall certify the same, together with a copy of all the testimony taken before him, to the governor, that a warrant may issue upon the requisition of the proper authorities of the said United States, or of *any of such States* for the surrender of such person according to the stipulation of the said treaty; and the said judge shall issue his warrant for the commitment of the person so charged to the proper gaol, *there to remain* until such surrender be made, or *until such person be discharged according to law.*" So by 22 Vict. c. 86, of Consolidated Statutes, it is enacted that "in case murder be charged to have been commited within a foreign country by a person who has sought refuge in Upper Canada, and in case a requisition for the surrender of such person be made by the Government of such country . . then upon such evidence of criminality as would warrant his apprehension and commitment for trial had the offence been committed in Upper Canada, the Governor may in his discretion, by and with the advice of the Executive Council, deliver up such person to justice and direct his transmission to the custody of such foreign Government: (3 Will. 4, c. 6, s. 1.) Sect. 3 reaffirms the discretion of the governor in such cases, and enables him not to deliver up the person charged if for any reason he think it expedient.

It is certainly remarkable that this latter clause, which is copied from the 3 & 4 Will. 4, c. 61, which was passed before the Ashburton Treaty was made, has been retained in the Consolidated Statutes; and it may perhaps assist diplomacy in extricating itself from the necessity of giving up Anderson. But the point on which we are now dwelling is the proposition that the foregoing statutes contemplate a diversity between English and Canadian law in the italicised words above; and this view is confirmed by the 6 & 7 Vict. c. 76, s. 1, which directs the extradition of criminals "upon such evidence of criminality as *according to the law of that part of her Majesty's dominions* would justify his apprehension and committal for trial." Now, the Canadian law, we repeat, as it stands, and must stand until duly reversed by a proper court of appeal or legislature, has declared that Anderson, in killing Digges while resisting his apprehension, which was lawful according to the law of Missouri, has committed murder under the treaty, according to the laws of Canada. If this be so, can it be contended that his extradition is not within the spirit and letter of the treaty, according to the letter of our own statutes and the judicial interpretation of the law?

At least enough appears, or ought to have appeared on the affidavits which it might be thought would have induced the court to follow the precedent of *Crawford's* case, in which the court only granted a summons in the first instance, calling on the Governor of the Isle of Man to show cause why a writ of *habeas corpus* should not issue.

Secondly, assuming the sufficiency of the affidavits, let us proceed to the principal question which must be argued when the writ is returned. Does the writ of *habeas corpus* run to the colonies? The Court of Queen's Bench, chiefly as it seems on the authorities which were cited to them on the *ex parte* application, have decided that it does so run. Undoubtedly it is

laid down in Bacon's Abridgment that "the writ lies by common law to any part of the King's dominions." In *Cowles'* case, 2 Burr. Rep. 834, Lord Mansfield said: "There is no doubt of the power of this court to issue the writ when the place is under the subjection of the Crown of England. *The only question is as to the propriety.* We cannot send a *habeas corpus* to Scotland or to the Electorate; but to Ireland, the Isle of Man, the Plantations, to Guernsey and Jersey we may: and formerly it lay to Calais" With the exception of Calais (as to which there are two ancient instances of the writ issuing there), there appears to be no authority for these *dicta*. No case was cited in *Ex parte Anderson* in which the writ has issued to Ireland; but until *Reg.* v. *Crawford*, 13 Q. B. 613, it was uncertain whether the writ runs to the Isle of Man.

In *Reg.* v. *Crawford*, a *habeas corpus* had been issued to the Isle of Man to bring up the body of a prisoner, who, as it appeared subsequently on affidavits, had been imprisoned for an alleged contempt of court in publishing a libellous commentary on the proceedings of the Court of Chancery in the island. It is remarkable, as has been said, that in this case a summons was issued in the first instance by a judge at chambers calling on the lieutenant-governor to show cause why the writ should not issue. Subsequently the writ issued, owing to the unavoidable omission of the governor, on account of the state of the weather, to shew cause within the prescribed time. In the mean time the prisoner was discharged; but cause was afterwards shown, and the judges held, but not distinctly nor without hesitation, that the writ ran to the island, at least since the incorporation of it with the King's dominions by 5 Geo. III., c. 26; but they held that the writ ought not to issue, as the commitment seemed to be good according to the law of the Isle of Man: "And we know that the law of the Isle of Man is not the law of England, but differs from it in some respect. We must leave this to the local law, as we did in *Carus Wilson's* case and *Brenan's* case. We cannot disturb what has been done in conformity with the law of the island. *We are not a court of appeal. Before this writ goes, we must see that the commitment is bad*; and I cannot come to the conclusion that it is contrary to the law of the place;" (per Patteson J.) The writ was then refused.

In *Carus Wilson's* case, 7 Q. B. 984, it was held that the writ of *habeas corpus* ran to Jersey. But the writ is expressly extended to Jersey by the Habeas Corpus Act, 31 Car. 2, c. 2, s. 8; and also by the 56 Geo. III., c. 100, s. 3, to the Isle of Man.

Two other cases were cited by counsel for the applicants, and relied on by the court in granting the writ. The first was *Ex parte Lees*, E. B. & B. 828, which was an application for a *certiorari* to bring up a record of a conviction alleged to be erroneous, of a prisoner in the Supreme Court of St. Helena; or for a *habeas corpus* to bring up the body of a prisoner. The Court refused both applications, and apparently on identical principles, which were thus stated by Lord Campbell, C. J. in express reference to the *certiorari*: "Some old precedents of writs, issued out of the court to the French dominions of our early English sovereigns, were cited to show that such writs might lawfully issue. No precedents, however, of any such proceeding with respect to a dependency like St. Helena, for several centuries, were brought before us. And it was not at all explained in what manner our writs of error, *certiorari*, or *habeas corpus*, could be enforced in such dependencies." Later in the same judgment his Lordship said, "Even supposing a writ of *habeas corpus* could run to St. Helena," it ought not to be granted in this particular case.

In *Dodd's* case, 2 De G. & Jones, 510, the application for the *habeas corpus* was on behalf of a prisoner who was alleged, in a very full affidavit, to have been imprisoned unlawfully for serving process under the English Common Law Procedure Act. There was a similar application on behalf of a prisoner who appeared to have been detained not only for the above cause, but also for debts under orders purporting to be made by the Royal Court of Jersey, and which orders were said to be irregular. In both cases the writs were issued; but in the latter case the Lord Chancellor held that the writ ought not to have been issued, and said that he would not have granted it *if he had looked at the affidavits more carefully.* His Lordship also quoted with approbation Lord Denman's dictum in *Carus Wilson's* case, that "a court within the Queen's dominions, exercising public authority, must be taken to be competent to judge of its own law."

It would seem that these authorities do not bear out very strongly the law as laid down by the Court of Queen's Bench in England in Anderson's case, when the Court said that "We have the practical exercise of this prerogative from the earliest down to modern times, and that the most remarkable cases are those where the writ was issued to the Isle of Man, of Jersey and St. Helena." Jersey and the Isle of Man are statutory exceptions. The St. Helena case is rather an authority that the writ will not issue to a foreign settlement. The old precedents of the writs to Calais are disposed of by Lord Campbell's observations in the St. Helena case.

Apart, therefore, from the *ex parte* judgment of the court in Anderson's case, it may be considered to be still doubtful whether the writ of *habeas corpus* runs to the colonies. It is plain that the Habeas Corpus Act never contemplated the writs issued at Westminster as extending to the colonies or Plantations; not only because they are not mentioned, while Jersey and Guernsey are expressly mentioned, but from the fact that the writ is made returnable in all cases within twenty days to the courts at Westminster. But it may be said that these courts have jurisdiction at common law over the colonies. But it is laid down by Blackstone, in reference to the American Plantations or colonies, that "the common law as such has no allowance or authority therein, they being no part of the mother country, but distinct, though dependent, dominions:" (1 Bl. Com. 109.) It is also difficult to avoid the force of the judgment of Lord Mansfield in *Campbell* v. *Hall*, Cowp. 204, where it was held that when the King had promised a colony a local Legislature he had thereby abandoned his prerogative of legislating for the colony. As to the laws of such colonies, Blackstone also says (1 Bl. Com. 109) what English laws "shall be admitted and what rejected, at what times and under what restrictions must in case of dispute be decided in the first instance by their own provincial judicature, subject to the power and control of the King in Council."

Thirdly, this last consideration suggests an important topic in this case—What is the right of appeal, if any, from colonial judgments to English Courts? For, if the law of the Canadian Courts be wrong, or even questionable, and if there be a proper court of appeal from those courts, it is clear that to such court only ought an appeal to be brought, and by such only ought an appeal to be entertained. Is the English Court of Queen's Bench, or any other of the Superior English Courts, such a court of appeal? Certainly not: for it is the first principle of colonial law that only to the Queen in Council does an appeal lie from a colonial court. It is laid down broadly by Serjeant Stephen (1 Steph. Com. p. 103, 2nd edit.), that "an appeal is universally allowed from the decision of colonial judges to the Sovereign in council." But this proposition is too large: for most colonial Legislatures have been invested with, or have assumed, the right to limit such appeals. Thus in civil cases the Canadian Legislature, acting in pursuance of their power, under 31 Geo. III., ch. 31, have enacted that no appeal shall lie to the Privy Council in which the sum in dispute shall not exceed 500*l*: (7 Vic., ch. 18, sec. 36). In felonies and criminal cases generally it seems that no appeal lies to the Privy Council except by leave obtained from the court below; for it has been decided that when the Crown grants a charter of justice by virtue of an Act of Parliament, it does not reserve its power of receiving an appeal in case of felony, except upon leave obtained from the court below: (see cases cited in Macpherson's Practice of the Privy Council, pp.

3 and 4). It has even been said by a high authority (Dr. Lushington) that "not only in England, but throughout the dominions of the Crown of England governed by the law of England, no right of appeal in felonies ever existed. Nor are we aware that in any one single instance the Crown has ever, by the exercise of its prerogative, granted leave to appeal in any such case:" (*Reg.* v. *Edu'* *e* and *Byramjee*, 5 Moo. P. C. 272; Macph. Priv. Counc. p. 4.) However this may be, it is understood that the Canadian courts have refused an appeal in Anderson's case, as it seems they have an undoubted right to do.

Fourthly, it seems, therefore, that not even the Privy Council in this country—still less any inferior court—has the right to entertain an appeal in criminal cases from the judgment of the colonial courts. If, therefore, the English Court of Queen's Bench has assumed such an authority, it seems to have clearly exceeded its jurisdiction. Are the proceedings in the *ex parte* form of Anderson's case virtually those of an appellate court overruling the judgment of an inferior court? We submit that they are of this character. Ambiguous, evasive and obscure as were the affidavits; doubtful, as perhaps it may be, whether the English Court was bound to take judicial notice of the proceedings and law of the Canadian court—it cannot be doubted that all the facts were fully in the minds of the judges; and it may be thought that in a less momentous national question—involving perhaps a horrible question of life and death—they would have yielded to a technical and even substantial objections to the affidavits. They knew that Anderson stood committed to take his trial in his own country for murder, according to international treaty, as construed by Canadian Law: therefore that he was lawfully in prison according to Canadian law. Could they, therefore, hold that a *primâ facie* case of unlawful imprisonment had been established, without virtually overruling that law? But if our premises hold, it was not competent to the English court even to question that law. The only pretence for bringing up Anderson in the case would be for the purpose of bailing him. But murder is not a bailable crime. Surely also a criminal, duly committed on so grave a charge by a proper tribunal, can hardly be admitted to even a temporary release by a court of concurrent jurisdiction, without a grave imputation on the committing tribunal; and it may be doubted whether, in the annals of England—even in the days of despotism—a case can be cited of such an interference of a Superior Court of concurrent jurisdiction with the act of a court of equal dignity. What would the Court of Queen's Bench in England say if the Exchequer, or the Court of Common Pench, interfered by *habeas corpus* to release a prisoner whom the former court had declared to be lawfully committed; or if the Court of Queen's Bench in Canada assumed a similiar jurisdiction over the committals of either of the Superior Courts in England? When the right to interfere is so doubtful—and when the integrity and ability of the tribunal are unimpeachable, the case seems to fall within many which might be cited in which the court of concurrent jurisdiction has refused to act.

Lastly, we cannot leave this subject—nearly inexhaustable as it is—without saying a few words on the main question, whether Anderson has committed murder within the terms of the Ashburton Treaty. Undoubtedly, there is plausable reason for contending, on its literal constructing that he has not committed murder. The treaty and the statutes—English and Canadian, which embody it—agree in the express declaration that the criminal is to be given up only if he be charged "upon such *evidence* as according to the law of that part of her Majesty's dominions would justify his apprehension and committal for trial . . . . If the crime had been there committed." These words, if read apart from legal canons, and by the light only of interlocutory remarks in the English Parliament before the Ashburton Treaty was accepted, seem to indicate—at least to the unlegal mind—that if the charge do not amount to the crime named in the country where the prisoner is apprehended, he cannot be legally committed for trial or given up. On the other hand, it is a first principle of English, and we believe also of American law, that the *lex loci contractus celebrati*—the law of the country where the contract was made—governs the substantial construction of the contract; the *litis ordinatio*, the mode of the procedure, depends on the law of the *forum* or country where the contract has to be fulfilled. Where is an international contract such as a treaty to be considered as made? Must it not be held to be offered and accepted in the countries of each contracting party? and, if so, is not each who seeks to enforce it, on an alleged breach, entitled to claim the benefit of the *lex loci contractus celebrati*, and so to claim that disputed words shall be construed accordingly? Again, it is laid down that the two rules of most general application in construing a written instrument, are, "first, that it shall, if possible, be so interpreted *ut res magis valeat quam pereat*; and secondly, that such a meaning shall be given to it as may carry out and effectuate to the fullest extent the intention of the parties. . . . . The construction must be such as will preserve rather than destroy; it must be reasonable and agreeable to common understanding; it must also be favourable and as near the mind and apparent intents of the parties as the rules of law will admit; and, as observed by Lord Hale, the judges ought to be cutious and subtle to invent reasons and means to make acts effectual, according to the just intent of the parties. They will not cavil therefore about the propriety of words when the intent of the parties appears; but will rather apply the words to fulfil the intent, than destroy the intent by reason of the insufficiency of the words:" (Broom's Legal maxims, 481, 482.)

