Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/ *Couverture de couleur*
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☑ Bound with other material/ Relié avec d'autres documents
- ☑ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☑ Quality of print varies/ Qualité inégale de l'impression
- ☑ Continuous pagination/ Pagination continue
- ☐ Includes index(es)/ Comprend un (des) index

  Title on header taken from:/ Le titre de l'en-tête provient:

- ☐ Title page of issue/ Page de titre de la livraison
- ☐ Caption of issue/ Titre de départ de la livraison
- ☐ Masthead/ Générique (périodiques) de la livraison

☐ Additional comments:/ Commentaires supplémentaires:

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
☐	☐	☐	☐	☐	☐	☐	☐	☑	☐	☐	☐

VOL. VII. TORONTO, MAY, 1861. NO. 5.

THE UPPER CANADA LAW JOURNAL

AND MUNICIPAL AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

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

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, $5.

CONTENTS.

REMITTANCES.

J F D, Bradford, $8, F. M, Orangeville, $4, G. McM., Mono Mills, $4, W M, Galt, $5, J. H, Kinmount, $2, Judge D, Toronto, $4, R B, Oakville, $4, T H., Whitby, $4, G L, Barrie, $4, C. R. A., Chatham, $9, G D. B., Toronto, $5, Judge M, Perth, $4, E C J, and Brother, Toronto, $5, J D, Warkworth, $8, A A B, Guelph, $5, H W. P., Guelph, $10, T M., Berlin, $7 92, J. O'C, Windsor, $10, C. B., Sandwich, $12 50, L & McF., Stratford, $5, J A. C, Stratford, $4, H F D, Chatham, $5, W McC, Chatham, $20, C. G. C., Chatham, $4, J G., Chatham $4, J S, London, $5, J. W, London, $14, C H, London, $9, Judge S, London $5, T S, London, $17 50, J G Woodstock, $5, J K., Woodstock, $20, E. R V N., Brantford, $19, R N. L., Hamilton, $15, F. & C, Hamilton, 20, B. & S., Hamilton, $5, Judge L, Hamilton, $10, J. G S, Napier, $4, J. B, Hamilton, $10.

STANDING RULES.

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

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

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

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

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

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

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

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

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

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

OPINIONS OF THE PRESS.

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

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

UPPER CANADA LAW JOURNAL.—We have received the April number of this excellent publication, which is a credit to the publishers and the Province. Among a great variety of articles of interest, we especially note two, one on a series on the Constitutional History of Canada, the other upon a decision declaring the right of persons not parties to suits to search the books of the Clerks of Courts for judgments. The question arose out of a request of the Secretary of the Mercantile Protection Association.—*Montreal Gazette, April, 26th.*

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

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

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

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

There is no magistrate, municipal officer, or private gentlemen, whose profession or education wishes the law to be well administered, should be without it. There are knotty points defined with a simplicity that the most ordinary minds can understand, and the literary gentleman will find in its pages, a history of the constitution and laws of Canada, from the assumption of British authority. Subscription, $4 00 a year, and for the amount of labour and erudition bestowed upon it, it is worth double the amount.—*Victoria Herald, January 19*, 1859.

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

This is one of the best and most successful publications of the day in Canada, and its success prompts the editors to greater exertion. For instance they promise during the present volume to devote a larger portion of their attention to Municipal Law, at the same time not neglecting the interests of their general subscribers.—*British Whig, January* 1., 1859.

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

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

THE UPPER CANADA LAW JOURNAL AND LOCAL COURTS' GAZETTE, is the name of an excellent monthly publication, from the establishment of Maclear & Co., Toronto.—It is conducted by W. D. Ardagh, and R. A. Harrison, B. C. L., Barrister at Law.—Price $4 per annum.—*Oshawa Vindicator*, October 14th, 1858.

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

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

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

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

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

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

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

THE UPPER CANADA LAW JOURNAL, &c.

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

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

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

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

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

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

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

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

DIARY FOR MAY.

1. Wednesday . . Last day for notice to Counties of apportionment of Grammar School moneys.
4. Saturday ..... Chancery Hearing Term ends. Articles, &c., to be left with Secretary Law Society.
5. SUNDAY ..... *Rogation Sunday.*
9. Thursday ..... *Ascension Day.*
12. SUNDAY ..... *Sunday after Ascension Day.*
14. Tuesday..... Last day for service of writ County Court.
19 SUNDAY ..... *Whit Sunday.*
20. Monday ..... EASTER TERM begins.
24 Friday ..... Paper Day, Q. B. Queen's Birthday.
25 Saturday ..... Paper Day, C. P. Last day to declare for County Court.
26. SUNDAY. . . *Trinity Sunday.*
27. Monday ..... Paper Day, Q. B.
28. Tuesday... ..... Paper Day, C. P.
29. Wednesday.... Paper Day, Q. B.
30. Thursday..... Paper Day, C. P.
31. Friday ..... Last day for Court of Revision finally to revise Assessment Rolls and for Co. Councils to revise Township Roll.

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. Hilton & 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.

MAY, 1861.

NOTICE.

The proprietors of the LAW JOURNAL *have at length determined to take legal proceedings for the recovery of unpaid subscriptions. All accounts amounting to $20 and upwards, will be, without further notice, placed in suit on the 1st July next. Subscribers concerned, who desire to avoid law costs, are therefore required to pay their dues before the day indicated, or abide the consequences of neglect.*

LAWYERS AND LAW STUDENTS.

It is said of the poet, "*Nascitur non fit.*" This cannot be said of the lawyer; with him it is rather "*Fit non nascitur.*" His life must be one of patient industry. A knowledge of law can only be acquired by study, and success is only attained by earnest and continued application.

There are men visionary enough to suppose that a man has only to "hang out his shingle," to become a lawyer. These theorists, while ridiculing apprenticeships of every kind, ignore all the teachings of experience.

The men who have risen to eminence in the legal profession, are those who in early life were "good students." The boy is the parent of the man. Give us the student who loves labor because of a healthy thirst for knowledge, and you give us the germ of the successful lawyer.

It is certainly a fact that some men are better qualified by nature for the profession than others The gift of language is an essential talent for the advocate. This is a gift not equally conferred upon all, nature to some being lavish, and to others niggard. But a man may be a brilliant advocate, and yet not be a lawyer. Of this history furnishes us with many examples. To be a lawyer is to know law, and we repeat that a knowledge of law is only acquired by hard work.

Our Legislature, in its wisdom, has established the system of attorney and apprentice, or lawyer and student. A certain number of years' service under articles, is regarded as a preliminary qualification to admission as an attorney. But what a misnomer is it in the case of some students, to say that they are *serving* under articles or *studying* their profession!

Articles of clerkship constitute a solemn compact between the attorney and his clerk. Each contracts to do something for the other. The obligations are reciprocal. The undertakings are mutual. A contract is made, and should be performed in spirit and in fact.

The student contracts, among other things, from time to time, and at all times during the term of clerkship, to conduct himself "with all due diligence, honesty and propriety." The attorney contracts, "by the best ways and means he may or can, and to the utmost of his skill and knowledge, the student to teach and instruct, or cause to be taught and instructed, in the practice or profession of an attorney or solicitor."

It is to be feared that with too many these undertakings are idle forms. A letter from a law student, in other columns, reminds us of the fact.

Students who pass a few hours daily in an office, flatter themselves that they are performing their part of the obligation. Attorneys who daily give a few hurried commands to students, suppose they are performing all that is required of them. Both are mistaken. The error is mutual; the fault is equal; and the result is the contrary of what both must have or should have contemplated at the time of the execution of the articles of clerkship.

It is a mistake for the student to suppose that he does any favor to his master by working hard in his office. The one who does so, does no more than his duty. The reward may not be immediate, but it is certain in the course of time. A student placed in an office where hard work is expected of him, is exceedingly fortunate. If he knew what is for his own good, he would never murmur. On the contrary, he would rejoice that he was compelled to learn his profession by dint of hard work. What is expected of him is "true diligence." He is not to deem himself privileged from work because he receives no pay. His pay is the knowledge which he acquires—more preci-

ous than gold or silver, more desirable than either, and in general the source of both.

The attorney, on the other hand, is not to look upon his students as pieces of furniture in his office. He is not to consider that he has four clerks, in whom he is not to concern himself any more than in his office chairs. A responsibility—a great responsibility, rests upon him. By his teaching, by his conduct, by his example, his student will shape his course. Each student is, as it were, a talent entrusted to his keeping. It is for him to improve the talent, and not to bury it in a napkin. He contracts not merely to teach and instruct the student, but to do so "to the utmost of his skill and knowledge.

Much responsibility rests upon the parent. It is his duty to train the child in the way he should go, and when he is old he will not forget it. How often has a son cursed his father for neglect in youth! Youth is the season of improvement; then it is that the mind receives impressions for good or for bad, and woe to the parent who from indifference allows his child to receive wrong impressions. His child then lives only to be a monument of reproach. The responsibility of the master to the student is of the same description as that of the parent to the child. Like master, like man. An earnest master produces an earnest student, just as the listless master begets the listless student. The master who feels the full weight of his responsibility is seldom unmindful of his duty to students. It may be that pressure of professional engagements prevents the daily lecture; but there are a thousand opportunities of imparting instruction even in the largest practice—in truth the larger the practice the greater the opportunities of instruction. Take nothing for granted. Consider the capacity of the student; consider his experience. Explain everything that needs explanation. Let him take nothing for granted. Let him ask for advice when in doubt, and remember the advice when received. Encourage inquisitiveness; take pleasure in responding to enquiries; invite inquiries instead of discouraging them.