Was it rather the intent of the parties to the treaty that each should give up to the other country only such criminals as to the restoring country should hold to be such; or such as were criminals according to the laws of the demandant country? If the former be the true construction, then either country can free itself from its obligations by daily changes in its penal code.

That construction of treaties must prevail which gives effect to the whole instrument, in preference to that which renders any part of it inoperative; (Wildman's Institutes, 180, vol. 1.) If the term murder be construed according to Canadian—or rather hypothetical English—law, it becomes partly inoperative as to the United States.

"Good faith clings to the spirit, and fraud to the letter of the convention; *in fraudem vero legis agit qui, salvis verbis legis, sententiam ejus circumvenit*:" (2 Phillimore International Law, 97.) "When the object of the agreement is universally to include everything of a given nature, and general description will comprise all particular articles, although they may not have been in the knowledge of the parties: (Ib. 98.)

Does not the larger definition of murder, according to the United States law, afford the canon of construction under this rule, rather than the restricted signification of the word in the English law?

The American view on the subject of ambiguities in treaties, has been well expressed by Judge Chace, whose opinion seems to have been adopted by Dr. Phillimore: "The universality of terms is equal to an express specification on the treaty, and indeed includes it. For it is a fair and conclusive reasoning that if any class of cases were intended to be exempted, it would have been specified. The indefinite and sweeping words made use of by the parties exclude the idea of any class of cases having been intended to be excepted, and explode the doctrine of constructive discrimination:" (2 Phillmore 108.)

Such are some of the objections which will have to be met, if the Ashburton Treaty is to be interpreted solely by English technology and law, rather than by American law. Whatever may be the result, it is to be hoped that no fear of public opinion will make our judges shrink from their only function as pronouncers, and not makers, of the law. If America be

entitled to her pound of human flesh, let her have it, and the execration of the civilised world at the same time, if it be so nominated in the bond. But let it not be said (even by slaveholders) that there are English statesmen of English judges,

> Who palter with them in a double sense:
> And keep the word of promise to the ear,
> But break it to the hope.

DIVISION COURTS.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page 52.*)

CHAPTER II.

Of the Division Courts from their Institution to the Consolidation of the Public General Statutes, A. D., 1841 *to* 1859.

The Provinces of Upper Canada and Lower Canada having been united by an act of the Imperial Parliament, "the Province of Canada" was proclaimed upon and from the 10th of February, 1841. In the month of June in the same year, the Provincial Parliament assembled, and at an early period in the session, Mr. Attorney-General Draper, (now Chief Justice of the Common Pleas) introduced a bill to repeal "the laws in force in Upper Canada for the recovery of small debts, and to make other provision therefor." It was based on the recommendation in the report before spoken of, and with some trifling exceptions became law, the 4th & 5th Vic., cap. 53.

By this statute Courts of Request were abolished, and Division Courts established in their stead. Six divisions were to be laid out in each district by the magistrates in sessions; every division to constitute a court, with resident clerk and bailiff; periodical sittings to be held in each, and jurisdiction as to amount fixed at ten pounds.

So far the reformed system of local courts resembled the original; the added provisions, numerous and comprehensive, were in their details admirably adapted to the business transactions, and to the actual condition of things in the country. A particular examination here of the new provisions would be out of place, for the whole substance of the statute being embodied in the existing law, these provisions must be discussed at length under the several heads to which they relate, we may however, indicate the leading features in the act.

The courts were in each district to be presided over by a resident judge, a barrister of a certain standing, who as sole judge was empowered to decide the cases coming before him in a summary manner, and in the event of illness or absence could depute a barrister to act for him. When the sum claimed exceeded £2 10s., a jury could be called, at the instance of either party, to try the case, and the verdict of a majority was received.

The jurisdiction as to subject matter, and to parties, was enlarged. Clerks were to be paid by salary, the fees on proceedings being funded to meet the expenses of the courts, and if these proved insufficient the difference was to become chargeable on the Consolidated Revenue Fund of the Province. Every district judge was empowered to make rules for regulating the practice in his own courts, and a summary remedy was given against officers guilty of extortion or misconduct.

Thus "the old and valued principle of bringing justice home to every man's door," enunciated in the first page of our legal history was re-affirmed, and courts which with all their defects and abuses half a century's trial confirmed the necessity for, were continued, but placed on a sounder basis, and re-modeled to suit the requirements of the country.* And looking at the act (4 & 5 Vic., chap. 53) in the light of twenty years' experience, on two points only can substantial exception be taken to the enactment, viz, the majority verdict and the independent rule-making power, instead of one set of rules for the whole of Upper Canada† while at least one most valuable principle in the law, payment of clerks by salary, has been abandoned, contrary it is believed, to the interest of suitors and the general good.‡

The statute 4 & 5 Vic., chap. 53, was limited to four years; when this period drew to a close, the new tribunals working satisfactorily, there was no disposition to return to the old order of things, and by the 8th Vic., chap. 37, the Division Court law was made perpetual.

By this last act some changes were also made, the number of courts was limited to not less than three nor more than nine in each district; payment by fees was substituted for salary in the mode of remunerating clerks, and

* A similar system of local courts was established in England in 1846, just *five years after it was introduced in Upper Canada.*

† Both of these provisions were amended by the Legislature. With respect to rules it was probably considered that all the district judges would by common consent agree on one set, but that was not done, and although at a subsequent period the rules for one of the Counties, which had been approved of by all the judges of the superior courts, were at their instance, printed by order of the government, and the concurrence of all the county judges sought therein, all did not concur, and the evil of variations in the practice if mitigated was not quite got rid of till the year 1854, when a uniform practice was applied to the whole of Upper Canada, under the rules framed by a Board of county judges, appointed for the purpose.

‡ The injurious consequences of the fee system, the corruption and vexations attendant upon it, has been a matter of complaint from the earliest times. The payment of clerks of courts by salary, instead of fees, long since recommended by the English common law commissioners, is now universal throughout England. It was felt that fees was a bad mode of remuneration, the system giving a strong interest to the fee-gatherer in litigation—in the number and protraction of suits. And moreover that the general funds of the country ought to bear a large share of the expenses in the establishment of courts; and it seems obvious enough, that as the machinery of justice must at all events be kept up, to make such courts self-supporting, is to levy an income on the necessities of the humbler suitors. The *Law Journal* of Dec., 1859, thus refers to the subject, "The fee system as applied to services by clerks of courts, is not without strong objections, and the plan of payment by salary instead of fees is certainly sounder in principle, for the general funds of the country ought to bear all the expenses of the establishment of courts of justice. Then why should a person seeking his rights be charged in his individual capacity when all the requisite legal machinery is in existence, and his claim creates no fresh public expense?"

unanimity was made necessary in the verdict of a jury. A few years afterwards the courts were enabled by statute to attach the personal property of absconding, removing, or concealed debtors, to answer claims to ten pounds against them; executors and administrators were specially authorised to sue, and rendered liable to suits upon causes of action within the jurisdiction (12 Vic. chap. 19) and this and the previous statute contained several provisions relative to procedure.

A measure was introduced by the Hon. J. S. Macdonald, in 1850, which resulted in the act 13 & 14 Vic. cap. 53. It consolidated the three statutes in force regulating the courts, and gave them new and greatly enlarged powers. These were, chiefly, an increased general jurisdiction to twenty-five pounds upon contracts, and ten pounds "in tort to personal chattels," a summary power to adjudicate upon claims made by third parties on property seized under process of the courts, an authority to examine judgment debtors with a view to the enforcement of such satisfaction as the debtor was enabled to give, and for the punishment of fraud —provisions for the revival of judgments in case of the death of the parties, for the removal of causes to the superior courts, for enabling a judgment to be made available in certain cases against the debtor's lands, for enlarging the remedy under writs of execution, and for further facilitating relief against officers and their sureties; all these in their original shape or in modified form, are continued to the present day.

Some of the provisions of this statute, the power to examine judgment creditors (the 91st clause) and the extensive range of executions, for instance, have been much objected to of late years, but on the whole the changes made by Mr. Macdonald's act continue to be regarded with favour by those who use the courts.

Under 4 & 5 Vic., the magistrates in Quarter Sessions had set off their several counties into Court Divisions By this Act (of 1850), these divisions were preserved with their existing limits, but the continued power to declare and appoint divisions was exercised in several counties.

The act 16th Vic., cap. 177, again enlarged the jurisdiction as well as improved the procedure in many particulars, and remedied certain defects in the existing law, and besides contained several provisions conducive to substantial justice, and to cheapness in administration. It met the difficulty respecting claims by landlords for rent due, when tenant's goods seized on demised premises, providing for the interest of both landlord and execution creditor, and extended the law of interpleader to such claims. It facilitated the speedy determination by a jury of controverted facts; moreover, by this act two entirely new elements were incorporated with the local law courts. 1st *The law of arbitration* was extended to the courts with all the advantages and without the technicalities of practice used in the superior courts. 2nd. The appointment of a Board of Judges was authorised, with power to make a uniform set of rules regulating the practice of the courts for use in all the counties in Upper Canada. The fears entertained respecting the original power to make rules (each judge for his own county) that different minds brought to bear on the same matter would without conference or intercommunication produce varied results, different codes of practice in the counties, proved to be correct, and in very few counties was procedure exactly the same. This evil was remedied under the enactment referred to, and the Board of Judges appointed,* framed general rules which, sanctioned by the judges of the superior courts, came into operation on 1st October, 1854, with a statutory obligation. They are still in force. This act, the work of Mr. Attorney-General Richards, aided largely the design of the courts to secure speedy, cheap, and substantial justice, combined with uniform and sound principles of administration. The statute 18 Vic., cap. 125, further enlarged the jurisdiction by enabling defendants to be summoned from any part of Upper Canada to the court division in which the cause of action arose, and this as of right and without any leave from the court.

And, in aid of this new jurisdiction, the act made provision for a judgment obtained in one county being enforced in another, for a writ of execution could not be executed out of the limits of the judicial district in which it issued.

Without referring to certain acts upon other subjects, which contained provisions affecting in some degree the powers of the courts, the next statute relating to the courts is the 22 Vic. cap. 33, which was introduced by Mr. Attorney-General J. A. Macdonald.

It was for "the Abolition of Imprisonment for Debt." The clauses of this statute which appertained to the Division Courts met objections which had been urged to the "Judgment Summons" clauses.

It was complained that these clauses had been greatly abused by creditors, and the power conferred by them used against debtors for the purpose of oppression and annoyance. To remedy this, Mr. J. A. Macdonald's measure provided that no party should be committed to gaol for default in attendance, unless twice summoned, or the Judge was satisfied that his non-attendance was wilful; and if it appeared that the debtor was improperly summoned, he was entitled to compensation for his trouble and attendance.

* The judges appointed were, Harrison, Malloch, Gowan, Campbell, (since dead) and O'Reilly, (since resigned). The rules were made the 25th of June, 1854, and approved by the judges of the superior courts on the 6th of July following.

A defendant once examined and discharged could not be again summoned, except the Judge was satisfied on affidavit that new ground existed for a further examination; and, as a general rule, the examination was to be in the Judge's Chambers and not in open court. Thus these provisions were guarded against the possibility of abuses in administration, and were strictly confined to their legitimate uses—the discovery of property withheld or concealed—the enforcement of such satisfaction as the debtor was able to give, and the punishment of fraud.

This brings us to the Consolidated Act 22 Vic. cap. 19, by the which the Division Courts are now regulated. Of this statute, it is sufficient to say here that it was substituted for the existing acts already noticed, which were all repealed, and that, without operating as a new law, it settled many doubtful points in the repealed acts it replaced, and the matter of these repealed acts it embodied in a revised and condensed form.

Such, in brief outline, is the statutory history of an important branch in the general system of local jurisprudence established in Upper Canada.

(*To be continued.*)

A FEW "VEXED QUESTIONS."

In the last number appeared a communication from Mr. Durand, under the above caption. We have heard from some of our correspondents in respect to them, and find, as Mr. Durand says, that a great difference of opinion prevails, particularly in reference to the first question.

According to our judgment, the giving a transcript of a judgment from the court in which it was obtained, does not do away with it as a judgment of that court. The effect would probably be held to be a suspension of the right to act on the judgment in the original court, till return made of the transcript. The terms of sec. 139 are to "*enter* the transcript in a book to be kept for the purpose," and the amount due *on the judgment* (*i. e.* in the original court) according to the certificate. The clause then goes on to say, "all proceedings may be taken for enforcing and collecting the judgment in such last mentioned court by the officers thereof, that could be had or taken for like purposes upon judgment recovered in any division court:" the effect of which seems to be that in the court to which the transcript sent, the same proceedings may be taken on the judgment *as if* it was a judgment of that court. It is obvious that there cannot be two or more judgments in force at the same time, and there is nothing to show that the proceeding in aid, by transcript, transfers the judgment. We think the return of *nulla bona* in the case put, would justify the action desired of the Toronto clerk. This is just one of the cases that ought to be settled by rule of the board of judges. On the whole we think Mr. Durand's view is the correct one.

2nd. Query? *Payment of money into court on a tender previously made.*

In the case put, we think that it is in the power of the Judge to grant an adjournment for the purpose of giving the notice. The words (sec. 88) "and all proceedings in the said action shall be stayed, unless," &c., by no means imply that the suit is necessarilly at an end. The word "*stayed*" on the contrary seems to convey the idea that the proceedings are to remain in *statu quo* until further order. Indeed there is room to contend that an express order from the judge is necessary to give effect to the provision.

If we look at sec. 179, the same language occurs, "and thereupon any action in the superior courts, in respect to such claim, shall be stayed." &c. Would it not be necessary under this section to apply to a judge in Chambers to stay proceedings in the action?

The power to adjourn is rendered still more clear by sec. 86 of the statute which enacts that in case the judge thinks it conducive to the ends of justice, *he may adjourn* the hearing of any case in order to permit a necessary notice to be served or to enable a party to *enter more fully into his case, or for any other cause which the judge thinks reasonable*, which is to be done on such equitable terms as to the judge may seem meet.

3rd. Query? *As to dividing causes of action.*

The cases put would not be within sec. 59 of the act which provides that "a cause of action shall not be divided into two or more suits for the purpose of bringing the same within the jurisdiction," &c. There is no necessary connection between the note and the account, nor yet between the account and the action for damages, but the items of a running account could not be divided. *Grimbly* v. *Aykroyd*, 1 Ex. 479, and *Wickham* v. *Lee*, 12 Q. B., 521, are leading cases on the subject of splitting demands.

On the fourth subject referred to by Mr. Durand, we cannot supplement the suggestion he offers.

We shall be happy to hear from Mr. Durand on the other unsettled points in the Division Court law to which he refers.

To the Editors of the Law Journal.

GENTLEMEN,—You having wished for any useful suggestions relative to the Division Courts, I take the liberty of making some. I give known facts acquired from experience, and they are by no means exceptions. It is right and proper that plaintiffs should know what they have to meet on Court-day, whether a defence or not. As an illustration, A. sues B. on an account for goods sold and delivered by three different clerks, he brought those three witnesses on Court-day a distance of twelve miles. On the case being called, the defendant answered and said the claim was right, consequently judgment was given without calling the witnesses, and I allowed the costs of these witnesses on the plaintiff's affidavit that they were necessary, and came for no other purpose than to give evidence in the cause. Again, C. sues D. and D. told plaintiff he would not dispute the claim; on Court-day plaintiff brought no witnesses. On the cause being called, defendant appeared by an agent and denied the claim, consequently the plaintiff applied and got leave to put off the trial on payment of costs of day. On the cause being called on next Court, the plaintiff appeard with his witnesses prepared to prove his claim, but defendant did not appear and the plaintiff's witnesses were not required.

These are great evils and now for the remedy. I would require appearances to be filed with the clerk a given number of days after service, the same as in the County Court, and I venture to say there would be less litigation on Court-days, and a saving to suitors of thousands of dollars in a year. Really defendants come to Court, under the present system, without any intention of defending, and when they find the plaintiff has no witnesses, then they deny and apply for remuneration, and often get it If defendants were compelled to make known their intentions in time, delay and expense would be avoided. I see no necessity of waiting until Court-day for judgment. Where there is no appearance, let the Clerk, in default of appearance, enter judgment at once, and not put the Court to the trouble of passing judgment in open Court, and defendants to the humility of hearing their names

proclaimed to the world as persons unable to pay. There seems no valid reason why there should not be uniformity in all our Courts.

Yours, &c.,
SAMUEL WHALEY
Clerk 5th D. C., Co. Perth

[We published in our last a similar letter to the above, from another clerk in the same county, Perth.

There is nothing in the letter before us calling for an enlargement of the remarks already before our readers.

Had B. chosen to give a confession to the bailiff who served him, or afterwards to the clerk, there would have been no witness fees in the case.

It was scarcely prudent in C. to take D's. word. Had he obtained a written *admission* from D., there would have been no occasion for a postponement.

As to the "humility" point the defendant can always save his feelings by acknowledging the claim before an officer of the Court in the usual way.

We cannot agree which our correspondent in the opinion expressed at the close of his letter. It is practically impossible to secure uniformity of procedure between Courts of Record and Courts of Summary Jurisdiction.—EDS. L. J.]

To the Editors of the Law Journal.

GENTLEMEN,—At the last Court of Quarter Sessions, some of our magistrates, I was told, were anxious to establish another Division Court in this county, which has now two or three too many. Their plan is, to take a portion of five townships, and from the five fractions make a whole;—a most absurd idea, every one admits. I fancy the project could only have been entertained by a few J. P.'s in the immediate neighbourhood, who thought they would like to be *near a court*. I am sure our worthy Judge, who is Chairman of the Board, would strongly oppose such a silly project The five townships from which the new Division is to be taken are Houghton, Walsingham, Middleton, Windham and Charlottville. The aggregate number of suits in these five townships, for the last sittings, was *eighty-one*, making an average of sixteen suits for each court. Still, in the face of this paltry business, some magistrates are endeavoring to form a new Court out of these five divisions.

About two years ago, these wise men established another Division in the small township of Woodhouse, because there happened to be two villages in it. The result is, there are now three Divisions within seven miles. Many are now (when it is too late) acknowledging the absurdity of making the eighth Division, as the public interest did not require it. The result is, the business is split up among two sets of officers, who scarcely care for the emoluments, and feel ready to abandon their situations at any time. The fact is, as has been remarked by the *Law Journal*, great damage has been done to the usefulness of these Courts, by establishing too many Divisions, and of course the blame rests upon the magistrates, as they have the power. The harm is upon us, and perhaps cannot be undone. They will find it much easier to make new Divisions, than to lessen the number. The fact is, if they keep on dividing, and subdividing, and making new Courts, Division Court officers will have to "go a-begging."

Your remarks upon Mr. Durand's "vexed questions," are looked forward to with much interest.

What is your opinion of the late Exemption Act?—*i. e.*, respecting the sixty dollars worth of chattels *besides* the articles enumerated? How is that value to be established? Suppose the bailiff has an execution against A., who has a horse, can A. claim the horse under the sixty dollars claim? Or supposing the execution creditor orders the bailiff to sell said horse, which brings say seventy dollars, I apprehend sixty dollars would have to be returned to the debtor, and the overplus would apply on the debt. Again: suppose the horse only brought fifty dollars, would not the execution debtor have some cause for damages? The whole question is, how or in what way is the value of sixty dollars to be established? This seems to me rather a nice point.

Are not bailiffs entitled to ten cents each for notices of sale of property under executions?

Yours, very truly,
March, 21, 1861. NORFOLK.

[The multiplication of Divisions has a positively pernicious effect, in our judgment, and was not designed by the Legislature. We have before us the copy of the forthcoming part of "*The Law and Practice of the Division Courts*," in which this subject is fully handled; and as we could offer no remarks more full and appropriate, we refer our correspondent to the treatise in question.

We have before examined the subject of "Exemption," and can add nothing to what we then said. There is the dilemma our correspondent refers to, and it is one of those difficulties in practice not easy of solution.

We think bailiffs are entitled to ten cents each for notices (not exceeding three) of sale of property under execution.—ED. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

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

SMITH v. THE CORPORATION OF THE VILLAGE OF COLLINGWOOD.

School Teacher—Order on municipality for his salary—Acceptance of treasurer—Refusal to levy rate—Right of Action.

Held, that an action would not lie against a municipal corporation by a school teacher, upon an order made upon and accepted by the treasurer in the plaintiff's favor for his salary, the treasurer having no power to bind the corporation by such acceptance

Held, also, that the teacher could not maintain an action against the corporation for refusing to levy a rate for his salary, upon an estimate furnished to them for that purpose by the trustees.

(H. T., 23 Vic)

This was an action by the plaintiff, a school teacher, against the corporation, for not paying him his salary or allowance.

The declaration contained seven counts.

The first count was on an order made on the 10th of January, 1859, by the school trustees of Collingwood, by their chairman, on the treasurer of the town of Collingwood, to pay the plaintiff £17 13s. 5d., "which the defendants by the hands of their treasurer accepted."

The second count was on an order upon the treasurer by the school trustees, made by their chairman, on the 4th of July, 1859, in favor of the plaintiff, for £62 10s., which the defendants by their treasurer accepted.

The third count was on an order made by the school trustees on the 23rd of August, 1859, by their chairman, on the treasurer of Collingwood, to pay to the plaintiff $6 95, accepted in the same manner.

The fourth count was for money had and received, which was clearly not supported by the evidence, and on which therefore the defendants had a verdict.

The fifth count alleged that the defendant was a common school teacher in the town of Collingwood for twelve months: that the school trustees, on the 22nd March, 1858, laid before the defendants an estimate of the sum required for paying the plaintiff his salary as such teacher, in order that the same might be levied on the ratable inhabitants according to law: that it became thereupon the duty of the defendants to levy a rate in order to make such payment: but that the defendants, though they gave to the plaintiff an order on their treasurer to pay the plaintiff £17 13s. 5d., for the salary then due to him, would not provide the said sum, nor levy, nor impose, nor collect a rate for the payment of

the same, but neglected and refused so to do, whereby the plaintiff was deprived of his salary as such teacher.

In the sixth and seventh counts the plaintiff complained in the same manner of the defendants, for neglecting and refusing to impose or collect a rate for paying the sums due to the plaintiff, for which they had given the other two orders on their treasurer, which were declared on in the second and third counts.

The defendants pleaded to the first count, that they did not accept the order mentioned in that count; and payment.

To the second and third counts, that they did not accept.

To the fifth count, that they did provide the money, and collect and impose a rate.

To the sixth and seventh counts, the same plea.

And to the sixth count defendants also pleaded, that they did impose the rate, and delivered the roll for collecting it, and the other assessments for the town of Collingwood for the year 1859, but that the day fixed for the return of such collector's roll had not yet expired, and that they had not yet received the said sum for the school trustees.

Issue was joined on all the pleas.

There was a case tried at the same assizes, at Barrie, before Robinson, C. J., brought in the Court of Common Pleas, in which Munson, another school teacher, sued the same corporation of Collingwood upon similar causes of action, the declaration and the pleadings being substantially the same as in this case. And it was agreed that the evidence given in that case should be submitted to the jury as evidence given in the present case, in order to shew the grounds upon which the corporation was sought to be charged, and what they relied upon as their defence.*

The evidence shewed that the orders were in each case signed by the chairman of the board of school trustees, and were sealed with their seal, and that they were accepted by the treasurer under his signature merely as treasurer.

The clerk of the corporation produced and proved an estimate that had been furnished by the school trustees of the money that would be required to be raised for school purposes in 1858, which estimate included the plaintiff's salary. A by-law was afterwards passed to raise money for certain school purposes; to wit, for school house, library and apparatus. The money required for teachers' salaries in that year was raised by a rate imposed by resolution, and the whole money required for that year seemed to have been levied.

The corporation received in like manner from the school trustees an estimate of the money required for school purposes for 1859. That also included the teachers' salaries, including the plaintiff's. A by-law was introduced to raise that money by assessment, but it was not passed. It was read a second time on the 25th July, 1859, but was neither passed nor rejected; nothing was afterwards done upon it.

The clerk of the corporation explained that the salary of the plaintiff should have been paid: that the government contributed a portion of the school money, and that the school trustees had power to make up the deficiency by rate, and so also had the corporation of Collingwood. He swore that a small portion only of the taxes of 1858 had been collected; and that he thought, but was not sure, that enough of money had been collected on the roll generally to cover teachers' salaries.

The chairman of the board of school trustees, who was at the same time a member of the town council, swore that in 1858, which was the first year of the existence of the corporation, the municipal council paid people whom they employed to make and improve their streets by giving them orders on their treasurer: that these orders got into circulation, and many persons paid their taxes with them, so that there was not enough actually collected in money to pay the school teachers: that the government grant would in common course be received by the end of June in each year, and the residue of school moneys required for the year had to be raised by rate; but that for some reason which he was not aware of, the government grant for school purposes for Collingwood for the first half of 1859 had not yet been received when he gave his evidence.

It was objected in each case, on the part of the defendants, that there could be no action against the corporation upon their alleged acceptance of the orders, and that at any rate the acceptance to bind them must be under the corporate seal; and that the corporation was not liable to be sued upon such causes of action as were stated in the special counts.

The learned Chief Justice said, that as to the objections to the sufficiency of the several counts they should be taken upon demurrer, or might yet be urged in arrest of judgment, but could not be gone into at *nisi prius*, where the only matter to be considered was the application of the evidence to the different issues of fact that had been joined.

The jury found for the defendants on the fourth count, and for the plaintiff on the others, with £69 8s. 2d. damages.

R. A. Harrison obtained a rule *nisi* to arrest judgment on the six counts on which the plaintiff recovered; or for a new trial on the law and evidence, on the ground that the treasurer of the corporation was the only party liable on the orders, and not the defendants, who had not bound themselves under their seal, and who could not be made liable on the treasurer's acceptance of such orders; and because on the matters stated in the fifth, sixth, and seventh counts, there was no remedy by action. He cited *Quin v. The School Trustees of Seymour*, 7 U. C. Q. B. 130; Tapping on Mandamus, 93, 347.

McMichael shewed cause.

The statutes bearing on the question are referred to in the judgment.

ROBINSON, C. J.—The same points precisely being before the Court of Common Pleas and this court upon the same evidence, the judges have communicated together upon the points involved, and agree in the same conclusions, upon grounds which need not be gone into at length in each court. I will therefore only shortly state, that as regards the orders of the school trustees accepted by the treasurer of the corporation of Collingwood, they must be looked upon as given in pursuance of the statute 13 & 14 Vic., ch. 48, sec. 24, sub sec. 8, and sec. 26, which makes it the duty of the school trustees of incorporated villages to give orders to teachers and other school officers, and creditors, upon the treasurer of each incorporated village for the sums which shall be due them. It appeared to me at the trial, that if we could in consequence of this provision look upon the incorporated village as in the light of a trading corporation authorised to make notes, or draw and accept bills, it might be found that it would follow as a consequence that they might transact such business in the same manner as it would be transacted by individuals; that is through their proper officers, by whose signatures merely the corporation might for such purposes be held bound; and it would not be necessary that the corporate seal should be applied on such occasions. I ruled therefore for the time, that the acceptance by the treasurer of orders authorised by statute to be drawn upon him might be taken to be the acceptance of such orders for the corporation, and that if there was any thing in the school acts or the municipal acts which would affect the question, it would be open to the defendants to move in term on any verdict that might be given for the plaintiff. It was understood at the trial that as the cases were new in their nature, the question on which they must turn would be discussed in term in both courts, and in order to ascertain the amount for which the plaintiff might recover if found entitled to support any of the causes of action, a verdict was given for the amount which was shewn or rather omited to be due in each case. We have now to consider the two classes of counts, and the answers given so far as may be necessary.

As to the three counts upon the orders, we think that we cannot look upon the provision in the School Act under which they were given, and which I have recited, as meant to serve any other purpose than as a voucher from the school trustees, which should show the treasurer of the municipality that the person in whose favour it was given had a claim upon the school funds as a teacher, whose services and the amount due for them had been ascertained by the trustees.

The order when complied with would of course acquit the corporation as to so much of the school fund as the treasurer should have paid upon it; but I do not think that the acceptance of the order under the hand of the treasurer had the effect of giving a right of action to the trustees against the corporation, in the same

* See *ante* p. 15.

manner as a bank or other trading corporation would be liable upon a cheque or bill accepted by their cashier.

Whether the corporation were bound to pay an order drawn on their treasurer, and when, and under what circumstances, must depend upon something more than the fact of the treasurer having accepted their order. He has not power, I think, to bind the corporation by his personal acceptance to pay immediately, without regard to any other consideration but merely the fact of his having written "accepted" upon the order.