Between the master and student, as remarked by our correspondent, there is real sympathy. If the master is indifferent as to the success of the student, the student is as to the master. If the master is anxious for the welfare of the student, and loses no opportunity of evincing it, the student reciprocates by a willingness to serve.

Besides, every attorney should take a pride in his students. The college is proud of its *alumni*. It swells with pride as they rise to fortune and to fame. While themselves shining lights, they reflect lustre on their *alma mater*. Why should not each lawyer take a pride in his students, and feel that each student who leaves him will be either a credit or a discredit? Why not then do everything possible to produce the creditable student? If this feeling of pride in students were more general, the complaints of students would be less frequent.

A word to our correspondent. He appreciates his real position. We hope he is satisfied with the office in which his lot is cast. Let him continue to feel as he writes, and his fondest expectations will be realized. He adopted as a profession one of the first in the Province—a profession which is not merely one of the best for a man of the required talents, but a profession which is the stepping-stone to place and power. Considered in itself, it is noble; considered as a channel to position and power, it is still more noble. It is surely a noble calling to defend the innocent, and to punish the wrong-doer—to be the oracle of those who are in doubt, and the guide of those who need advice. A lawyer is powerful for good or for bad, and it should be the aim of every lawyer to be powerful for good The profession is universally admitted, humanly speaking, to have more influence and more weight in every civilized community, than any other profession or calling among men

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

FOOT-NOTE OMITTED IN FIRST COLUMN OF PAGE 94.

Owing to a practical difficulty, the following was omitted in the last number, but is now inserted, and should be read as a note to corresponding subject on first column of page 94:

A great deal was said in the public prints about the "iniquity" of this provision, the "cruel and oppressive powers" it conferred; that it authorized "imprisonment for debt" merely—the "punishment of debtors who by misfortune became unable to pay," &c. &c. If such occurred, the evil was not in the law, but in the way it was administered, and that surely cannot be charged against Mr. McDonald. The provision did not sanction imprisonment for debt; and the following extract from a published exposition of the law by Judge Gowan, in March 1851, immediately after the passing of the act, will show how it was from the first understood:

"The new provision (the 91st clause) will be a death-blow to fraudulent practices, and will also be some check on persons about to contract debts, who have no reasonable certainty of being able to discharge them afterwards.

"The powers given are, for the discovery of the property withheld or concealed, and for the enforcement of such satisfaction as the debtor may be able to give, and for the punishment of fraud.

"*This last is by no means to be understood as imprisonment for the debt due.* Under the statute, a debtor cannot be imprisoned at the pleasure of the creditor merely, without public examination by the court, to ascertain if grounds for it exist, in the deceitfulness, extravagance or fraud of a debtor. The man willing to give up his property to his creditors, ready to submit his affairs to inspection, and who has acted honestly in a transaction, although he may be unable to meet his engagements, has nothing to fear from the operation of this law. It is the party who has been guilty of fraud in contracting the debt, or by not afterwards applying the means in his power toward liquidating it, or in secreting or covering his effects from his creditors, upon whom the law looks as a criminal, and surrounds with danger"

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page 95.*)

The dispensation of civil justice, from the first divided between the superior courts and tribunals of limited jurisdiction, has by a gradual but steady current of legislation been forced into local channels, enlarging the old and opening new, every day bringing our plan of judicature nearer to that in the Saxon time, when not only every county and shire in England, but even smaller districts, had a local court competent to deal with civil suits to a large, probably an unlimited extent.

The increase in the jurisdiction and powers of our inferior courts has indeed more than kept pace with our growth in prosperity and population;* and little reflection is necessary to discover that the length of time they have been established, their accessibility and simple forms, and the extent to which the business transactions of the great body of the people have been moulded in accordance with the system, have given the existing courts an enduring hold in the country.

In that view, an attempt is made to place the law regulating the Division Courts in systematic form before those for whose benefit it was designed and upon whom it operates. And first, of the Courts.

Chapter III.

Of the Courts.

The Division Courts system, established in the year 1841, was in full operation when, in 1859, the public general statutes of the country were revised and consolidated.

Upper Canada then stood parted into thirty-one judicial districts, each composed of a single county, or of two or three counties united, for judicial and other purposes. As before mentioned, all the counties had been subdivided for court purposes, each division forming the territorial limits of a court; every judicial district in the country having its own separate establishment of Division Courts, distinguished by numbers and supplied with the proper officers. General rules concerning procedure had been framed; and approved under the law, these rules had like force as if contained in an act of parliament, and applied to all the courts.

The local Judge presided over all the Division Courts, as well as over the Courts of Record, *in his judicial district.*

On the 5th December, 1859, the Consolidated Statutes of Upper Canada came into force, and the several statutes for which they were substituted stood repealed. In respect to the then existing Division Courts, cap. 19 of these Consolidated Statutes is substituted for the acts relating to them, which were all repealed, and is a revised consolidation of the law as contained in the acts so repealed.*

The body of consolidated statutes were not designed to operate as new laws, and a general enactment provided, in comprehensive terms, that the general repeal *should not* affect matters done, existing or pending at the time.—(Con. Stat. U. C. cap. 1, secs. 6, 7, 8.)

But special provision is made respecting the Division Courts, preserving the establishment as it existed when the consolidated statutes came into operation, with the procedure then in force and for completing proceedings pending in the courts. By section 2, it is enacted that,

> The Division Courts, and the limits and extent thereof, existing at the time this act takes effect, shall continue until altered by law; all proceedings heretofore duly had shall remain valid; and all suits and proceedings heretofore commenced shall be continued and completed under this act; and all rules and orders made under the provisions of any former Division Courts act, and in force when this act takes effect, shall continue in force, subject to the provisions of this act.

Section 70 of the act† provides that,

> All rules and forms legally made and approved under the former Upper Canada Division Court acts, and in force when this act takes effect, shall, as far as applicable, remain in force until otherwise ordered.

And section 218 enacts as follows:

> All proceedings commenced before this act takes effect shall be valid to all intents and purposes, and may be continued, executed and enforced, under this act, against all persons liable thereto, in the same manner as if the same had been commenced under the authority of this act.

Upon these sections it may be remarked, that the court divisions existing on the 5th December, 1859, as to number, limits and extent, will continue, with the sanction of an act of parliament for their existence, unless *duly* altered under the 8th or 14th section of the act; and any alterations made will be of course subject to the restrictions in the act, and void if they are not complied with.

The general rules and orders in force when the act took effect, are those of the 28th June, 1854, and approved on the 8th July of the same year; and they too stand upon a

* To secure the truly good and excellent in matters of legal concern, even if difficult of attainment, was the aspiration of times that are past. The spirit of our day and country hankereth after cheap law, off-hand law, all sorts of law, at men's doors, even if the article be inferior in quality and occasionally unsound. Be it admitted that where the claim in contest is small, it will not bear the expense of scientific and deliberate investigation,—with the aids available in the Superior Courts, therefore, leave such to be dealt with by the Inferior Tribunals, where the successful litigant will not be a loser in the end. But let it not be supposed that, because the Division Courts are able to deal satisfactorily with cases under their present pecuniary limit, that the jurisdiction may with advantage be further increased. To gorge these courts with business would be to impair their value to the humble suitor and in the end lead to their abolition.

* In the consolidation some slight alterations were made by the Legislature, to free provisions from obscurity, to complete their full intent, and to reconcile conflicting enactments.

† To avoid repetition, 22 Vic. cap. 19 (the Division Court Act), will in general be found referred to as "the act;" and where the number of a section only is given it must be understood to mean a section of this act, unless otherwise indicated.

statutory foundation, and are to be continued in use in the courts until otherwise ordered, under the 62nd and subsequent sections of the act.

Thus moulded under the authority of several statutes, and recast in the Consolidated Act, cap. 19, the law regulating the Division Courts presents itself for consideration.

While the courts existing on the 5th March, 1859, are supported by the statute, as just mentioned, they may nevertheless be altered, and new courts formed. As provided for in the act, there must be at least three, and cannot be more than twelve Division Courts in every county or union of counties—in every judicial district, as it may be termed—(sec. 3)—and these are called into existence upon an order of the Court of Quarter Sessions, determining the number and designating the local limits of each. The mode of forming and appointing court divisions is prescribed in sec. 8, which enacts that,

> The justices of the peace in each county, in general quarter sessions assembled, may, subject to the restrictions in this act contained, appoint and from time to time alter the number, limits and extent of every division, and shall number the divisions, beginning at number one; but a less number of justices shall not alter or rescind any resolution or order made by a greater number at any previous session.