The statutes give no general power in terms to the treasurers of municipal corporations to bind the corporations by their acceptance, and we must find something in the statute from which such a power can be properly implied in any particular case before we can hold that it is given or implied in such case.

As to school moneys, we find they come in part from provincial funds, and in part from funds to be raised by assessments, and regard must be had to the fact whether the corporation is in funds to make any payment out of school moneys upon an order of school trustees at the time of such order being presented; and if they are not in funds, the right to demand payment nevertheless may depend upon questions which the treasurer has not the discretion to settle by his acceptance. This acceptance, I think, has no other effect than to mark the time and fact of the order being presented, which may be of consequence to the teacher as regards the order of payment under circumstances that may sometimes exist.

I think, therefore, that judgment should be arrested as regards the three first counts

With respect to the last three counts, we find no instance of an action against a municipal corporation for not levying a rate for a public purpose, in which rate the individual bringing the action has no other interest than as one of a class who would have a claim to be paid out of such assessment if it were raised; and if an action on such a cause as is set out in the last three counts respectfully is not maintainable, that objection cannot be held to be cured by pleading over, for it is not only a substantial objection, but one that goes to the very root of the action. No authority has been cited in support of the declaration as regards these counts, and we ought not to decide in its favour except upon the clearest ground, when we consider that it cannot be truly said that the plaintiff's salary is unpaid, because the municipal corporation has not imposed and collected a rate for school purposes, for by the School Act the school trustees who contracted with the plaintiff to employ him and pay him, have express authority given to them to levy themselves whatever money might be necessary for enabling them to fulfil their contract.

I am of opinion that the rule must be made absolute for arresting the judgment on the last three counts, as well as on the first three.

BURNS, J.—With respect to the first three counts, I think the plaintiff cannot maintain an action against the corporation, treating it as bound by the acceptance of the orders of the trustees. The effect of so holding would be treating the orders in the nature of bills of exchange. These orders were given in compliance with the 8th sub-section of section 24, of the school act, 1850, and with them in his hand the plaintiff was entitled to call on the treasurer for payment, but the treasurer could not bind the corporation by any acceptance he might write upon them. The liability to pay must depend upon something else than what the treasurer may choose to say about it.

Then with respect to the last three counts, charging the defendants with a breach of duty in not levying a rate in order to pay the orders, after some doubt and hesitation I have at last settled into the opinion that the plaintiff cannot maintain such an action. If it were shewn that the rate was levied and the money in hand, I have no doubt an action for breach of duty in not paying it would lie. The school trustees having done all that was required on their part, and given the teacher the requisite order to receive the amount due to him, would entitle the teacher to be paid if the money were there for that purpose, and it would be a breach of duty in the corporation not to pay. In that case the breach of duty is individually applicable to the teacher, the person who suffers by not being paid.

The charge in this case—namely not levying a rate—applies to a class of persons, and the question is whether there is such a breach of duty in such a matter to each individually as gives a right of action. The 21st section of the act enacts that this corporation, being a town, shall be liable to the same obligations as are enacted in respect of townships under the 18th section, and councils of counties under the 27th section. This section is very plain, that no teacher shall be obliged to wait for the collection of the rate, but the treasurer shall pay in anticipation of it; but still it shews that a rate is to be imposed for the purpose of providing the fund in time or to reimburse the corporation.

The corporation is to impose the rate at the request of the trustees, and it is asserted in this case that the trustees did request it to be done. I have met with no authority shewing that an action can be maintained for not complying such a request. The plaintiff is not a contractor with the defendants, but has contracted with another corporate body altogether, and therefore no obligation arises on the defendants beyond what grows out of the provisions of the school acts. These obligations are, I take it, in the first place to comply with the request of the school trust and levy a rate, and when that has been done, then, secondly, the treasurer shall comply with the orders of the trustees by paying from any moneys in his hands.

The first of these obligations, I take it, must be enforced by mandamus, and *that* I think is the proper remedy, and not an action of this description. It would be very inconvenient if the corporation should be exposed to an action by every individual of a class of persons for a breach of duty, when it might be in the power of the corporation to shew that there existed something in the request of the trustees which might be illegal.

It is a pity the plaintiff has been advised to try an experimental action when the other remedy was so plain, and about which there there could be no doubt. The best consideration I can bestow upon it leads me to the conclusion this action is not sustainable.

MCLEAN, J., concurred.

Rule absolute to arrest judgment.

CHAMBERS.

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

MCGINNIS V. THE CORPORATION OF YORKVILLE.

Action against a Municipal Corporation—Common Counts—Extra Work—Pleas.

A plea that the cause of action, if any, arose for and concerning a debt incurred and falling due during the preceding year to that in which action brought, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed, cannot be allowed on an application to plead several matters with other pleas, going to the merits of the cause of action. [April, 3rd 1861.

This was an action on the common counts for work and labor, materials, &c. *Jas. Paterson* obtained a summons calling on the plaintiff to show cause why defendants should not have leave to plead the following pleas:—

1. Never indebted.

2. That the work, &c, was for building a new Town Hall in Yorkville under special contract, setting out some of the terms and conditions, and averring that the defendants paid all plaintiff is entitled to under the contract for contract work, extra work, or otherwise.

3. A similar plea, setting out another condition, that the work should be completed on or before 15th August, 1860, under a penalty of £10 for every week during which it should be left incomplete beyond that day: that there were no weekly returns of extra work according to conditions, and that no extra work was in fact done; that the work was not completed until 31st Dec, 1860, being nineteen weeks after said 15th August, 1860, whereby plaintiff had forfeited £190, and that after deducting that sum defendants had paid in full for all contract work, extra work, or otherwise howsoever.

4. Plea setting out that the work was done under a contract under seal, setting out terms and conditions relative to extra work, conditions, &c., also a clause providing for a reference to William Hay, Architect, in case of difference: that defendants had paid contract price in full: that differences having arisen as to deductions and extra work, said William Hay took upon himself the burthen of the reference, and within proper time, according

to the agreement, made his award, finding a balance in favor of defendants

5 Payment before action

6 That before action the debt, if any, was attached by four several orders, issued by judgment creditors of the plaintiff, and served on defendants before this action, in one of which actions leave was given to judgment creditor to proceed against defendants by writ

7 That the cause of action, if any, arose for and concerning a debt incurred and falling due during 1860, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed

Mr. Paterson, as to the last plea, cited *Scott* v. *The Corporation of Peterborough*, 19 U. C. Q. B. 469.

D. McMichael shewed cause

ROBINSON, C. J.—I allow the defendants leave to plead all the pleas with the exception of the last, and give leave to plaintiff to reply and demur to such of the pleas as he may see fit. I cannot allow the last plea in connection with the other pleas. I do not think that a plea of that kind should be allowed with pleas going to the merits. Where a contract is made by a municipal corporation with a person for the doing of any work for which a provision to raise money has been made by by-law, and the contractor in performance of the work under the contract does extra work, for which an action would lie on the common counts, but no action is brought till the year following that in which the work was done, the plea that no provision was made for extra work, though it might according to the facts be a good plea on the authority of *Scott* v. *The Corporation of Peterborough*, ought not, I think, to be allowed with other pleas going to the merits of the cause. I therefore decline to allow it with the other pleas mentioned in the abstract.

CARLISLE v. HOSHEL.

Plea in Abatement—Time—Setting aside.

Defendant executed in favour of Plaintiff a bond in the penal sum of £700, conditioned to pay £350 with interest, by instalments Plaintiff sued on this bond, and obtained a verdict for the penalty, 1s damages for detention, and £21 damages assessed on breaches assigned Afterverdict, defendant paid the damages and costs. Instead of entering judgment for the penalty as a security for future breaches, plaintiff commenced a second action to recover another instalment, and interest Defendant without intimating that he intended to plead in abatement, as a favour asked plaintiff for further time to plead, which was granted. Sixteen days after declaration defendant pleaded the pendency of the former action, and prayed judgment whether plaintiff ought a second time to implead him for the same cause of action, attaching to this plea an affidavit of its truth Plea set aside with costs, and plaintiff allowed to sign judgment by default, unless defendant should pay costs and plead within four days.

(March 22nd, 1861.)

Plaintiff in this cause obtained a summons to set aside a plea in abatement with costs, and that plaintiff should be at liberty to sign judgment as for want of a plea, because the plea was pleaded after four days had expired from declaration and notice to plead served, and also pleaded contrary to good faith and intended only to embarrass and delay.

The action was on a bond in the penalty of £700, conditioned to pay £350, with interest, by instalments.

Plaintiff sued on this bond, and in November, 1860, obtained a verdict at the last Niagara Assizes, for the penalty, and 1s. damages for detaining, and £21, the damages on the breach that had then accrued.

After verdict, defendant paid damages and costs.

Judgment was not entered, in order to stand for further breaches to be suggested, if any should occur. Instead of that, plaintiff brought this new action on the bond to recover an instalment and interest.

Defendant asked for leave to plead (not intimating that he intended to plead in abatement) which plaintiff gave him (several days) and then sixteen days after declaration served, defendant found out what the fact was as to the former action, that there was no judgment entered, but a verdict apparently not set aside, and he pleaded the facts truly, avering the identity of the £700 (the penalty sued for) as the cause of action in both suits, and concluded by praying judgment whether plaintiff ought a second time to implead him for the same cause of action, and he attached to this plea an affidavit of its truth. He did not in his plea pray judgment of the writ and declaration, nor conclude with prayer that the writ and declaration be quashed

James Paterson for plaintiff

D. McMichael for defendant

ROBINSON, C. J.—It would seem as if defendant's attorney had not decided in his own mind whether he was pleading in abatement or in bar, but he had no right at that late time to plead in abatement the pendency of another action If we look on this as a plea in abatement, though it neither commences nor concludes as such, nor expressly avers that the first suit is pending, then it must be set aside as being pleaded too late, and the Court would not now support it, by any *ex post facto* indulgence in extending the time, because after obtaining time to plead as an accommodation, the defendant should not have pleaded in abatement If he had asked the court for time, he would have been placed under the condition of pleading issuably

We can not look on this as a plea in bar, for it is clearly no bar, (*Harley v. Greenwood*, 5 B. & Al., 101.) the first suit having gone no further than verdict, by which the debt of £700 on this bond is clearly not extinguished.

The plea must be set aside with costs. Let judgment by default be entered, unless defendant shall pay costs, and plead within four days.

Summons absolute.

ELECTION CASES.

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

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

REGINA EX REL TILT v. CHEYNE.

Municipal Elections—Qualification of Candidates—Equitable estate

Where defendant in November, 1858, conveyed the real estate, which formed his qualification, to his father for a consideration of £300, for which he took his father's notes payable at distant dates, and in February, 1860, purchased the property back, returning to his father all the notes, though the father did not reconvey the property to the son till 3rd October, 1860, yet the son was held to have had at the time of the assessment "an equitable estate" within the meaning of sec. 70 of the Municipal Institutions Act.

(March 9, 1861.)

In November, 1858, the defendant conveyed the real estate which formed his qualification to his father for a consideration of £300, for which he took his father's notes payable at distant dates.

The defendant called as a witness, explained the motives for this transaction, and asserted *bona fides*.

In February, 1860, he purchased the property back, and returned to his father all the notes, not one or any part of which had been paid. The first of them fell due a year from its date, and soon after it was due this resale took place.

At the time of the resale, and some time before, one Silverthorne, a brother-in-law of defendant, occupied part of the house, and Defendant had a bedroom in it furnished by himself which he occupied, boarding with Silverthorne, and this continued after the resale. Subsequently the defendant leased a room in the house to an Orange Lodge.

He received a conveyance from his father on 3rd October, 1860, and in January following was elected a Councillor for Ward number two of the Township of Toronto.

His election was moved against by relator on the alleged ground of want of qualification.

Robert A. Harrison, for relator.

D. McMichael, for defendant.

DRAPER, C. J.—I assume the *bona fides* of the dealing between father and son, and I see nothing to warrant the conclusion that the resale and conveyance was a mere scheme to give the defendant an apparent qualification to be elected. There is no reason to suppose that defendant entertained the idea of being a candidate at any time before 3rd October, 1860.

Then considering that defendant was a vendor with no part of his purchase money paid, holding only notes for it, the moment the agreement for resale was made, and these notes were actually

given back to the father, the father became in effect only a trustee for defendant, who had an immediate and perfect right to the conveyance of the legal estate. As between himself and his father and every other person who had not through the father acquired some right or charge upon the estate, the sale to the father might from that moment be deemed virtually rescinded.

The legal estate, however, was in the father still. But on these facts, I think, I am warranted in treating the defendant as having an "equitable estate" in the premises from the moment he returned the notes, which was equivalent to a payment by him of all the purchase money.

Lord St. Leonard (V. & P. 124, 13th ed.) says, "It would be difficult to refuse a specific performance where the purchaser has paid all the purchase money," and here we have the additional fact that the defendant was vendor to as well as purchaser from his father, and had a lien upon the estate for the whole of the original purchase money.

I have not overlooked the doctrine in equity, as stated by Lord Justice Knight Bruce, that "a parol contract for the sale of land, though all the money be paid without part performance (for the payment of the money is no part performance) cannot be carried into effect if the person sued chooses to avail himself of the defect." —*Hughes* v. *Morris*, 2 De G. M. & G 356. Here both vendor and vendee swear the contract was complete and partly executed, by part performance beyond the return of the notes.

I think judgment should be given for the defendant with costs.

Judgment for defendant with costs.

(Before the Honorable Mr. Justice BURNS.)

REGINA EX REL. GEORGE BENDER v. FRED. J. PRESTON.

Town of Clifton—Mayor—Qualification.

The Town of Clifton was incorporated by special Act of Parliament (19 & 20 Vic., cap. 63) it was subsequently by proclamation of the Governor General divided into three wards; thus entitling the Town to nine Councillors and a Mayor At the time of the election in January last there were not more than seventeen persons in the Town qualified under sec. 70 of the Municipal Institutions Act to be elected Councillors, so that there was not in the language of sec. 72 "at least two persons qualified to be elected for each seat in the Council," though there were more than two persons qualified under sec. 70 to be elected Mayor,

Held, that the Mayor holds a seat in the Council

Held also, that no greater qualification is required for Mayor than for a Councillor.

Held also, that the only qualification requisite for a person to be elected Councillor owing to the peculiar circumstances of the place, being that of an elector, a person elected Mayor, and possessing the last mentioned qualification, was sufficiently qualified under sec. 72 of the Act.

[March 24, 1861]

This was a complaint against Frederick J. Preston as Mayor of the Town of Clifton, on the ground that he had not the required property qualification, according to the provisions of the 70th sect. of ch. 54 of the Cons. Acts, when he was elected.

It was conceded that if what appeared upon the Assessment Roll for the year 1860 should govern, then that Mr. Preston was not duly qualified to be elected Mayor at the last election, but it was contended on his behalf that the provisions of the 72nd sect, viz., that there should be at least two persons qualified to be elected for each seat in the Council, otherwise no qualification beyond the qualification of an elector, should be necessary, aided him.

It appeared that Mr. Preston was a properly qualified elector of Clifton, and the question was, whether the 72nd sect. applied to his case, and if so, in what manner.

The Town of Clifton was first incorporated by Act of Parliament 19 & 20 Vict., ch 63, and was subsequently divided into three wards, each ward electing three Councillors, and now a Mayor is elected by the inhabitants generally.

The additional facts necessary to the determination of the question raised for adjudication, appear in the judgment of the Court.

Robert A. Harrison for relator – Clifton is a Town incorporated by Act of Parliament (19 & 20 Vic. c 63), having three wards, and consequently entitled to nine Councillors and a Mayor. The qualification of a person to be elected Mayor in a Town is freehold property to $80 per annum, or leasehold property to $160 per annum (Consol. Stat. U. C., cap. 54, s. 70). It is conceded that defendant had not this property qualification. He is not, therefore, entitled to hold the office unless sec. 72 suspends the operation of sec. 70 of the Municipal Act in regard to all Municipal offices in the Town of Clifton. By sec 72 it is provided, that "in case in a Municipality there are not at least two persons qualified for each seat in the Council no qualification beyond the qualification of an elector shall be necessary in the persons to be elected." It is submitted that the word "Municipality," as used in this section, does not include a town but rather applies to rural Municipalities only (s. 75, 76, 78). Even if applicable to a town it is certainly by the interpretation clause of the Municipal Act restricted to towns "incorporated under the Act" (s. 424, sub s. 1), which Clifton was not, having been incorporated by a different or special Act of Parliament (19 & 20 Vic c. 63). But if the 72nd section is held to apply to the Town of Clifton, it is submitted that in its operation it is restricted to "Councillors" or "members of the Council," and that the Mayor is neither a Councillor nor a member of the Council, but only its chief executive officer, elected in a manner different from members of the Council (sec. 66 sub. sec. 2, 70, 101, 115, 118, 120, 132, 135. 143, 144, 145). Presume, however, for the sake of argument, that the office of Mayor of the Town of Clifton comes within the language of s. 72, are the facts such as to warrant the application of that enactment? There can only be one Mayor for the Town,—only one seat for Mayor,—and if there be at least two persons qualified for that seat the one elected should be duly qualified. Now it is shown that at the time of defendant's election there were more than two persons qualified for the seat. There were in the first place all residents of the County of Welland having property in the Town (s. 70), and in the second place, at least seventeen persons resident in the town itself.

Richards, Q C—I admit that defendant is not qualified under sec 70, but contend that he is sufficiently qualified under sec. 72. The qualification of a Mayor in Towns is the same as that of a Councillor in Towns, (sec. 102,) and it is shown on affidavits that in the Town of Clifton, under sec. 72 of the Act, the only qualification necessary for a person to be elected a Councillor is the qualification of an elector. Defendant possesses the qualification of an elector. I urge that sec. 72 does apply to a Town such as Clifton, though incorporated by special Act of Parliament. It is by sec. 1 of the Municipal Act provided, that "the inhabitants of every County, City, Town, Village Township, &c., incorporated at the time this Act takes effect, shall continue to be a body corporate," &c. Clifton was incorporated at the time of the passing of this Act, and continued to be so under the Act as much as if incorporated under it. Then the question is, whether the Mayor of the Town of Clifton holds a seat within the meaning of sec. 72? I contend that he does, and on this point refer to secs. 147 and 149 of the Act. I also argue that the Mayor is a member of the Council. He is the head of it and must be a member of it.

BURNS, J.—On looking over the various clauses of the Act, considering the powers and authority vested in the Mayor, the mode of his election, what is required for qualification, and his presiding over and voting with the members of the Council, I think his position is that of the chief seat in the Council.

It appears from the evidence that the whole number assessed on the Roll for Clifton for the year 1860 is as follows:—North Ward, 89; Centre Ward, 118; and South Ward, 53. The Town Clerk swears, that out of this number there are thirty-five persons only who are qualified in respect of property to be elected Mayor or Councillors. The 102nd section of the Act places them upon the same footing in respect to qualification.

Now in what manner is the 72nd sect. to be construed? Is it only to come into operation when the number is below two persons qualified to be elected for each seat as applied simply to qualification in respect of property, or after deducting all those who are disqualified to be elected from other causes? I apprehend the expression, "qualified to be elected," must be construed in the larger sense that is for the benefit and advantage of the whole body of electors, for if it should happen from some cause or other that all those who might be elected as respects property, yet were disqualified from interest or otherwise, the Town would have no Council if the inhabitants could not resort to the electors for members.

Of the thirty-five persons qualified in respect of property seven are disqualified on account of being at the time of the

election inn-keepers or saloon-keepers. Six others are non-residents of the County in which Clifton is situated. Three of the number have contracts with the Corporation, among which is the relator himself One was in 1860, and still is, collector of the taxes. Two persons are not British subjects. This makes 19 persons out of 35 who are disqualified. Thus leaving only 16 who might be elected, and of these one it is said is not rated in his own right for a sufficient property qualification, and this would seem to be so upon looking at the Roll, and another, it is said, is security for the collector.

To exclude the electors from resorting to their own body in filling up the Council there should appear to be at least twenty persons properly qualified, and not disqualified, from whom they might select their Council In the present instance the number from whom the electors might make a selection is below the standard. There is nothing in the Act to shew that the Legislature intended to put the seat or office of Mayor upon any different footing than that of Councillor, or to shew that the electors must exhaust the body of those qualified without being disqualified first, before going to their own body for members of the Council, and indeed it would have been unjust to have put matters upon such a footing, for in such a case some portion of the electors would be forced to elect, or suffer those to be elected, who might be distasteful to them. It is much better it should be thrown open.

The relator, it appears, was the candidate who opposed Mr Preston, and he, it is true, is properly qualified in respect of his property. He asks in his statement that he should be seated instead of Preston. I could not do that under any circumstances, for it appears that the relator, together with his partner, has a contract with the Corporation to supply the market with water, and that disqualifies him from being a member of the Council.

I, however, see no sufficient reason for ordering a new election of Mayor, and probably at the end of the year the inhabitants will be as well satisfied with Mr. Preston as they would have been with any other person seated in his place.

My judgment is, that the summons be quashed with costs to the respondent.

Judgment for Defendant with costs.

(Before Mr. Justice Burns.)

REG. EX REL THOMAS M. BLASDELL v. JOHN ROCHESTER.

Municipal election—Qualification of candidates—Residence—Writ of Summons, by whom to be issued.

Held, that a person rated on the assessment roll of a City for the necessary property qualification, but at the time of the election a resident in an adjoining Township of the County in which territorially the city is situate, is not qualified to be elected a member of the Municipal Council of the City.

Held also, that a writ of summons in the nature of a quo warranto, signed by the Clerk of the Process, and under the process seal, though in fact issued by the Clerk of the Crown in the Court of Queen's Bench, is sufficiently issued by the Clerk of the Process within the meaning of Consol. Stat. U. C, cap 54, sec. 128, sub. sec. 5.

[Feb. 24th, 1860.]

This writ of *quo warranto* was for the purpose of testing the right of John Rochester to be elected an Alderman for Victoria Ward, in the City of Ottawa, under the following circumstances:

John Rochester did not reside within the limits of the City but lived in the Township of Nepean, another Municipality adjoining Victoria Ward, of the City of Ottawa. He was assessed for property in the City of Ottawa, which was a sufficient property qualification, and he had a place of business within the City of Ottawa where he attended daily. His trade occupation was that of a tanner, which business was carried on where he resided in the Township of Nepean, and he was also assessed upon the roll of the Township for the property situated there.

The Relator was a candidate at the Municipal election for 1860, and complained that Rochester was not qualified by reason of his residence in another Municipality, to be elected a member of the Council of Ottawa.

McBride, for relator.

Jackson, for defendant.

Burns, J.—This proceeding brings up a very important question as to the meaning of the last Municipal Institutions' Act, and the proper construction to give to it.

The defendant contends that the effect of the 70 sect. of 22 Vic. ch 99, repeated in the Consolidated Acts, page 539, is to render persons who live in the County in which the Municipality is situated for which he may be elected eligible, provided he be rated on the assessment roll of that Municipality in respect of property sufficient to qualify

In this case there is no doubt that by the Territorial Divisions' Act the City of Ottawa is for some purposes part of the County of Carleton, and that defendant resides in the County of Carleton. If there were nothing else to be considered than simply these facts it might be contended, under the language of section 70, that the defendant is right, and that he may be an Alderman of the City of Ottawa though he does not reside within its limits, but resides in the same county within which it is situate. Section 73 enacts, who shall be disqualified to be elected, and non-residents are not there enumerated, so that section so far upholds defendant's views Then section 74 provides for those who may claim exemption from serving, and nothing is said about non-residents.

But it is a principle in the government of every municipal corporation that it has a right to the service of all its members in those offices to which they are capable of being elected, and from which they may not claim exemption In the present case the defendant sought the office, and the office was not forced upon him, but if he be qualified to ask for it he must be also qualified to perform the duties of it if elected against his will. I apprehend the principle in respect to qualification applies to the one case as well as the other, and I see nothing in the 70th sect which can imply that a person might be at liberty to elect whether he will consider himself qualified or disqualified on the ground of non-residence, as may suit either his convenience or his inclination. The 183rd sect. of the Statute enacts, that every qualified person duly elected who refuses the office shall be subject to be fined not more than $80 nor less than $8. I see nothing which would exempt the defendant from being subject to this penalty if he be qualified to be elected, as he contends, in case he were elected and refused to take the office. But the mere penalty would not be all. There is nothing in the Act to shew that the Legislature intended that the payment of the penalty would excuse the non-acceptance of office, or that it is to be in lieu of doing the duty. It is clearly laid down in *The King* v. *Bower*, 1 B. & C. 585, that it is an offence at Common Law to refuse to serve an office when duly elected. I refer also to *The King* v. *The Cor. of Bedford*, 1 East. 79, to shew, that if the defendant in this case was qualified to be elected he might on refusal to serve have been indicted for his refusal. *The King* v. *Woodrow*, 2 T. R. 731, also strongly supports this view. I cannot imagine the Legislature ever contemplated that a person appearing upon the assessment roll of one Municipality in respect of property which would qualify him yet if he lived in another Municipality twenty miles distant would be liable to be treated as qualified notwithstanding, and be subject to be fined and indicted because he did not accept the office to which he was elected.

There is nothing in my opinion from which to draw any inference that the Legislature intended that a person might be qualified to accept office and yet at the same time not be subject to the consequences in case of refusal. We must therefore come to the conclusion, that the meaning of the 70th section is something different from what the defendant contends in this case. I confess it is not easy to see what was meant. Possibly it may have been thought the expression would provide for cases of doubtful domicil, or such cases as it may be said that a man may have two domicils, though I do not suppose the Legislature meant that in this case the defendant could at the same time be a member of the Council of Ottawa and of the Township of Nepean. So far as I can see from the facts, there is nothing which would or could have prevented the defendant from being elected for the Township of Nepean, and of being subject to the penalties for not taking the office if he had been elected there.

The Court of Queen's Bench in *Reg ex. rel Taylor* v. *Caesar*, 11 U. C. Q. B. 461, determined that a person could not have two domicils for the purpose of voting, and I see nothing which warrants a person having two domicils for the purpose of qualification to be elected either seeking the office or having it forced upon him.

The conclusion I have arrived at is, that whatever the Legislature did mean they did not mean that a person who was living in a distinct municipality from another where he may be rated for property, also might be forced in the latter municipality to accept office at the risk of penalties, and if that be a correct construction, and I think it is, then it follows that such person is not a qualified person liable to be elected, and if that be so, then the only remaining question is, whether he may be elected with his own consent against the wish of any individual who complains of it. I do not think he may. Though the defendant may be rated on the Roll of the City of Ottawa, yet that does not constitute him a member of that Corporation. The 1st section of the Act shews that it is only the inhabitants of the City of Ottawa which compose the Corporation, and it appears to me any one of the corporators has a right to complain that a stranger, one who is not a corporator, has been chosen to fill the office of Alderman.

We know that in cities and large towns there are many persons who have their places of business within the limits of the city or town but yet do not reside there, and very probably the Legislature intended to render such persons eligible to the corporate offices mentioned, but that object should have been accomplished either by putting it upon the footing of a voluntary choice by the electors, combined with the will of the elected, to accept, or else have distinctly said that such persons are members of the Corporation, and leave no reason to doubt their being liable to the penalties if they refused to serve if elected against their will. It is in this respect the Act is defective, and we must give it a construction which will render the whole Act consistent, and apply to every case.

Besides this view of the subject, it is to be observed that the Territorial Divisions' Act, chap. 3, of the Con. Sta. Acts, U. C., declares that for municipal purposes, the City of Ottawa shall be a county, and that by the Municipal Institutions' Act it is clear a person resident in one county, is not eligible to be elected for a corporate office in another county. This, of itself, would seem to dispose of the question in this case.

The defendant raised an objection, that the Writ in this case was not properly issued, because it appears to be marked in the margin of it as having issued from the office of the Clerk of the Crown in the Court of Queen's Bench, whereas the 5th sub. sec. of sect. 128 of the Con. Act, ch. 64, says, that the Writ shall be issued by the Clerk of the Process. The Writ is properly signed by the Clerk of the Process, and is under the process seal, and I think that it is issued within the meaning of the Act of Parliament. I must set aside the election of the defendant, and the judgment must be, that the Corporation proceed to another election. I give no costs however, as the language of the Legislature is very well calculated to lead people astray.

Judgment for Relator without costs.

(Before his Honor the Judge of the County of Carleton)

THE QUEEN, ON THE RELATION OF THOMAS M. BLASDELL, AGAINST JOHN ROCHESTER.

Municipal Election—Candidates for City Council—Qualification—Residence.