Justices of the peace, in altering old divisions or forming new, can act only in *general quarter sessions*. It would not be competent for justices, however numerous, to meet in *special* sessions, and appoint or alter the court limits; but a general quarter sessions may of course be adjourned to a time anterior to the first day of the next general quarter sessions, for the purpose of acting under this clause.

The power conferred is to be exercised by the magistrates assembled *in* sessions; in other words, the business is an act of the court, and must, it is presumed, be done in open court, and recorded as provided for in sec. 15.

In the exercise of this duty, a large discretion has been given to magistrates, as ministers of the law and custodians of the public interests; and the Legislature evidently contemplated open, deliberate action, at periods when the courts are most numerously attended.

If the appointment or alteration of divisions is to be made at a general adjourned sessions, public notice should be given of the business to be transacted at the court.

The justices are restricted as to the number of divisions. Section 3 enacts that "there shall not be less than three, nor more than twelve Division Courts in each county or union of counties; of which there shall be one Division Court in each city and county town."

This provision, to some extent, gives a clue to justices in the exercise of the power vested in them. In the small and least populous counties, it may be assumed, the Legislature indicated that three divisions would be sufficient; while in large and populous counties, as many as twelve *might* be required.

Under the law of 1841, the number of courts in every judicial district was the same, arbitrarily prescribed, irrespective of surrounding circumstances. The present law gives scope for an adjustment of court divisions, according to the actual state of things in a locality. Population and extent seem obviously guiding principles by which magistrates should regulate their discretion in determining the number of court divisions to be established in each judicial division.* The latter part of this section relates rather to the place of holding a court than to anything in connection with forming divisions.

(To be continued.)

AMENDMENTS IN THE DIVISION COURT LAW.

We have already multiplied observations on the working of the "91st clause," as it has been called, and endeavored to show how unfounded are the objections raised against it; that the jurisdiction it confers does not enable a creditor to imprison his debtor for the debt, but gives authority to punish the fraudulent debtor for fraud committed; that if the power has been abused, the fault was chargeable against the administration of the law, and not against the system. It is easy to make general charges and complaints; but we have not seen sufficient proof of their truth, and it ought to be sufficient to give them a general denial.

But we have not confined ourselves to this, but have laid before the public statistics of the business from a number of counties, disproving the allegations made, and showing affirmatively the value of the provision. The information we gave was from persons well qualified to furnish it—from clerks of the courts, who spoke literally "by the book"—and we have pleasure in adding the testimony of a practi-

* While "population and extent" are to have their due weight in appointing Court Divisions, the following are suggested as considerations not less important in the exercise of a sound discretion. The divisions ought, as a general rule, to be of such size that the great body of suitors may be able to come to and return from the court within twenty-four hours. An object of the Division Court system is, to bring cheap justice to the people's doors, as it were; and if the courts be so situate as to involve an absence of two or three days in resorting to them, the expenses are of course greatly increased. The divisions ought to be as nearly uniform in size as circumstances will permit; but there will be great practical difficulty in accomplishing this in a new country, where, from various causes, the settlements are scattered and unequal. But no separate division should be formed where the probable amount of legitimate business is not likely to afford a reasonable remuneration to officers from the authorized fees. The multiplication of such divisions would be a great evil in any community. Divisions should be so appointed as to include, if possible, some town, village, or place of business resort, where a court may be conveniently held. This greatly contributes to the public convenience. In fixing the number of divisions in a county, a wise discretion must be exercised, uninfluenced by the pressure of selfish aspirants for little offices, or the clamour of particular localities. The public *general* good—the efficiency of the courts—should be the prevailing consideration. In the *largest* and *best settled* counties, *no more than twelve divisions can be appointed*. In most counties, six divisions will afford all the court accommodation that is required. The splitting up a county into a number of divisions encourages discord, and has a most pernicious effect.

tioner of considerable experience to the same purport. Mr. Durand, we think, handles the subject in the subjoined letter with great fairness. The public voice has not been heard through any of its legitimate channels, in favor of a repeal of the law; and if the law was such an intolerable grievance as represented, it is scarcely possible to suppose people would not have petitioned generally for its repeal.

In respect to the payment of jurors, we are of the same opinion as our correspondent. The remuneration to jurors is absurdly low at present, and should be increased. The only exception we would make is in the case of a jury called by the court from those present, who are there on their own business, and upon whom the duty of serving entails no additional outlay; but to bring a man ten or fifteen miles from home, and compel him to serve as a juror for ten cents, is a serious grievance.

In respect to appeals, as suggested, we entertain serious doubts. The appeal system has become a perfect nuisance in the State of New York, and we fear, if introduced here, it would be offering a premium to the longest purse. The subject, however, is not unworthy of discussion, and we should like to hear from some of our regular correspondents on the point.

We agree in the third suggestion. A bill was introduced last session, to effect the proposed improvement. The measure has not been brought forward this year, and we fear that it is too late in the season to hope for its passing now.

The fourth proposition is *just;* but there is little use in moving on it; for the Legislature would not, if we may judge from the votes on "homestead" and "exemption" law, entertain it.

Fifth. While agreeing in principle with these remarks, we cannot think the proposed remedy practicable. It might answer in a city, but would be of little use in rural divisions. At all events, the plan would not be workable under the present state of the law, requiring a party to be twice summoned; and to be effectual, the whole system would require to be remodeled.

The sixth and seventh suggestions are of value, and commend themselves to favorable consideration with all who are interested in the efficiency of the Division Courts.

AMENDMENTS TO THE DIVISION COURT LAWS.

To the Editors of the Law Journal.

Toronto, April 16, 1860.

GENTLEMEN,—Your prompt and courteous insertion of my letter on the subject of "Some vexed questions in Division Court practice, and the importance to the public of the efficient maintenance and improvement of the Division Court laws," induce me to again trouble you with a few thoughts on the same subject. There are three subjects on which I thought of addressing you on this occasion, but I will postpone two of them for some other occasion, choosing at present the more urgent, whilst the Legislature is in session. I had thought, at your invitation, so kindly given, to have again referred to some other vexed questions in your May number, but will defer such article until your June issue. The third subject is one of very general importance to all of our counties, and that is, a uniformity of decisions among the judges of Division Courts, in carrying out the law in such courts. The conflict of decisions or varying constructions of Division Court judges in Canada of Division Court laws, when fully known, is very strange and embarrassing to those who go before them in different counties. I defer my remarks on this subject, and confine them to attempts now being made in the Legislature to injure the efficiency of these Courts, adding some remarks on amendments which I think should be at once made to the Division Court law.

There are certain members of the Legislature, who appear to be very anxious to do away with the power to orally examine debtors, and of imprisonment, in cases of fraud or contempt, for not appearing. A leading and very influential newspaper (the *Globe*) has taken a very strong stand against this part of the Division Court law. Now, I may perhaps venture to say, without being charged with egotism, that few persons in Canada have had better opportunities than I have had, for over ten years past, of fully knowing the effects of the working of the Division Court laws, and especially of this objectionable one. Personal acquaintance with many of the judges, and their procedure in various counties, fully authorizes me to say that this power of oral examination and imprisonment is never knowingly abused; and in probably ninety cases out of a hundred, it causes the dishonest to act justly towards his creditors. In a few cases the contumacious may be sent to jail, either because they wilfully will not appear to give an account of their property, or because they manifestly equivocate and conceal the facts as to their property. In numberless cases again, after an examination, acting honestly, they are discharged, the payment of the costs by the creditor, and of the debtor's day expense, being a sufficient punishment to them. Great numbers of cases have occurred within my experience, where, without this remedy, men really able to pay their debts would have entirely escaped. It is a law quite as favorable to the poor man as to the rich. It is a fact, too, that the public do not want its repeal. No petition has been, to my knowledge, sent in for its repeal, and no grand jury or municipality has petitioned for it.

The members in question, and the newspaper in question, act not in accordance with sound public opinion, but in all probability take their opinions from a few complainants, who have deservedly come within the wholesome power aforesaid.

I would ask here, why is there not a movement made to petition against this hasty and needless legislation?

The *amendments* to which I would refer as needed in the Division Court law are these (I cannot say that you or others will agree with me):

1st. I think jurors summoned should be paid higher fees—certainly as much as 1s. 3d. each, if not 2s. 6d. At present the juror must travel ten miles, lose his day, pay his tavern bill, and travel back, all for 6d. perhaps, just to gratify some neighbour who wanted a jury. Why, if he calls a jury, should he not pay reasonable remuneration?

2nd. I think, in all cases of contract for any sum over £5, involving special points of law or peculiar facts, and in all cases of tort or damages of a similar kind over £2 10s., the the party choosing it should have the right to an appeal (in the same way as in convictions before justices) to the county courts, where a jury may be called. The objection, I know, urged, is the expense and delay; but the appellant, if he loses, has to pay the expense, and would be careful not to do so in trifling cases. He would also be obliged to give security, and do so within a very few days. Another objection is, that the appeal lies to the same judge; but a trial in

the County Court, before twelve jurors, and conducted by legal men, is a very different thing from a hasty country trial. The right to appeal is a very wholesome one.

3rd. I think creditors in those Courts should have the right to garnishee debts on filing an affidavit, as in the County Courts.

4th. I think that in all sums over £5, lands should be made liable, as in cases now over £10.

5th. I think that judges should have power to examine debtors orally upon any day in chambers, upon say five days' notice, or less time, and, in certain cases of fraud or apprehension, proved by affidavit, of the intention to leave the country by the debtor, should have power to detain for a limited period. Many a debtor, to my knowledge, has walked away with his pockets full, and fled the country; and his poor creditor, the amount being under £25, could not detain him Why should the poor man lose his £5 or £10, and the rich man have the power to arrest for £26? Is not the ground of arrest fraud?—and that affects small as well as large debts.

6th. The law should explicitly define the duty of out county clerks and bailiffs as to the transmission of money collected on transcripts to the head office.

7th. The law should allow witnesses to be examined on commissions in outward counties, and in foreign countries. This provision would save much expense and delay.

I will not further enlarge this already too long letter, but will remark that many, if not all the above amendments are embraced in the American laws applying to courts similar to our Division Courts, and work well.

I am, &c.,

CHARLES DURAND, *Barrister.*

OWEN SOUND, April 18th, 1861.

To the Editors of the Law Journal.

GENTLEMEN,—In your remarks on subsec. 6 of sec. 4 of the "Act to exempt certain articles from seizure in satisfaction of debts," you observe that "the wording is somewhat vague, and may lead to difficulty." I must confess that, noting the brevity of the subsection, and the simplicity of its phraseology, I did not arrive at a like conclusion; and still less did I suspect that any man's (lawyer's) obtusity would be such as to lead to such a case as I have now to lay before you, and to ask your opinion on.

On the 27th of December last, I received two executions against a certain defendant, and thereunder I seized and sold a small boat. The defendant came to these parts in the early part of its settlement, and at once established himself as a wood-turner. Burnt out, he removed into this town, took advantage of a small water privilege, erected a mill thereon, stocked it with lathe, patent taps, and other machinery necessary to the manufacture of patent bedsteads, spinning wheels, and general wood-turnery; put up a signboard designating himself as "turner and wheelwright," advertised himself as such in the newspaper, has always been assessed as a turner; indeed his apparent and actual occupation, by which he has procured his livelihood, has always been the manufacture of patent bedsteads, spinning wheels, and turning for the cabinet-makers and general public. But now comes the "rub." Living near the water, he has sometimes, as lately, owned a boat, and, as others, his neighbours, have done, he has occasionally, in their season, caught a few herrings or the like—seldom more than has been immediately used in his own family; and on this flimsy pretext, his legal adviser claims the boat to be exempt from seizure, on the ground that the defendant is a "fisherman."

Now, I would like your opinion, first, as to whether, under such circumstances, an officer may not fairly take exception to any more complicate proceedings being taken against him than those provided by sec. 185 of the Division Courts Act. The view I have heretofore taken of that section is, that the Legislature, perceiving how very obnoxious officers would be to such imputations as the above, considerately made the investigation of them as prompt and inexpensive as possible; and I conceive that, on the same ground, a defendant may object to an action being brought against him in a superior court for a cause cognizable in a division court, and that I may object to a formal suit in the above stated case. And can any tortuous definitions be permitted to the very simple words essential in the above cause—such as "ordinarily" meaning usually, commonly; "used" as meaning employed, occupied; "occupation" as meaning principal business of one's life, the business which a man follows to procure a living; and "fisherman" as meaning one whose *occupation* is to catch fish?

I take it for granted, although the statute speaks of "the debtor's occupation," that the chattels *ordinarily used* in the debtor's occupation should be considered as protected from seizure under certain circumstances. For example: suppose the debtor to be a bricklayer; as he could not follow that occupation in winter, he might occupy himself at that time in some other way—say teaming. I know of at least one instance of this kind. Now, here, I think, that when the debtor is *following* either of these occupations, the chattels used therein would be exempt from seizure; whilst those belonging to the other occupation would be liable to attachment. Please say if, in your opinion, I am right herein.

Some time before your notice of the Act, I had, in answer to some of my county colleagues (clerks and bailiffs), expressed the thought that the subsection in question exempted the team to the extent provided ($60), as being chattels; but I go further. Thus: suppose a teamster debtor to have a span of horses, worth respectively fifty dollars and fifty pounds, and that he has nothing else. Now, exercising his right of selection, he takes the fifty-dollar horse on account of his sixty dollars. Here my conclusion is, that as such chattels are *exempt from seizure* "to the value of sixty dollars," the officer could not lawfully seize the remaining horse. And here again I would enquire if you think I am right?

Lastly, although by subsection 3, one stove, &c., *only* are exempted, my view is, that in the case of a tavern or boarding-house keeper, sixty dollars' worth more of the like kind of goods would be exempt, as being "chattels ordinarily used in the debtor's occupation."

I believe that an article by you, embracing the above points, would be gratefully received by many besides

Your most obliged,

PAUL DUNN.

P. S.—As I take the Division Courts to have been established for the benefit of the "unfortunate creditors," and not for the creation of incomes for the officers of said courts, I consider "Norfolk's" argument, about officers having to "go a-begging," as being very inappropriate. It would be much better, I think, to point out to all whom it may concern, the utter unlikelihood that a staff of proper men can be retained as officers of said courts by the present small emolument, whether that smallness arises from the minute subdivision of the business, as "Norfolk" complains, or from the (to the Legislature) discreditably low tariff of fees, as I would suggest. He is also, to my mind, very wrong in supposing that the officer may lawfully sell debtor's goods, horse, or anything else *exempted*, whether "A" does or does not "claim," and then return debtor sixty dollars. The very fact of the officer returning debtor sixty dollars, is proof that he (the officer) has *sold* what he had no right even to *seize*; for "to the value of sixty dollars," such chattels are *exempt from seizure*—at least this is my view; but of course I write that I may have an opportunity of expressing my gratitude for correction, if wrong.

P. D.

[At present we can only say we think that no judge would hold that the boat was not liable to seizure. Mr. Dunn has reasoned out the point fairly enough.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

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

REGINA v. MOYLAN.

Libel—Pleading.

A plea to an information for libel under the Consol. Stats. U. C. ch. 103, sec. 9 must allege the truth of *all* the matters charged, and

Held, upon the information and plea set out below, that the plea in this case was clearly insufficient in that respect.

(E. T. 23 Vic.)

This was a criminal information, charging that John Hillyard Cameron, one of her Majesty's counsel learned in the law in Upper Canada, Grand Master of the Loyal Orange Association of British North America, had been duly appointed and was acting as Crown prosecutor for and on behalf of our lady the Queen, at the court of Oyer and Terminer and general gaol delivery, then being held in the city of Toronto, in and for the united counties of York and Peel, and as such Crown prosecutor had at the said court prosecuted and conducted a certain indictment against one Robert Moore for the murder of his wife, upon which the said Moore had been arraigned and pleaded "not guilty," and upon his trial therefor had been found guilty, by the jury empanelled on his said trial, of manslaughter: that James G. Moylan, of Toronto, aforesaid, contriving and intending to injure and aggrieve the said John Hillyard Cameron, and to cause it to be believed that he had acted corruptly in his conduct of the said trial as such Crown prosecutor as aforesaid, and that he had wilfully perverted the course of justice, and had prevented the conviction of the said Moore for the crime of murder on the said trial, falsely, wickedly, unlawfully, and maliciously, to wit, on the 4th of November, 1859, did compose, print and publish, and did cause and procure to be composed, printed and published, in a certain public newspaper called *The Canadian Freeman*, a certain false, wicked and malicious libel, of and concerning the said John Hillyard Cameron, and of and concerning him as such Crown prosecutor at the said court, upon the said trial of the said Moore as aforesaid, which said false, wicked, and malicious libel was to the tenor and effect following: that is say,—(Those parts of the libel that seem immaterial to the pleadings are omitted.)

"How Orange Law Officials discharge their duty!!!"

"Messrs. J. H. Cameron and R. Dempsey screening a wife murderer!!!"

"More than once have we had occasion to express our utter want of confidence in the manner in which criminal law is administered, so long as the secret grip and pass-word, and infamous oath of infamous secret societies exert their polluting influence over the officers of justice, from the judge on the bench and the prosecuting Crown counsel down to the meanest subaltern about the law court. Repeated instances could be adduced to prove that trial by jury in this city is a mere farce when an Orangeman is implicated, either as plaintiff or defendant. * * *

"One of the most glaring instances perhaps on record of this gross perversion of justice and malfeasance on the part of law officers, happened in this very city, and during the present sitting of the court of assize. The facts recorded by our contemporary the *York Herald*, if investigated and established before the proper tribunal, are sufficient to call forth an expression of general horror, and stamp with the seal of infamy the character of the base bad men who have betrayed the trust confided to them, and made use of their position to vitiate justice, and shield from condign punishment the worst of malefactors.

"We allude to the case of Robert Moore, who, &c., &c., (stating the principal facts of the case.) Such are in brief the main features of the case. Now for the after-plot. It appears that Moore is an Orangeman, the principal witness against him a Catholic. Every effort has been made by members of the Orange order, not only to procure a light verdict, but if possible to clear the criminal altogether. The article which we extract from the *Herald*, a journal published in the place where the murder was committed, and therefore supposed to be ripe on all the details connected with the crime, will shew to what extent Messrs. Cameron and Dempsey, the Crown counsel and county attorney, conspired to defeat the ends of justice.