Held, that under sec. 70 of the Municipal Act, a person, to be qualified to be elected a member of a City Council, must not only possess the property qualification required, but be a resident within the city limits.

Held also, that a person whose family resided without the city limits, and with whom for weeks continuously he lived, could not, although occasionally boarding with an inhabitant of the city, be deemed a resident of the city

Quære: Have the aldermen of a city, as *ex officio* justices of the peace, any jurisdiction beyond the city limits?

[May, 1860.]

In March last the defendant, John Rochester, came forward as a candidate for the office of alderman for one of the wards of the city of Ottawa, and was declared duly elected.

The relator, who was the opposing candidate, applied for and obtained a writ of *quo warranto* to remove the defendant, on the ground that he was not at the time of his election a resident of the city, and also on the ground that he was not a British subject.

The latter ground was abandoned; so that the question for decision was, whether the defendant had a right to sit as an alderman, he not being at the time of his election a resident within the limits of the city, although in all other respects duly qualified. It was admitted that the defendant resided and carried on his business without the limits of the city, but within the county of Carleton, of which the city of Ottawa, for certain purposes, forms a part.

A few weeks previous to this application, the same question, and between the same parties, was brought before a learned judge of Queen's Bench (Mr. Justice Burns), under the same form of process, and for the same cause, who declared the defendant not duly qualified to be elected an alderman.*

The only difference between that case and this was, that after the first election, and before the one contested on this application, the defendant contracted with an inhabitant of the city of Ottawa, to board with him at fifteen shillings a week, and had paid him for a few weeks board at that rate. It was admitted, however, that he did not board with him continuously, but very frequently lived with his family without the city limits, and at one time for eight or ten days uninterruptedly.

Lewis, for the defendant, did not rely upon such an arrangement as in itself sufficient to establish the fact of a residence so as to qualify his client to be elected, but contended broadly that the defendant being a resident within the territorial limits of the county of Carleton, within which the city of Ottawa is situate, was duly qualified.

ARMSTRONG, Co. J.—The learned judge of the Queen's Bench decided that the defendant was not qualified, and with that decision I most fully agree.

The 70th section of the Municipal Act declares that the persons qualified to be mayors, members of a council, or police trustees, are such residents of the county within which the municipality or police village is situated, as are not disqualified under this act, and have at the time of the election property, &c., rated on the assessment roll of such municipality or police village, of certain value.

Now, in the Territorial Division Act, page 18 of Consolidated Statutes of Upper Canada, it is enacted that for municipal purposes the cities of Toronto, Hamilton, Kingston, London and Ottawa, *shall not* form parts of the counties of York, Wentworth, Frontenac, Middlesex and Carleton, within the limits whereof they are respectively situated, but shall, for municipal purposes, be counties of themselves.

If, therefore, the city of Ottawa forms no part of the county of Carleton for municipal purposes, I cannot understand how the defendant is a resident of such county, when it is admitted he lives without its limits.

The word "mayor," used in the 70th section of the Municipal Act, is not confined to the head of a city council alone; it applies equally to the head of a town council, and as no town is declared to be a county in itself for municipal purposes, the mayors of towns, or members of a council, or police trustees, must necessarily be residents of the county within which such municipalities are situated, if they reside within the county at all, and which they must do to qualify them for election, as declared by the 70th section.

There are many clauses in the Municipal Act which speak of cities as distinct from towns, although towns are all referred to as parts of the counties in which they are situated. For instance, the 154th section directs the clerks of townships, villages and towns to make certain statistical returns to the clerk of the county within which they are situated, to be by such clerk transmitted to the provincial secretary:—the clerks of cities are required to transmit similar returns to the secretary direct; so far showing that cities are separated from counties within which they are situated.

Mr. Lewis lays some stress upon the 361st and following sections of the act, as to the authority which mayors and heads of councils have as justices of the peace. I do not think it is by any means clear that mayors and aldermen of cities are *ex officio* justices of the peace beyond the limits of the cities they represent.

The 361st section says, "every city, *and town separated*, shall be a county of itself for municipal purposes, and such judicial purposes as are herein specially provided for in the case of all cities, but for no other."

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* See preceding page.

The 366th section authorizes the Governor to appoint justices of the peace for a *town*, with jurisdiction over *all* the county in which the town is situated, and if, as is contended, the city of Ottawa is part of the county of Carleton because the mayor and aldermen have jurisdiction as justices of the peace over the whole county of Carleton, it is not easy to understand why the legislature should have declared, by the 364th section, that so soon as a town becomes a city, commissions of the peace for such town shall cease.

It appears to me more than probable that if the point be ever brought up in any of our superior courts, it will be found that mayors and aldermen of cities have no jurisdiction as justices of the peace beyond the limits of their cities; for although it was intended to give the inhabitants of cities the power of electing their own magistrates for certain judicial purposes within their cities, I am by no means certain that such elected justices of the peace have any greater jurisdiction beyond their respective cities, than justices of counties have beyond their counties.

The 365th section makes a distinction between justices of the peace for a county in which a city lies, and justices for the city, by saying that warrants of county justices shall require to be backed or endorsed before being executed in a city, in the same manner as is required by law when to be executed in a separate county, showing that for certain judicial purposes a city forms a separate county in itself.

It is true, there is no express provision for backing the warrants of a mayor or alderman, when to be executed out of the city or in another jurisdiction; but I think it very possible that the 24th section of the act, respecting the duties of justices of the peace out of sessions (p. 1048 Con. Stats. U. C.), applies to their warrants as well as to those of other justices, and that therefore it was not necessary to provide for them, supposing cities to be separate counties, as I think they are.

The 367th section says, that the mayor of any city may call out the posse to enforce the law *within his municipality*, under the same circumstances as would justify the sheriff of a county in doing the same act within his county.

However, these clauses are not very material or necessary to the decision of the present case, which turns altogether upon the point, whether the defendant is entitled to act as an alderman of the city of Ottawa, he not being at the time of his election a resident within the limits of the city, although a resident of the township of Nepean, part of the county of Carleton, which, for certain purposes, includes the city of Ottawa. That portion of the Territorial Act first referred to is, in my opinion, of itself sufficient to settle the question. It beyond a doubt cuts off the city of Ottawa from the rest of the county of Carleton, for municipal and certain judicial purposes. The election of an alderman is clearly one of these municipal purposes; and as the defendant was not, in my opinion, a resident within the municipality at the time of his election, the election must be declared null and void.

I regret that he did not, after the decision of Mr. Justice Burns, abstain from placing himself in his present position. The consequence is, that he must in this instance pay the relator his costs.

My judgment, therefore, is, that John Rochester be removed from the office of alderman for Victoria ward of the city of Ottawa; that a new writ for the election of an alderman in his stead do issue; and that he pay the relator his costs.

Judgment for relator with costs.

(Before His Honor the County Judge of Waterloo)

THE QUEEN, ON THE RELATION OF GAVIN HUME v. MORRIS C. LUTZ AND SAMUEL RICHARDSON.

Municipal Act—Towns—Election of Reeve & Deputy Reeve—Equality—Casting vote

Held, that the mayor of a town, as the member present who was assessed for the highest amount on the last revised assessment roll, had no power to give a second and casting vote at the election of reeve and deputy reeve of the town.

[March, 1861]

The town council of the town of Galt met in the town hall on Monday, the 21st January last, for the purpose of electing a reeve and deputy reeve for the town.

Morris C. Lutz received seven votes, including the mayor's vote, for the office of reeve, and a like number of votes was given for James Kay, also a candidate for the office of reeve.

There being an equality of votes, the mayor, as the member present who was assessed for the highest amount on the last revised assessment roll, gave a second and casting vote for Mr. Lutz, who was thereupon declared the duly elected reeve of the town for the present year.

At the same meeting of the council, Samuel Richardson received seven votes, including the mayor's, for the office of deputy reeve, and the like number of votes was given for James Young, also a candidate for the office of deputy reeve.

There being an equality of votes, the mayor, as the member present highest on the assessment roll, gave a second and casting vote for Mr. Richardson, who was thereupon declared the duly elected deputy reeve of the town of Galt for the present year.

It was contended by the relator, that the mayor, as the member present who was assessed for the highest amount on the last revised assessment roll, had no power to give a second and casting vote for the parties, and that their election was therefore invalid.

John Miller, for relator; *S. B. Freeman, Q.C.*, for defendants.

MILLER, Co. J.—I adjudge and determine, first, that the relator had, at the time of making his complaint, an interest in the election to the said offices of reeve and deputy reeve respectively, as a voter at the said election, and also at said election gave his vote in favor of the election of James Kay for the office of reeve, and of James Young for the office of deputy reeve of the town of Galt, and as a councillor duly elected to represent ward No. 5 in said town of Galt for the present year; secondly, that the mayor, as the member present who was assessed for the highest amount on the last revised assessment roll, had no power by law to give a second and casting vote for the said Morris C Lutz and Samuel Richardson; thirdly, that the 134th section of the Municipal Act, on which the defendants have relied as authorizing the proceedings taken at their election, is no authority for them, for the 147th section of the same act says that *any* question at *any* meeting of the council on which there shall be an equality of votes, shall be deemed to be negatived;—there having been an equality of legal votes for the candidates proposed for the reeveship and deputy reeveship, I have no doubt this section must apply to the proceedings, and that the motions should have been considered as negatived;—and, fourthly, I determine that the defendants pay the relator's costs, to be taxed.

I refer to *Reg. ex rel. Pollard* v. *Prosser*, 2 U. C. Prac. R. 330.

ASSESSMENT CASES

IN THE MATTER OF THE APPEAL OF MR. HATT.

Assessment Act—Steamboat—Personal property—Where assessable

Held, that the personal property of a partnership must be assessed against it at its usual place of business.

Held also, that a steamboat is personal property within the meaning of the act, and properly assessable at one of the two places between which in summer it plied, and at which in winter it was laid up.

(July 1, 1859)

ARMSTRONG, Co. J.—In the matter of the assessment of the steamer Phœnix, Mr. Hatt appeals against the decision of the Court of Revision of this city, for assessing the whole property in this municipality.

The Steamer is owned by several persons, of whom Mr. Hatt is one, and he is the proprietor of one fourth of the vessel, and has his residence here—the other proprietors reside out of this Province. The Steamer runs between this and Grenville, in Lower Canada, and in the Winter is laid up at this place—and is assessed against Mr. Hatt, who objects to being assessed for the whole value of the boat, he being the proprietor of but one fourth part of her. The vessel is not assessed in any other municipality.

The 10th section of the Assessment Act of 1853,* enacts that the personal property of any partnership shall be assessed against it at the usual place of business of such partnership, and each partner in his individual capacity shall not be assessable for his *share of the personal property* of any partnership *which has already been as-*

* Consolidated Statutes of Upper Canada, cap 55, sec. 36, *et seq*

assed, and if a partnership has more than one place of business, each branch as far as may be, shall be assessed in the locality where it is situated for that portion of the personal property of the partnership which belongs to that particular branch, and if this cannot be done, the partnership may elect at which of its places of business it will be assessed for the whole personal property, and shall be required to produce a certificate at each of the other places of business of the amount of personal property assessed against it elsewhere.

The Steamboat being personal property liable to assessment, not assessed elsewhere, she being in this municipality, and one of the partners or joint proprietors being resident here, (although I think it matters not whether he resides here or not, if the partnership have a place of business here, which it may be presumed they have), the Steamboat is properly assessed against them. If assessed elsewhere, a certificate to that effect may relieve them. The steamer, I take it, is not assessed against Mr. Hatt as an individual, but against Messrs. Hatt & Co, at least it should be so. This is a description of personal property which can only be assessed as, a whole, and although the boat plies between this and Grenville, I do not understand that its business is of a nature consisting of several branches, within the meaning of the statute, so that I think it is properly assessed in this place.

I sustain the decision of the Court of Revision and order that the appellant do pay the costs.

IN THE MATTER OF THE APPEAL BETWEEN THE GAS COMPANY AND THE CITY OF OTTAWA.

Assessment—Gas Company—Pipes—Realty or Personalty.

Held that the pipes of a gas company laid throughout and under the streets of a city cannot be deemed "land" but rather personal property within the meaning of the Assessment Act.

(July 11, 1859.)

ARMSTRONG, Co. J.—The Gas Company of the city of Ottawa appealed from the decision of the Court of Revision, on the ground that the pipes conveying the gas from the establishment are valued with and as part of their land. The valuation set upon the whole is £6,000; and it appears by the testimony of Mr. Cousens, one of the assessors, that in this amount is included a sum of £2,000 as the value of the pipes carried through the city; and it was admitted that the Company are over assessed to the amount of £2,000, if the pipes be not assessable as part of the land or real estate.

The 9th section of the Assessment Act of 1853 enacts, that the real estate of all incorporation companies shall be assessed in the township, village or wards (the last word, I suppose, applies to towns and cities) where the same shall be, in the same manner as the real estate of individuals: and their personal property shall not be assessed against them in their corporate capacity, but each shareholder in any incorporated company shall be assessed for the value of the stock in shares held by him as part of his personal property, except when such stock is specially exempted by this act.

It is the *real estate*, which includes the land of the Gas Company, that is liable to be assessed, but the Court of Revision contend that every foot of Gas pipe in the city forms part of the lot of land owned by the Company, and on which their works are erected; and their counsel contends that because certain things are called by law fixtures and pass by conveyance with the land, or in other words, are considered attached to the freehold, that therefore all such things constitute real estate or land, however remote from the visible land, if the articles can only be called fixtures.

Land, in its legal signification, is of an indefinite extent upwards as well as downwards; upwards, so that no man may erect a building to overhang another's ground; and downwards, so as to include whatever is in a direct line between the surface of the land and the centre of the earth. (See Blackstone's Commentaries.) Another very learned writer says, "Land is a word of very extensive signification, and comprehends all things of a permanent, substantial nature, not only gardens, arable grounds, meadows, pastures, moors, *waters, rivers*, marshes, furze, heath, but also messuages, that is, houses, lofts or places where houses once stood, mills, castles, &c.: in short, any ground, soil or earth whatsoever, with all buildings thereon;" and concludes by saying, as Blackstone does, that "land includes not only the face of the earth, but everything under it or over it."

The 3rd section of the assessment act declares, "land," as used in the statute, shall be held to include all buildings or other things erected upon, or *affixed* to, the land, and all machinery or other things so *fixed to any building* as to form *in law*, part of the *realty*.