"We gave a report in full of the coroner's inquest, since which time several additional facts have come to light, which we supposed would of course be elicited at the assizes when Moore was brought to his trial, more especially as the witnesses were subpœnaed; but great was the astonishment and indignation of every one present, when they found that these witnesses were not examined. * * * * * * *

"So much for the value of the evidence given in Moore's favour. But after all this is not so bad as the fact that seven material witnesses were not examined at all, although they had the subpœnas in their pockets. We unhesitatingly affirm that had these persons been put upon their oath, and sworn what we have heard them state, that their narration of the vile and fiend-like acts of cruelty of the prisoner to his wife, would have horrified anybody only to hear. Why, we ask, was not the woman who attended Mrs. Moore in eight confinements put upon her oath? What was the county attorney, R. Dempsey, Esq., about? He subpœnaed her—why not then hear her evidence? It makes one shudder only to listen to what she relates. Why was not Mrs. Burns and several others also examined? * * * *

"No wonder that crime increases when so little effort is made to convict the guilty; for actually, with the witnesses before them, so indifferent are our law officers to the majesty of the law, they are too indolent to have them put in the box. We have heard before that law and justice are at a low ebb in Canada, but never before did we feel its truth as now. All through this part the indignation is extreme against such a mock trial as that of Moore has proved to be. * * * * * * * *

"Have we not here the strongest and most damning proof of the total disregard for the oath which Messrs. Cameron and Dempsey took when entering office, to perform their duties faithfully and impartially? But why speak of oaths? Does not their extra-judicial oath of Orangeism set aside and render nugatory every other oath? Did not Mr. J. H. Cameron, after the last parliamentary election, constitute himself the legal champion of Orangeism, and pledge himself to help every brother Orangeman through any difficulty in which he might entangled? The case of Moore, the wife-murderer, has afforded the grand master and Queen's counsel a most excellent and laudable opportunity to give an earnest of his intention to redeem his promise. Here, though there was no necessity to call into requisition his legal lore and affected declamation, Mr. Cameron more effectually assisted his brother in trouble by withholding such evidence as must have forced even an Orange jury to render a verdict of murder. If there be a shred of morality or religion left in the country, if the public be not content to see the very fountains of justice polluted, if we be not altogether dead to the disgrace and ignominy which must necessarily attach to our system of criminal legislation, if we have any reverence for the sanctity of the law, if we value the safety of human life, it is high time to put an end to such nefarious proceedings. The facts connected with Moore's case are so glaring and flagrant that we cannot conceive how the Crown counsel and county attorney can escape prosecution and punishment. If the *Herald* speaks truth there cannot be a shadow of a doubt upon the mind of any unprejudiced man, that they have disgracefully participated in defeating the ends of justice. Is there no law, we ask to reach these men? Can such an outrage be inflicted upon civilized society with impunity? Is the worst of murderers, because a wife-murderer, to be shielded from adequate punishment because of his being an Orangeman? That Cameron and Dempsey have been guilty of complicity with the friends of Moore, is evident from the statements of the *Herald*. Such being the case, we call upon our contemporary, and the other respectable parties at Richmond Hill, who are cognizant of the facts referred to in the *Herald*, to impeach before the competent and proper tribunal those unjust, unscrupulous, and perjured law officers."—To the great damage and scandal of the said John Hillyard Cameron, to the evil example of all others in like cases offending, and against the peace of our said lady the Queen, her Crown and dignity."

PLEA.—That it is true, that upon the said trial of the said Robert Moore, in the said information mentioned, the said John Hillyard

Cameron neglected and omitted to call to give evidence on behalf of the Crown the following, among other witnesses who were subpœnaed on behalf of our lady the Queen, and present in the said Court at the said trial ready to be examined if they had been called on, and who could have given important testimony against the said Moore relating to the matter in issue between our said Lady the Queen and the said Robert Moore, on the said trial: to wit, Nancy Burns, Mrs. Hu[illegible]s, Mrs. Arksey, Mrs. Williams, William Harrison, and James M. Jenkins; and the said James G. Moylan further saith, that before and at the time of the publication of the matters in the said information mentioned the said Robert Moore was an Orangeman, or member of the secret society denominated the Loyal Orange Association of British North America, of which the said John Hillyard Cameron is the leader or head, denominated, as in said information set forth, Grand Master: that the society then was, and is, a political religious society, the members whereof were and are united by secret oaths and ties to aid and assist each other as brothers, and are hostile in spirit and feeling to the professors of the Roman Catholic religion and church, of which church a large portion of the subjects of Her Majesty in this province are members, and are entitled to the protection of the laws of the land, and interested in the due administration thereof equally with the rest of Her Majesty's loyal subjects; and the said James G. Moylan further saith, that before and at the time of the said trial of the said Robert Moore, and of the said publication in the said information mentioned, the said James G. Moylan was, and still is a Catholic, and editor of a public newspaper or journal published in the City of Toronto called the *Canadian Freeman*, being the paper in the said information mentioned: that as such editor he had became aware of frequent instances in which justice in this province had failed in its due course, where a member or members of the said secret association, of which the said John Hillyard Cameron is so the head or grand master, had been tried for criminal offences or outrages upon Roman Catholics, by reason of brother Orangemen having been upon the jury by whom such offences were tried; and the said James G. Moylan further saith, that before and at the time of the said trial, and of the said publication, there was, and still is, a distrust among Catholics generally that they were and are not secure in their lives, liberties and properties, and will not receive impartial justice in the courts of the province when members of the said secret association were or are interested against them. by reason of the influence possessed by the members of the said Orange association in Her Majesty's courts of justice, through and by means of their oaths and ties of fellowship and secret signs, and their hostility to Roman Catholics. That the Roman Catholics of this province, constituting a very large portion of the inhabitants thereof, cannot place confidence in the administration of justice when it is placed in the hands of leaders of the said association; and by intrusting the prosecution of criminals, or persons accused of crime, to members of the said association great discredit is brought upon the administration of justice, and a feeling of insecurity pervades a large portion of Her Majesty's subjects. And the said James G. Moylan further says, that for the well-being of the province it is absolutely essential that all classes of Her Majesty's subjects should have confidence in the administration of the laws, and that such confidence cannot exist where the conduct of criminal prosecutions is entrusted to members of the said society; and that he, the said James G. Moylan, being fully of this belief, and having read the statement from the *York Herald* mentioned in the said information respecting the said trial of the said Robert Moore, and believing the same to be true, and that there had been a miscarriage of justice in the case of the said Robert Moore, published the said matters in the said information set forth, with the view to the public discussion of the propriety and right of the government of this province to place in the hands of a leader of an oath-bound secret political association the conduct and management of criminal prosecutions, and the consequent power of adducing or withholding evidence at pleasure, and without any personal feeling against the said John Hillyard Cameron. By reason whereof it was for the public benefit that said matters so charged in the said information should be published.

Demurrer to this plea, as insufficient.

Eccles, Q. C., for the demurrer, cited Consol. Stats. U. C. ch. 108, sec. 9.

M. C. Cameron, contra, cited *Clarke* v. *Taylor*, 2 Bing. N. C. 654.

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

The statute on which this plea is framed, Consol. Stats. U. C., ch. 103, has made a change in the law of libel, which may prove of great advantage to the publishers of newspapers or other public journals, in cases where they have stated certain facts, however injurious to the character of an individual which they may know to have occurred, or which they find stated upon such authority that they are satisfied they can venture to rely upon being able to prove their truth if it should be questioned.

In such cases, where the public have an interest in the matter to which they have resolved to give further publicity, and where they do not give with their article any injurious comments evidently dictated by malice and in a spirit of exaggeration the statute affords them a fair degree of protection by enabling them to plead by way of justification "*the truth of the matters charged*," which was formerly no defence against a criminal prosecution, and to plead also, as a part of such defence, that it was for the public benefit that such matter should be published.

The defendant is allowed to plead this in addition to the plea of "not guilty," and if the special plea is pleaded in a manner conformable to the statute, then it will be for the jury upon the trial, if they find that the defendant has published the alleged article, and that it is a libel, to find also whether the matters—that is, all the matters—charged in the libel are true, and whether it was for the public benefit that it should be published.

This special plea has not yet been submitted to a jury, because on the part of the prosecutor it is denied to be such a plea as the statute requires or admits, and it is contended that if what is stated in it were proved to be true it would not constitute a defence under the statute.

All that the plea asserts as a justification, so far we mean, as the truth of the charges are concerned, is, that the prosecutor, John Hillyard Cameron, "neglected and omitted to call as evidence on the part of the Crown the following, among other witnesses who were subpœnaed on behalf of the Crown, and were present in court at the trial of Moore, to be examined if they had been called, and who would have given important testimony against the said Moore relating to the matters in issue (enumerating six witnesses): that the defendant having read the article in the "Herald," *and believing the same to be true, and that there had been a miscarriage of justice in Moore's case* published the matters in the information set forth with the view to the public discussion of the propriety and right, of the government to place in the hands of a leader of an oath-bound secret political association the conduct and management of criminal prosecutions, and consequent power of adducing or withholding evidence at pleasure, and without any personal feeling against the said John Hillyard Cameron—*by reason whereof*, the defendant alleges, it was for the public benefit *that the said matters* so charged in the said information should be published."

It is the plain intention of the statute, and in the case of *Regina* v. *Newman* (1 E. & B. 568) it is laid down, that a plea under the statute must affirm the truth of all the charges, and not merely that some of them are true, or that the defendant believed them or some of them to be true. Now in this case the plea only affirms that John Hillyard Cameron neglected or omitted to call certain witnesses who had been subpœnaed and were in attendance It does not affirm that it was true, as the article published asserts, that John Hillyard Cameron betrayed the trust confided to him, and made use of his position to vitiate justice, and shield from condign punishment the worst of malefactors; or that there was a plot to screen the offender by withholding evidence; or that Messrs Cameron and Dempsey conspired to defeat the ends of justice; or that from the indifference and indolence of the the law officials the witnesses were not called; or that John Hillyard Cameron acted in disregard of his oath of office to perform his duties faithfully and impartially; or that he had pledged himself to help every brother Orangeman through any difficulty; or that he effectually assisted his brother Orangeman in trouble, by withholding such evidence as must have forced any jury to render a verdict of "murder;" or that he had been guilty of nefarious proceedings to which an end must be put if the public be not content to see the very fountains of justice polluted; or that John Hillyard Cameron and Dempsey

had been guilty of complicity with the friends of the person indicted for murder; or that they are unjust, unscrupulous, and perjured law officers.

If the fact alone of the witnesses alluded to not having been called justified in reason the inference that all these injurious charges and allegations were true, then the defendant could have ventured to rely upon proving the one as sufficient to establish the truth of all the rest, and so might have taken upon himself at his peril to affirm that all the injurious charges and imputations built upon it were true, but he has not done so in the plea, as it was necessary he should to make the plea what the statute requires, namely, a plea setting up as a defence "the truth of the matters charged."

We think this plea comes far short of what the statute intends in this respect, and is therefore insufficient.

As to the other part of the plea, no doubt it would be a legitimate subject for public discussion in a candid and temperate manner, whether it is or would be proper and expedient in the government to commit the conduct of public prosecutions to a prominent member of the Orange Society, and its probable effect upon the due administration of justice is no doubt a matter that it may well be held to be for the public benefit should be argued and commented upon as freely as any other matter of public interest: that is, with no other reserve than the law makes necessary for the public peace, and for the protection of individuals against injurious charges upon their character for which there is no sufficient foundation in truth.

It is one thing to argue that a public officer or an individual must from his position and circumstances be inevitably exposed to the suspicion of acting from unworthy motives, and another thing to affirm that he has yielded to the supposed temptation, and has already abused the trust reposed in him. It is but reasonable that the person who takes upon him to affirm the latter, or to republish what others have stated to the same effect, should be held bound to prove the truth of such statements when he is called to account for having given publicity to them—that is, where he means to rely upon the truth as his defence; and the statute expressly enacts (in the 10th section) that without a plea asserting "the truth of the matters charged"—that is, not of a part of the libellous charges, but of the whole—the truth of the matters shall in no case be enquired into, nor whether it was for the public benefit that such matters should have been published.

Our judgment is against the defendant on the demurrer.

Judgment for the Plaintiff on demurrer.

COMMON PLEAS.

(Reported by E. C. Jones, Esq., *Barrister-at-Law, Reporter to the Court.*

The Corporation of the Township of Beverley v. Barlow et al.

Bond—Pleading—Period of appointment of Treasurer of a Township under 12 *Vic., cap.* 81—*Right to impose further taxes without vitiating.*

The plaintiffs declare on a bond to "the Beverley Municipal Council" (there being no such corporation in existence). The defendants do not deny the making of the bond, but plead over. On demurrer to the plea and objections to the declaration:

Held that by not pleading "*non est factum*" the defendants were debarred from taking the objection to the form of the bond as pleaded.

2nd. That the appointment of a treasurer under 12 Vic., cap. 81, is an appointment, till removed, and not only for a year, and that a plea not averring the office (for the breach in the performance of the duties of which the action was brought) to have been an annual one, at the time of the taking the bond was bad.

3rd. That the imposition of additional taxes to those assessed at the time of the security, and the increase of the risk thereby, did not vitiate a bond given for the general performance of duties and payment of all moneys.

(E. T. 23 Vic.)

Declaration on a joint and several bond, whereby defendants jointly and severally agreed and covenanted to pay plaintiffs, by the name of the Beverley Municipal Council, £800; if default should be made in the condition following, viz: if Heman Gates Barlow, who had been chosen treasurer of the plaintiffs, by reason whereof he should, and did receive into his hands divers sums of money, notes, chattels, and other things, the property of the plaintiffs, upon request should give to plaintiffs a true and just account of all such sums of money, &c., as should come into his hands or possession as treasurer, and should pay and deliver over to his successor, &c., all such sums of money as should be in his hands due by him to the plaintiffs, then, &c. Averment that the condition was not kept, but default was wholly made in the condition of the bond, whereby defendant became liable to pay the said sum to plaintiffs.

Pleas 1.—That the condition of the bond was kept and performed. 2nd. That the bond was made on the 28th February, 1853, and the appointment of the said Barlow, as treasurer was an annual appointment for the year 1853, and terminated at the end of the municipal year, and that Barlow as treasurer for that year, did make and give to plaintiffs a true and just account, &c., as treasurer during the currency of his appointment for the year 1853, and did pay all sums, &c, as were in his hands, and due to plaintiffs during his appointment as treasurer for the year 1853.

The plaintiffs took issue on both pleas, and demurred to the second, because the bond was not limited in its effect as pretended in the plea.

The defendant excepted to the declaration—that it is asserted therein that the defendant covenanted with the plaintiffs by the name of the Beverley Municipal Council, and sought to set up a bond entered into by that name, whereas there is not, nor ever was a corporation known as the Beverley Municipal Council, and the statute requires bonds for the faithful discharge of a treasurer's duties to be taken in the name of the corporation.

At the trial in November last, before Sir J. B. Robinson, C. J., at Hamilton, it was shown that from 1850 to 1853, Barlow was annually appointed treasurer,

On 21st February, 1853, a by-law in the following words was passed:

"Whereas it is expedient and necessary to appoint under the new act. 12 Vic., ch. 81, being an act to establish township councils in Canada West: we, the Municipality of the Township of Beverley, do hereby appoint the township officers under the above mentioned authority. Be it therefore enacted by the Township Council of Beverley that the different persons appointed to the different township offices within the corporation of the township of Beverley, do hold their respective offices for the present year."

By a by-law passed 6th June, 1853, they voted the salaries of the township officers for that year. The treasurer was named in this by-law. Barlow continued to be treasurer without any new appointment after 1853. Evidence was given of the amount of Barlow's default, the taking of the accounts was referred to an arbitrator, and the following questions were reserved for the court:

1s. Was the liability of the defendants as sureties limited to the deficiency of Barlow for 1853, or did it extend during the whole time of his filling the office of treasurer?

2nd. Assuming that the liability of the defendants as sureties, was otherwise co-extensive in duration with the time for which Barlow remained in office, were the sureties liable for any moneys received by Barlow under 16 Vic., ch. 184, and 18 Vic., ch. 2, or either of them?

3rd. Assuming that the defendants were only liable for the deficiency of Barlow for the year 1853, would the fact that in 1854 the balance in his hands was reduced below the sum due at the end of that year, relieve the sureties *pro tanto* if the balance in his hands at the time of action brought exceeded the amount in his hands at the end of the year 1853?

S. Richards, Q.C., for the plaintiff. Demurrer and special case.

As to the declaration, it must be taken on these pleadings the bond in question was made to the plaintiffs; though by the name of the Beverley Municipal Council. Grant on Corporations 51; *The Mayor and Burgesses of Lynne Regis*, 10 Co. 122 B.; *Re Barclay and The Municipality of Darlington*, 11 U. C. Q. B, 470; *Fisher* v. *The Municipal Council of Vaughan.* 10 U. C. Q. B., 492; *Re Hawkins* v. *The Municipality of Huron, Perth and Bruce*, 2 U. C. C. P., 72; *Farrell* v. *The Town Council of London*, 12 U. C. Q. B. 343; 13 & 14 Vic., ch. 67, sec. 60. This is merely directory. *Judd* v. *Read*, 6 U. C. C. P., 362; *The Brantford Building Society* v. *Clement*, 9 U. C. Q. B., 339; *Webster* v. *Macklem*, 4 U. C. C. P. 266; *Cole* v. *Grem*, 6 M. & Gr. 872; *Reg.* v. *Leicester*, 7 B. & C. 6; *Reg.* v. *Birmingham*, 8 B. & C. 29; *Kitson* v. *Banks*, 4 E. & B. 854; though the bond is general, the objection that the office is annual may be raised on the pleading, *Mayor of Berwick* v. *Oswald*, 8 E. &. B. 653; *Curling* v. *Chalklen*, 8 M. & S. 502, shows that

the appointment being created under an act of parliament, reference may be made to the act to see if plea be good, and on the face of the statute the defendant cannot allege the office was annual, *Mayor of Birmingham* v. *Wright*, 10 Q. B., 603; 12 Vic., ch. 81, and 171, 173.