By what mode of reasoning the numerous links or pieces of Gas pipe, which are spread over a large city—many of them perhaps miles distant from the visible land upon which the Gas Works are erected—can be so affixed to the same land as to form, in law, part of the realty, I am at a loss to comprehend. I think the clear meaning of the clause of the statute is, that such things as are recognized by law to be fixtures shall be valued as part of the land and nothing more, and I do not think that such portions of the Gas pipes of the company, as are beyond the boundaries of their works, and placed either in the streets or on the lands of other men, are portions of the realty. If the company were to sell the fee simple of the lot on which their works are erected to an individual, for general purposes, I do not think the purchaser would be allowed to tear up streets, and grounds, and gardens of parties without the permission of the city authorities, or the owners of the grounds in order to remove or otherwise interfere with the pipes laid down under the streets or gardens of private parties, which he might expect to do if the pipes were either actually or in law a part of his land.

I rather incline to the idea that the pipes of a Gas Company are more the personal property of the Company than the real property. Every man's stock or shares in the company are valued and liable to assessment. Now as it is to a great extent, by means of the pipes, value is given to the stock or shares, in valuing the one the value of the other is included—but looking at the case in its more simple light, namely, whether the pipes are so affixed to the land as to form part of the realty, which the law requires, to sustain the position of the Court of Revision, I must decide that they are not, and therefore order the assessment roll to be amended, by reducing the assessment of the Gas Company to £4,000, and that the city pay the costs.

COUNTY COURT CASES.

McINNES v. HAIGHT.

Assignment—Filing within five days—Relation to time of execution.

Where an assignment of goods and chattels for the general benefit of creditors is filed within the five days allowed by Consol. Stat. U. C. cap. 45, sec. 4, the filing has relation to the time of the actual execution of the instrument, so as to prevent the operation of a *fi. fa.*, against the goods and chattels of the assignor, placed in the hands of the sheriff between the time of execution and time of filing.

(April 1, 1860.)

On the 28th August, 1860, one John Stephen, being indebted to the plaintiff and other creditors, executed an assignment in trust to the plaintiff, for the benefit of all his creditors generally, without priority, &c. The instrument was executed at Hamilton, in the county of Wentworth. The goods were at St. Thomas, in the county of Elgin. The plaintiff's clerk was despatched to St. Thomas on the evening of the same day, to take charge of the goods. He reached that place on the morning of the 29th, and took possession.

The defendant had a judgment in this court against Stephen, and issued execution on the 14th July, 1860; but it was not placed in the sheriff's hands until the 29th August, the day after the bill of sale was executed. The sheriff seized under that execution; and the plaintiff, as trustee under the assignment, claimed the goods, and forbade their seizure or sale by the sheriff, and threatened that officer with an action; upon which he applied for and obtained the usual interpleader order.

It is unnecessary to recapitulate the evidence given at the trial, which took place at the December sittings of the County Court. The learned judge charged the jury, that if an immediate delivery of the goods did not accompany the sale, followed by an actual and continued change of possession, the sale must be by writing duly registered, accompanied by the affidavits required by sec. 4 Consol. Stat. U. C. cap. 45, p. 452; that if registered within

five days, it would take precedence of the execution, and protect the goods against all other claims, that the sheriff could only seize the goods of John Stephen under the execution, and not those which had been his, but of which he had divested himself of all title; that the question was, whose were the goods that the sheriff seized under Haight's execution—they had undoubtedly been John Stephen's property, but had that property been changed—that he (the judge) thought the property might be so changed if, upon a valid and good consideration, to carry out an honest purpose, as where the debtor transfers or makes a sale of his goods to pay his debts, provided it be done in a way that no badge of fraud, such as the law declares shall be a fraud, attaches to the transaction, and provided the sale and delivery be completed before the sheriff receives the execution in his hands to satisfy a judgment of some *bona fide* creditor, or provided a bill of sale be registered within five days of the execution of the instrument, as required by the 4th section of the statute.

The jury found the bill of sale registered within five days of its date and execution (that is, within three days), and found a verdict for the plaintiff.

Stanton, for the defendant, objected to the judge's charge, and in January term moved for a new trial, the charge being, as he contended, contrary to law, and cited *Feehan* v. *Bank of Toronto*, 10 U.C. C.P. 32.

Abbott, contra, cited *Feehan* v. *Bank of Toronto*, 19 U.C. Q.B. 474; *Shaw* v. *Gault*, 10 U.C. C.P. 236.

HUGHES, Co. J.—Although I knew, at the time of the trial of this cause, of the existence of the decisions in appeal in the several suits of *Feehan* v. *Bank of Toronto*, by the Courts of Queen's Bench and Common pleas respectively, and *Shaw* v. *Gault et al.*, then referred to in a digest of recent decisions in the July number of the *Upper Canada Law Journal*, I did not possess the advantage of having read them as they now appear fully reported in 19 U. C. Q. B. 474, 10 U. C. C. P. 32, and 10 U. C. C. P. 236; and now, finding that the two superior courts differ so widely upon the point which most materially affects this case, I feel that I occupy delicate ground when I express a decision upon that about which the judges of the superior Courts of Upper Canada are not agreed.

Were it not that I find no analagous decisions of the superior courts in England or Ireland referred to either in the arguments of counsel or in the judgments of the superior courts here, and that I have, after much trouble and anxiety, succeeded in finding cases which I think bear very strongly by analogy upon the question at issue, I should not have presumed to say anything further than simply to give my judgment upon the authority of one or other of the cases referred to in the argument before me, and allow the court above in appeal finally to set the matter at rest as between the parties; although no doubt the question would still remain open between the courts above, until settled by the Court of Error and Appeal.

I told the jury, in effect, at the trial, that I considered the title to goods, since the statute, passed by the bill of sale or assignment, in the same way that it used to do before there were any statutes passed or in force requiring the registry of such instruments under certain circumstances; that the delivery of the instrument completed the title, and does so still, but that such title is now liable to be absolutely annulled or avoided as against the creditors of the bargainee or assignee, and as against subsequent purchasers, &c., or morgagees in good faith, where there is not an immediate delivery accompanying the sale, followed by an actual and continued change of possession, *i. e.*, by the non-fulfilment of the condition created by the statute, which I looked upon in the light of a condition subsequent.

Mr. Fisher, in his work on the Law of Mortgage, page 20, with reference to the Imperial statutes [illegible] & 18 Vic. cap. 36 (the English Bills of Sale Act), and 17 & 1[illegible]c. cap. 55 (the Irish Bills of Sale Act), which, like our Provincial statute, have for their object the guarding against private and secret bills of sale, says, "The act, therefore, appears simply to make registration necessary in cases which were already within the statute of Elizabeth and the authority of Twyne's case. Nor does it affect bills of sale of property of which possession is delivered, but only of such as remains in the possession of the maker of the bill; and whereas before the statute the question in ascertaining the validity of the bill of sale was, whether the transaction were *bona fide* or made with an intention to defeat the creditors of the assignor, the question now is, whether the instrument has been registered. Then apparent possession of itself raised a presumption of fraud, which might be determined by a jury; but even this was not a sufficient safeguard, and now apparent possession raises no presumption of fraud if the instrument be registered; but if it be not, the apparent possession will not merely raise a presumption of fraud, but will invalidate the transaction as against the persons mentioned in the act."

It has been laid down by Mr. Baron Parke (now Lord Wensleydale), in construing the Imperial statute 2 & 3 Vic. cap. 29, s. 1, that "the sound rule of construction with respect to acts of parliament is, that the words are to be read in their ordinary and usual grammatical sense, unless that mode of construction leads to manifest inconvenience, or is repugnant to the plain intention of the legislature."

Lord Chief Justice Campbell said in the case of *England* v *Blackwell*, (30 L. T. Reports 148): "When looking for the meaning of the words of a particular act of parliament, you must see what was the purpose of the legislature in the act, and how that is to be obtained."

Lord Chief Justice Denman said "It is undoubtedly true that the court will always put such a construction on the words of an act of parliament as will carry out the object of the Legislature; but if the act of parliament uses words which do not carry out the supposed intentions of the Legislature the Court cannot add them." (14 L. J. N. S. 220; Q. B.)

Now, I take the object of this act to be to guard against private or secret bills of sale, and the plain meaning of the words of the 4th section to be that sales of goods coming within the purview of that section shall be, first, in writing; secondly, the property shall be well described; thirdly, an affidavit of a witness to its execution; fourthly, an affidavit of the bargainee or his agent of the *bona fides* of the transaction; fifthly, a registry within five days from its execution; and, failing a writing, the sale shall be void; failing a proper description, the sale shall be void; failing an affidavit of a witness, it shall be void; failing the affidavit of the bargainee or his agents of the *bona fides* of the sale, it shall be void; or failing a registry within five days, it shall be void. When I say void, I mean as against the creditors of the bargainor, and as against subsequent purchasers or mortgagees in good faith. The necessity for registry cannot be here taken absolutely without the qualifying words, "within five days."

As I construe the words of this section—and I think that the construction does not overstep the intention of the legislature, as gathered from the whole scope of the act, any more than does the construction which has been put upon the words "immediate delivery" by the Court of Common Pleas, in *Haight* v. *Munro* (9 U. C. C. P. 466), which were held to mean, in the same act, "delivery as quickly as the nature of the case admits of, and an absence of delay on the part of the purchaser to obtain possession;" for surely if the time a purchaser may take to gain immediate possession under one section of the statute is to be understood in a qualified sense, and to be governed by the individual circumstances of each case, the words "within five days," the time within which a mortgagee is expressly allowed to register, may be understood in the common and ordinary sense by which the words are made use of. The word "otherwise," in the 4th section, I take to mean, "if these things are not all done," the sale shall be void, &c.; and I take the converse to be plainly implied, *i. e.*, "if these things are all done," the sale shall not be void as against the creditors of the bargainor and as against subsequent purchasers, &c. I do not think it would be at all overstraining the intention of the Imperial and Provincial legislatures to hold, that a bill of sale of goods executed in England or Ireland, not accompanied by immediate delivery, shall hold good for twenty-one days without registry, and that a similar instrument executed in Upper Canada shall, under similar circumstances, hold good without registry for five days as against creditors, &c. I cannot think the legislature intended to put an obstruction or difficulty in the way

of persons finding it necessary to execute or take mortgages on chattels or assignments for the benefit of creditors, by the passing of the statute which has been so much discussed, but merely to regulate them in so far that their *bona fides* should be secured, or sworn to at all events, and their notoriety made public by registry within a specified time. Were it the intention to require their registry before they should have any efficacy against creditors and subsequent purchasers, &c., in good faith, I think such intention would, in the concise and simple language now used in our acts of parliament, have been more plainly expressed, and probably language similar to that of the Imperial statute 3 & 4 Wm. IV. cap. 55, secs. 34 & 35, which provides that no bill of sale shall be valid and effectual till registered, would have been employed, and that a proviso would have been inserted that it should not be valid if not registered within five days from its execution; thus conferring validity on the bill of sale on its registration, and if not registered within five days making it invalid.

I must say I think the legislature had no intention to restrain the making of such instruments; indeed I should think it especially otherwise, as applicable to assignments like that which is the subject of this interpleader, or to deeds of composition with creditors; for it not unfrequently happens that a large body of creditors are willing to take what an honest and unfortunate debtor may have to give up to them in liquidation of their debts, which, when properly disposed of by ordinary fair means, may go largely to satisfy their claims, and that some rapacious and unprincipled creditor, determined to get his last penny at any sacrifice, watches and takes his opportunity of advantage, and puts an execution in the sheriff's hands, to have everything seized and sold at an enormous sacrifice, to the detriment of every one but himself; and the holding that a bill of sale or assignment like the present takes no effect by relation would have a tendency to invalidate a great number of such instruments, that are not executed on the exact spot where they are required to be registered.

In this case the assignment was registered within five days, that is, within three days, and I think all that the statute required to be done was done in order to make and continue it a legal transfer or sale of the goods in the store, but not so of the household furniture. If the five days had not been specified in the statute, the instrument would have to be registered within a reasonable time, which, if done to the satisfaction of the court and jury, I think the transfer and title would still relate to the execution and date of the instrument; but I regard the specific five days set forth in the statute as inserted to prevent litigation and uncertainty, and to place the matter beyond the doubts that parties might entertain by the variety of circumstances that would encompass each particular case, and the still greater uncertainties that might exist of satisfying the minds of jurors as to what is reasonable and what unreasonable.

I think there is an analogy between the assignment in question here, and the bill of sale of a ship, under the Imperial statute (now repealed) 34 Geo. III. cap. 68, which, in sec. 16, required, in the case of a ship absent from port, that the bill of sale should be registered, and that the endorsement should be made on the certificate of registry within ten days after return, with a provision making void the bill of sale on failure of compliance with these requisites.

Moss v. *Charnock* (2 East, 399) was a decided case, expressly under the statute last referred to, and would, had it not been overruled, have been to my mind a decisive authority against a title under a bill of sale or mortgage of chattels registered within five days, as our act requires, being construed to have relation back to the day of its date, because the court held that that statute was to be construed as enacting that no bill of sale or other such instrument shall be allowed to have any operation or effect until the requisites imposed on the parties to the sale are complied with, and not allowing any relation to hold good so as to make the conveyance effectual from any antecedent time. It is to be observed, however, that that decision did not proceed upon the 16th section of the statute, which required the endorsement on the certificate of registry to be made within ten days after the ship's return to port—because the endorsement was not made within ten days after the ship's return—but because an unreasonable time had elapsed between the date of the execution of the bill of sale and its registry.

I find the subsequent cases—*Palmer* v. *Mozon* (2 M. & S. 43), *Dixon* v. *Ewart* (3 Meriv. 322), *Mestaer* v. *Gillespie* (11 Ves. 637), and *Hubbard* v. *Johnson* (3 Taunt. 208)—so materially qualify the decision of *Moss* v. *Charnock*, as to overrule it for all purposes of the question now before me.

In *Dixon* v. *Ewart*, Lord Eldon, acting upon the opinions of Dallas, C. J., and Abbott, J., held, "that a transfer of a ship at sea, if all the requisites of the registry acts have been fully complied with at the time of the transfer, vests the property in the vendee, subject only to be divested by the neglect of the vendor to make the endorsement on the certificate of registry within ten days after the return of the ship into port; and that if a bankruptcy intervenes before the arrival of the ship, the endorsement being only an act of duty on the part of the vendor, and passing no interest, may be performed by the bankrupt himself."