The 2nd plea is put in issue. See by the by-laws put in to show the appointment was made for a year only, and renewed each year. Three by-laws. The expression is "township officers," that may refer to such officers as by statute are to be annually appointed.

These by-laws cannot vary the statute. The treasurer by sec. 173, must have held his office until removed, and the by-laws were superfluous and had really no operation. Sec. 31 of 12 Vic., ch. 81, as to passing of by-laws.

2nd. If the office of treasurer comes within these provisions. The continuing a man in the office is not a removal and re-appointment, and there is no by-law subsequent to that for 1853. *Bamford* v. *Iles*, 3 Exch. 380; *Frank* v. *Edwards*, 8 Exch. 214; *Mayor of Berwick* v. *Oswald*, 3 E. & B. 653; *Mayor of Clifton* v. *Sully*, 7 E. & B. 97.

Then the defendants deny liability for certain moneys received by the treasurer under statute 16 Vic., ch. 184, and 18 Vic. ch. 2, as to effect of office being varied (*Pybus* v. *Gibb*, 6 E. & B. 902), but here no variance by adding certain moneys which were to come to his hands, 12 Vic., ch. 81, sec. 172.

Anderson on same side. *Thompson* v. *McLean*, 17 U.C.Q.B. 495, is the case on which defendants will rely; it is to be distinguished by the fact of the 172 sec. 12 Vic., ch. 81. *Pybus* v. *Gibb*, 6 E. & B. 902, also suggests a further distinction. If plaintiff had replied instead of demurring, we could only have replied the statute which is matter of law, not of fact—to be submitted to a jury.

Irving contra. The cases as to by-laws cited are not applicable. Insists that law requires the security to be to the corporation, and it must be by its corporate name.

Plea good. Though council may appoint for a year definitely if they please—that will be an appointment during pleasure—and the plea avers the office was terminated.

Oswald v. *The Mayor of Berwick*, and the latter case is altogether in defendants' favour.

Mayor of Cambridge v. *Dennis*, 27 L. J. Q. B. 474.

Barlow, the treasurer, at the end of 1853, owed £193; subsequently he paid up, so that he only owed £70 or £80. Afterwards he again increased his debt. Defendants may take advantage of his payment, but cannot be liable for increase by subsequent liabilities; the bond only extends to the year 1853.

DRAPER, C. J.—The defendants have not denied the bond declared upon. At the date of that bond, 28th of February, 1853, by the 2nd section of 12 Vic. ch. 81, all the corporate powers possessed by the plaintiffs, were to be exercised by, through, and in the name of the Municipality of the Township of Beverley. Their present corporate name is given by Con. Stat. C. C. ch. 54, sec. 4.

The question would have assumed a different shape if *non est factum* had been pleaded, and we must have determined whether the bond would not be valid, notwithstanding the error of the name, in accordance with the principles of many old cases which are collected in Com. Dig., title Capacity B. 5, Bacon Abr., Corporation C.

But by pleading over it was admitted that the defendants made this bond to the plaintiffs by the name of the Beverley Municipal Council, and I think they cannot return to this objection on a demurrer to their plea, even if it were available, which at present I am not prepared to decide. It is on the record, and if it be error they are not prevented from taking advantage of it.

Then as to the Plea, it asserts that the appointment of Barlow as treasurer, "was an annual appointment;" that his appointment as treasurer *terminated* at the end of the municipal year, 1853, and that during the currency of that year he did account, &c., and did pay over, &c., all moneys, &c., due by him to plaintiffs, during the currency of his appointment as treasurer for the year 1853, and according to *Kitson* v. *Julian*, (4 E. & B. 854) the allegation in the plea that the appointment was for one year and no longer being admitted by the demurrer, it had the same effect as if the same period of appointment had been recited in the condition of the bond, and brought the case within the principle of *Lord Arlington* v. *Merricke*, in a note to which the cases down to 1845 are referred to, 3 Wm. Saund. 415b, note *k*. That however was a case in which, apart from the record, the court could have no knowledge of the duration of the appointment, whether it was for one year or more. But by 12 Vic. ch. 81, sec. 171, it is made the duty of municipal councils of townships to appoint a treasurer who shall hold office during their pleasure; and by section 173 of the same act, the treasurer as well as other officers, with regard to whose period of service no other provision is made by the act, shall hold their offices until removed therefrom by the municipal council for the time being. The case then seems to me to fall within the decision of *Curling* v. *Chalklen*, 3 M. & S. 502, where a plea very similar was held to be bad for two reasons: 1st, that it should have been averred that it was an annual office at the time the bond was made. 2nd, that the appointment was under an act of parliament which, so far from limiting it to one year, provides expressly for its longer continuance. Here the words of the condition are general, extending over any period during which Barlow should hold office; the public statute law is in direct contradiction to the assertion in the plea that the appointment is annual, and there is no averment of any special appointment differing in terms from the provisions of the statute, nor any thing in the condition qualifying the liability by any special appointment, if there was one, which on the demurrer we have no notice of.

I think therefore, this plea is bad. This determination renders it useless to consider the 1st and 3rd questions submitted by the special case.

As to the second question, which strictly speaking, on this record, and after our judgment on the demurrer, arises, if at all, only as to the amount of damages, I cannot say I have entertained any serious doubt. Nothing can be more general than the language of the condition that Barlow shall make and give "a true and just account of all such sums of money, notes, chattels, and other things that have or may come into his hands or possession as treasurer aforesaid, and shall pay or deliver over to his successors in office or any other persons duly authorised to receive the same, all such balance or sums of money, notes, chattels, and other things as shall be in his hands, and due by himself to the said Beverley Municipal Council."

The objection is: 1s. That by 16 Vic., ch. 184, the municipal councils were authorised to impose duties on pedlers and hawkers, and to require them to take out licenses; to require auctioneers, persons selling liquors by retail, in places other than houses of public entertainment, (as to which the councils had already the same power,) and persons keeping billiard tables for hire or gain, to take out licenses, paying for them such sums as the councils should by by-law determine, which sums should be collected and received by such municipal officers as the councils should appoint to receive the same. That large sums would consequently come into the treasurer's hands, thereby increasing the risk of the defendants as his sureties, and altering the nature of his office by adding to the extent of his duties.

2nd. That under the 18 Vic., ch. 2, moneys arising from the sale of clergy reserves, remaining unexpended and unappropriated under the 2nd, 3rd, and 4th sections of the act, are, by the 5th section, to be apportioned among the several "*county and city municipalities*" in proportion to their population, and the portion coming to each municipality shall be paid over by the Receiver-General to the treasurer, chamberlain, or other officer having the legal custody of the moneys of each municipality, and shall make part of the general funds of the municipality.

As to the first, I do not see how the question arises; for it no where appears that any by-laws imposing such duties or license fees have been passed, or that the treasurer has by any by-law been appointed to receive the same, without which either we must hold that by the conferring on township councils additional means and power to increase their revenue, although unexercised, the character of the office of treasurer is altered and the risk of the sureties increased, or we must overrule the objection. The latter, in my opinion, is the proper course.

When as to the second, the township municipalities are not referred to in the 5 section of the above clergy reserve act. The

act however is amended by 19 & 20 Vic., ch. 16, which directs the apportionment of the unexpended and unappropriated moneys to be made among the several cities, towns, incorporated villages, and township municipalities in Upper Canada, commencing with the balance on 31st of December, 1855. Whether any such payments were made to Barlow during the terms for which it is sought to make these defendants responsible, does not appear.

But on a more general ground, I am of opinion, and I believe my brothers fully concur with me, that the creation of additional sources of revenue can no more be treated as altering the nature of the office, or the duties of the treasurer, or the risk of the sureties, than the increase of rates and assessments levied upon subject matters within the power and authority of the council at the time the sureties entered into their obligation, could be held to have such an effect. I cannot conceive that such was the intention of the parties apart from the bond, and neither the bond or condition contain any thing to lead to such a conclusion. There is no undertaking expressed or implied that the municipal revenues shall remain *in statu quo* as to their sources, any more than there is as to their amount; the increase of the latter must certainly have, in the very nature of things, been expected. So long as the duties to be performed by the treasurer as to receiving and paying out *all* moneys of the municipality, so long I consider the liability of his sureties as to such receipts and payments is unaffected.

I think, therefore, the sureties are liable for every deficiency rising on receipts from these two sources, as well as from any other, which is not contested.

The plaintiffs are, in my opinion, entitled to the *postea*.

Per cur.—*Postea* to plaintiffs.