Bayley, J., said, in *Palmer* v. *Mozon*: "The case of *Moss* v. *Charnock* was, I think, rightly decided, under the circumstances: for there the bill of sale was executed on the 23rd August, and the requisites of the statute were not complied with until the 5th December; so that there was gross delay. Expressions used in that case have been pressed upon us, which would certainly militate against the present decision; but these expressions appear, upon consideration, to have gone further than what was necessary, or than the law warrants. The true construction of the act seems to be this, that the bill of sale shall be holden to transfer the property from the time of its execution, but shall be liable to become void *ex post facto*, that is if the party does not comply with the requisitions of the statute within a reasonable time; upon the failure of which, the statute makes the sale null and void."

Dampier, J., in the same case, said: "The efficient act is the bill of sale, which is to be void if the requisites of the statute are not complied with afterwards. That falls precisely within the definition of a condition subsequent."

The same view of *Moss* v. *Charnock*, in the more recent case of *Boyson* v. *Gibson* (4 C. B. 122), although that was a decision under an entirely different statute (3 & 4 Wm. IV. c. 55), which requires a registry before a bill of sale can have any force or effect whatever. The court, in disposing of that case (p. 145), said: "A review of the cases of *Palmer* v. *Mozon* and *Dixon* v. *Ewart*, which were cited for the plaintiffs, and of the statute on which those cases were decided, will be found to confirm the opinion we have formed on the statute 3 & 4 Wm. IV." And again, at page 146, speaking of 34 Geo. III. cap. 68: "When the registration and endorsement had been made, the bill of sale was taken out of the operation of this avoiding clause, and stood on the same ground as it would have done if there had been no such clause in the act, *i. e.*, as a bill of sale, operating from its execution according to its terms; and in conformity with this view, in *Palmer* v. *Mozon* and *Ewart* v. *Dixon*, it was held that under 34 Geo. III. cap. 68, the interest passed by the bill of sale on its execution, and that the performance of the requisites as to registration and endorsement was a condition subsequent, and failure to perform it defeating the interest which had vested by the bill of sale immediately on its execution. That this is the true construction of the act 34 Geo. III. cap. 68, we think is not to be disputed. But it is to be observed that the cases cited overruled the doctrine as to the construction of that act, on which the Court of King's Bench, in the case of *Moss* v. *Charnock* (2 East, 399), proceeded, and speaks of the decision as a somewhat forced construction, in which the words of the enactment are made to give way to the presumed intention of the act."

I have diligently searched through the authorities within my reach for decisions under the recent Imperial Statutes known as the English Bills of Sale Act (17 & 18 Vic., cap. 36), and the Irish Bills of Sale Act (17 & 18 Vic., cap. 55), which, although more comprehensive than our Provincial Act, are like it in their provisions, and the same in character, I have found only one, which I think quite decisive upon the question, and bears out the view I entertain upon it *Marples* v. *Hartley* was an interpleader issue decided last month by the Court of Queen's Bench in England:—The plaintiff lent one Shemwell £45, upon the security of a bill of sale of household furniture and stock, dated 27th June, 1860. A

few days afterwards, the plaintiff instructed the Sheriff to take possession under the bill of sale, which he did on the 2nd July, and was in possession when an execution issued at the suit of the defendant. That execution was tested the 3rd July, but delivered to the Sheriff on the 5th. Seizure was made under it on the 6th. An interpleader order was dated the 16th. at the trial it was objected that the bill of sale was not registered. A verdict was taken for the plaintiff, with leave reserved to the defendant to enter a verdict for him. It was held that the assignee, under the bill of sale, had twenty-one days allowed to register his title, and the rule was discharged (3 L. T. Reports, N. S. 774). During the argument Whightman, J., said there was no non-compliance with the Act of Parliament on the 6th July. Cockburn, C. J., said to the defendant's counsel, "You want the apparent possession to be in the maker *after the twenty-one days*, and you also want *the lapse of the twenty-one days*. You must combine the two, and we are to see whether the plaintiff had not a good title on the 6th July." In delivering the judgment of the Court Cockburn, C. J., said—"I think this is very clear, the assignee, under the bills of sale, *has twenty-one days allowed him by the Act of Parliament to register his title*, and when he removes the goods he need not register. *Here he had the remainder of the twenty-one days unexpired, either to register or remove.*"

I therefore order that the verdict shall stand, and that the defendant's rule be discharged with costs, and that judgment be entered for the plaintiff, upon the points reserved.

Rule accordingly.

GENERAL CORRESPONDENCE.

Assessment Law—Towns and Villages—Statute Labour.

To the Editors of the Law Journal.

Gentlemen:—You would confer a favour by replying to the following queries, which relate to matters of general interest.

1. In incorporated towns and villages, are any inhabitants liable to a tax for statute labour, except those whose other taxes do not amount to two dollars?

2. Are the lands of non-residents, in incorporated towns and villages, liable to a tax for statute labour?

3. How and by whom are the names of "the other male inhabitants," (Con. Stat. U. C., cap. 55, sec. 79) who are not on the assessment roll, but who are liable to a tax of two dollars for statute labour, to be ascertained and inserted on the collector's roll, as required by sec. 86 of the same chapter?

M. N.

[1. The right of the council of an incorporated town or village to impose statute labour, except on those whose taxes did not amount to two dollars, was under the assessment act of 1853, very doubtful. The doubt, however, was in 1858 removed by the statute 22 Vic., chap. 99, sec. 409. By the last mentioned enactment the powers of township, town, and village councils in respect to the assessment and imposition of statute labour were declared to be the same. Upon reading sections 82, 83, and 84, of the present assessment act, it will be found that no change in the law in this particular is contemplated.

2. The answer to No. 1, is also an answer to this inquiry.

3. As the clerk is required by sec. 89 of the act to make out the collector's roll on which he is "to set down the name of every person assessed, &c.," and we can find no provision allowing him to set down on the roll the names of persons *not* assessed, such as those contemplated by the first part of sec. 79, it is difficult for us to say how the names of such last mentioned persons can, under sec. 86, legally appear "upon the collector's roll." Perhaps, however, some of our readers who are practically acquainted with this branch of the law will be good enough to throw some light on the point for the information of our correspondent.—Eds. L. J.]

Deadly weapons—Power of Justices of the Peace.

To the Editors of the Law Journal.

Chatham, March 7th, 1861.

Gentlemen,—A question of considerable importance to rural magistrates has recently come under the consideration of Justices here, viz.—Has not a magistrate power to summarily try and punish a person guilty of carrying weapons contrary to 22 Vic., cap. 91, s. 9 (Canada)? Or is that power vested in *police* magistrates of *cities* alone? If the magistrate has not authority to summarily convict, how should he dispose of the case, as frequently the expense and inconvenience of sending one to be tried by the nearest police magistrate of a city, or recorder, (pursuant to 22 Vic. cap. 105, Canada) is very great. In such instances would it be the duty of the magistrate to send the case to the quarter sessions, assuming the accused would desire to be summarily tried? By answering the above queries through your valuable journal, you will confer a favor I believe on Canadian Magistrates generally.

Yours truly,

A. J. P.

[We are of opinion as follows:—

1. That no Justice of the Peace out of sessions other than a Recorder or Police Magistrate, has power, with or without consent, summarily to try a person accused of carrying deadly weapons contrary to the provisions of Consolidated statute of Canada, cap. 91, s. 9.

2.—That if any person is charged before any Justice of the Peace out of Sessions with any such offence, and in the opinion of such Justice the same may be proper to be disposed of by a Recorder or Police Magistrate, the Justice may, if he see fit, remand the accused for further examination before the Recorder of the nearest City or before the nearest Police Magistrate. (Consolidated statute Canada, cap. 105, s. 18.)

3. That instead of adopting the last mentioned course, the Justice may, if he see fit, remand the accused to the next Court of Quarter Sessions; but as this is a point yet undetermined by judicial authority, our opinion is not given free from doubt. (See Dickenson's Quarter Sessions 4 Ed. p. 129.)—Eds. L. J.]

Judgment—Registry—Fi. fa.

To the Editors of the Law Journal.

Feb. 20th, 1858.—A. registers a certificate of judgment against the lands of B.

Feb. 27th, 1858.—B. sells by deed of bargain and sale to C. In about two and a-half years after registry of judgment, A. issues *fi. fa.* lands against the lands of B.

The certificate of judgment runs out before *fi. fa.*

The lands of C. were sold March 5th, 1861.

Does the *fi. fa.* keep alive the certificate of judgment of A. and preclude certificates registered immediately after his from taking effect?

Please answer through Journal.

A SUBSCRIBER AT ST. MARY'S.

[Our answer is in the negative. In the case put we do not discover any immediate relation between A.'s certificate of judgment registered July 20th, 1858, and his *fi. fa.* lands issued two and a-half years afterwards, so as to cut out intermediate judgments against the lands of B. The ordinary remedy of a judgment creditor who relies upon the registry of a certificate of his judgment as a charge upon the lands of defendant is not by *fi. fa.*, but by bill in equity, and in that court judgments are claimed and taken to be valid and effectual according to the priority of registered certificates.—EDS. L. J.]

Municipal Institutions' Act—Overseer of Highways—Councillor.

TO THE EDITORS OF THE LAW JOURNAL.

Walkerton, March 25th, 1861.

Gentlemen,—Please to give your opinion on the following in your next number, and oblige your obedient servant.

According to chapter 99, section 73 of 22nd Vic., can a councillor of a municipality act as overseer of highways in the municipality, and hold the office of councillor at the same time.

I am yours, &c.,

A SUBSCRIBER.

[The two offices appear to us to be incompatible, and such is the decision of the County Judge of Simcoe, in *Reg. ex rel. Richmond* v. *Tegart*, which will be reported in our next number.—EDS. L. J.]

Exemption Act—Effect thereof.

TO THE EDITORS OF THE LAW JOURNAL.

Norwood, C. W., March 1st, 1861.

Gentlemen:—Can the chattles now exempt by law from seizure under execution, be seized and sold under a landlord's warrant, or a collector's warrant for taxes. Your answer in next *Law Journal* will much oblige.

Yours truly,

J. FOLEY, *C. D. C.*

[Yes. The exemption is only "from seizure under any writ issued out of any court whatever," (See 23 Vic. cap. 25, sec. 4) the object of which is to exempt from seizure under writs of execution. The remedies of a landlord by distress for rent, or of a collector of taxes by distress for unpaid taxes are not at all affected by the act; they remain as if the act had never been passed.—EDS. L. J.]

REVIEWS.

THE NORTH BRITISH REVIEW for February, opens with a paper of interest upon India, wherein is fully described the system pursued towards that country by the different political schools of England. There is perhaps no more difficult subject in the science of politics than the system of rule, suitable for the millions whom the British Government controls in India, and particularly worthy of consideration is this subject at a time when, as now, peace is restored in that late unhappy land. A review of the Autobiography of Lord Dundonald makes the reader intimate with some stirring events in the life of that nobleman, and affords a glance at important scenes in the history of his country. The writer of Modern Necromancy reviews with the proneness to ridicule natural, but not therefore the most proper, the developments of spiritualism, with the scantiness of result which must always attend such investigations. Articles upon the Political Press, Hessey's Bampton Lecture, Lord Palmerston and our Foreign Policy, &c. &c., make up the number.

THE ECLECTIC MAGAZINE for March, appears embellished as usual with two fine engravings, the portrait of Lord John Russell and Shakspeare before Sir Thomas Lucy. We are made acquainted with the Middle Ages of England by a paper as readable as such an one must be, upon such a subject. Two papers upon Geographical subjects inform the reader of the opening up of new lands in the East to civilization, and of the wanderings of brave men in the Northern climes. The life and times of William Pitt will be read by all who look with due regard upon the acts of one of the most remarkable men who ever swayed the fortunes of a great people. The Magazine concludes with other selections of varied interest.

THE ECLECTIC MAGAZINE for April, has a portrait of Don Pedro II., of Brazil, and a historic print of Lord Russell taking leave of his family. "Modern Thought" opens the number with one of the best articles upon the subject of the philosophical disunion which is now extending so widely in England. Tennyson's philosophy is a graceful review of the style and spirit of the Poet Laureate of England.

THE CHRISTIAN EXAMINER reviews Dr. Thompson's plea for Eternal Punishment from the stand point of the writer and with an ability very different in the eyes of different readers. Müller's History of Vedic Literature carries us far back in the ages of the Indian religions, and renders plain the time and character of the literature of that early period. The Emancipation in Russia, and other papers, fill the number.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

MORGAN JELLETT, the younger, Esquire, Attorney-at-Law.—(Gazetted March 9, 1861.)

THOMAS HENRY BULL, of Toronto, Esquire, Attorney-at-Law.

THOMAS DEACON, of Perth, Esquire, Attorney-at-Law.

JOSEPH BANE, of Toronto, Esquire, Attorney-at-Law.

HENRY CAFFIN WINDEAT WETHEY, of Brockville, Esq., Attorney-at-Law.

EDWARD S. CALLETT, of London, Esquire, Attorney-at-Law.

SALTER J. VANKOUGHNET, of Toronto, Esquire, Attorney-at-Law.

JOHN ANDERSON ARDAGH, of Toronto, Esquire, Attorney-at-Law.

THOMAS F. GRAYDON, of St. Catharines, Attorney-at-Law.—(Gazetted March 23, 1861.)

CHARLES FREDERICK GOODHUE, of London, Esquire, Barrister-at-Law.

CORONERS.

JAMES B. LEWIS, Esquire, Associate County of Welland.—(Gazetted March 9, 1861.)

JOHN W. WALDEN, Esquire, M.D., Associate, County of Waterloo.

AUGUSTUS A. YEOMANS, Esquire, M.D., Associate, County of Hastings. (Gazetted 9, 1861.)

ALFRED NASH, Esquire, Associate County of Lambton.—(Gazetted March 23, 1861.)

TO CORRESPONDENTS.

"SAMUEL WHALEY"—"NORFOLK"—Under "Division Courts."

"M. N."—"A. J. P."—"A SUBSCRIBER AT ST. MARY'S"—"A SUBSCRIBER"—"J. FOLEY"—Under "General Correspondence."

"A SUFFERING ONE."—Not aware that you are a member of the legal profession, and if not, you are sailing under false colors, so far as your first communication is concerned.

"OTTAWA."—Additional enclosures received; will be published in next number.

"R. B. W."—Judgment received. Please send names of counsel. Judgment will be published in next number