See *Mayor of Cambridge* v. *Dennis*, 5 Jur. N. S. 265; *Barclay* v. *Municipal Council of Darlington*, 11 U. C. Q. B. 470; *Fisher* v. *Municipal Council of Vaughan*, 10 U. C. Q. B. 492; *Hawkins* v. *Municipal Council of Huron*, &c., 2. U. C. C. P. 72; *Farrell* v. *Mayor and Town Council of London*, 12 U. C. Q. B. 343; *Wilkes* v. *Clement*, 9 U. C. Q. B. 339; *Cole* v. *Green*, 6 M. & G. 872; *Judd* v. *Read*, 6 U. C. C. P. 362; *Webster* v. *Macklem*, 4 U. C. C. P. 266; *R.* v. *Justices of Leicester*, 7 B. & C. 7; *R.* v. *Birmingham*, 8 B. & C. 29; *Kitson* v *Julian*, 4 E. & B. 854; *Mayor of Berwick* v. *Oswald*, 3 E. & B. 653; *Curling* v. *Chalklen*, 3 M. & S. 502; *Frank* v. *Edwards*, 8 Exch. 214; *Holland* v. *Lea*, 9 Exch. 430.

Craig v. Rankin et al.

School rates—Collection of—Trustees.

A general school meeting having passed a resolution, "That the expenses of the school section be paid by a voluntary subscription and the balance to be raised from a tax to be levied upon the parents and guardians of those sending children to the school." The school Trustees, after the failure of the voluntary subscription, levied a general rate, upon which this replevin arose, the plaintiff contending that he was not liable as not being a guardian or parent of a child attending the school.

Held, that the trustees had no authority to tax parents or guardians of those sending children, or to alter or annul the resolution, and that the 10th subsection of the act authorized the levy as made.

Replevin by John Craig against Hugh Rankin, Reuben Spooner, Patrick Daly, and James Swift, for a cow, value £5.

Pleas 1st.—That defendants did not take.

2. Cognizance by defendant Swift, that the the other defendants were school trustees of school section number 14, in the township of Kingston, and that the plaintiff was liable to be rated for school purposes in said section; that a rate was imposed by said trustees, and plaintiff was thereby rated for the sum of ——. That a list or warrant was delivered by said trustees, to defendant Swift, who was collector of said school section, that defendant Swift demanded amount of rate from plaintiff, which he refused to pay, wherefore defendant Swift took said goods as a distress for said rate.

3rd. Avowry by the other defendants, Rankin, Spooner, and Daly, as trustees of said school section, setting out same facts as in the cognizance of defendant Swift.

Replication.—1st. Joins issue on defendants' pleas. 2nd. As to cognizance of defendant Swift, that plaintiff was not the occupier of property in school section No. 14, nor liable to be rated as in the cognizance mentioned.

3rd. As to cognizance of defendant Swift, that before assessing said rate, to wit, on the 13th of June, 1858, at the annual meeting of said school section it was decided that the expenses of said school section should be provided by a voluntary subscription; that a large amount, to wit, £50, was subscribed, which the trustees should have collected before imposing said rate, but that said trustees did not collect said subscription, but unlawfully, &c., made said rate and delivered said list and warrant to defendant Swift to collect same.

4th. As to avowry of defendants Rankin, Spooner and Daly, same as to defendant Swift.

Rejoinder by defendant Swift.—1. Joins issue on plaintiff's plea to cognizance of the defendant Swift.

2nd. Joins issue on plaintiff's second plea to cognizance of defendant Swift.

3rd. Also, as to said second plea to defendant Swift's cognizance That said resolution was in the following words: "Resolved that the expenses of the school section be paid by voluntary subscription, and the balance be raised from a tax to be levied upon the parents and the guardians of those sending children to the school." That the only amount subscribed under said resolution was £2 2s. 6d., and was wholly insufficient to defray the expenses of the school, and could not be collected, wherefore the amount provided by said resolution by any proceedings that could legally be taken thereunder being insufficient to defray expences of school, said rate was duly made and imposed to defray balance and amount due, or to become due for expenses of the school section.

4th. Defendants Rankin, Spooner and Daly join issue on plaintig's plea to the avowry.

5th. Defendants Rankin and others, also as to said plea rejoin same facts as defendant Swift.

Surrejoinder by plaintiff—1. Joins issue to replication to said plea to defendants Swift's cognizance.

2. As to the said replication, also says that he the plaintiff was not nor is a parent or guardian of a child or children sent to said school, and that the rate could not be legally imposed on him.

3., Joins issue on replication of defendant Rankin and others to plointiff's second plea to avowry of Rankin and others.

4. As to said replication, same as to Swift's replication.

Demmurrer by defendant Swift to surrejoinder on the following grounds: that the said surrejoinder admits the fact stated in the replication to which it professes to be an answer, but shews no sufficient answer thereto; that the rate required to pay the expenses of the school section could only be levied and collected of the freeholders and householders of the section, and that the plaintiff being a freeholder or householder of the section was liable to said rates, and that he was not exempt from such rate by reason of his not being the parent or guardian of a child or children sent to or attending the school of said section; that the mode of raising the balance of the expenses of the school section provided by the resolution set forth in said replication is unreasonable and illegal, and the trustees could not legally carry out the said resolution, and what was provided by said resolution was insufficient to defray the expenses of the school section, and the trustees were therefore justified in levying the amount by rate on all the freeholders and householders of the section.

Demurrer by defendants Rankin and others to surrejoinder, the same grounds as demurrer of defendant Swift.

Richards, Q.C., for defendants, referred to *McMillan* v. *Rankin*, 19 Q. B. U. C. 356.

No counsel appeared for plaintiff.

Draper, C. J.—A similiar question in a suit brought by one McMillan against these same defendants, upon similar pleadings, was decided last term by the Court of Queen's Bench on demurrer in favour of the defendants.

I quite agree in that conclusion, and I have had more trouble in reading the pleadings in this demurrer book than in making up my mind upon the question raised.

The rejoinder is no answer to the replication. By section 27, of Consolidated Statutes U. C., sub-section 1, (division C.,) the secretary and treasurer is to receive and account for all school moneys collected by rate bill, subscription, or otherwise from the inhabitants of the school section; by sub-section 2, they may appoint a collector to collect the rates imposed by them on the inhabitants of their school section or the sums which the inhabitants have subscribed, and such collector shall, by virtue of a

warrant signed by a majority of the trustees, have the same power in collecting the school rate or subscription and shall proceed in the same manner as ordinary collectors of county and township rates and assessments. The 10 sub-section of the same section authorises the trustees to provide for the salaries of the teachers and all other expenses of the school in such manner as may be desired by a majority of the freeholders and householders of the section at the annual, or a special school meeti. g, and to employ all lawful means to collect the sums required for such salaries and expenses, and *if the sums* thus *provided be insufficient to defray* all the expenses of the school the trustees may assess and cause to be collected an additional rate in order to pay the balance. The 125th section of the same act declares that all the school expenses of each section shall be provided for by all or any of the three following methods: 1st Voluntary subscription. 2nd. Rate bill for each pupil attending the school. 3rd. Rate upon property. The replication to the plaintiff's second plea to the cognizance of one defendant, and the avowry of the other three, sets forth the only resolution passed at the annual school meeting of the section in question in these words, "Resolved, that the expenses of the school section be paid by voluntary subscription, and the balance be raised from a tax to be levied upon the *parents and guardians of those sending children to the school.*" It avers the total insufficiency of the voluntary subscription or otherwise under the said resolution for the required purposes, and that even that sum was not paid and could not be collected, wherefore the rate and assessment in the cognizance and avowry respectively mentioned was duly made and imposed by the school trustees in order to pay the balance of the school expenses. The plaintiff rejoins that he was not the parent or guardian of a child sent to or attending the school, and that a tax could not lawfully be levied upon him for the balance of the said expenses, according to the terms of the said resolution. He thus admits this was the only resolution passed, and admits also the total failure of the voluntary subscription, and relies upon a matter which, whatever, may have been intended, certainly is not expressed in the resolution. He treats the resolution as providing for the school expenses by two out of the three methods mentioned in the 125th section, namely voluntary subscription, and rate bill imposed on each pupil attending the school, and sets up as an answer that he is not a parent or guardian of any child sent to the school, meaning thereby that the resolution of the annual meeting authorises a rate or tax upon such parents or guardians and on no one else to make up any deficiency in the voluntary subscription. But the resolution provides for a tax on the parents or guardians of those sending children, not of the children sent to the school; and the trustees had no authority by law to tax such parties or amend this absurd resolution, and therefore they had to resort to the authority given in the 10th sub-section of section 27, already set out, in the event of the sums provided at the annual school meeting being insufficient. This is what they rely upon in the replication, and what the rejoinder attempts to, but does not, meet.

I think the defendants entitled to judgment on this demurrer.

Judgment accordingly.

JOSEPH KRAEMER v. JOSEPH GLISS.

Married Women—Effect of Consol. Stat. U. C. cap. 73—Action.

Held, that the Consol. Stat. U. C. cap. 73. intituled "An Act respecting certain separate rights of property of married women," does not alter the disability of a married woman to contract; and that, since the statute, a married woman is no more enabled to bind herself by contract than she was before that statute.

Held also, that the objects of the statute are—1. To protect a married woman in the right to her separate property free from the debts and contracts of the husband. 2. To secure her earnings to herself, under certain circumstances. 3. To enable her creditors to obtain satisfaction out of her separate property for debts incurred *dum sola*. 4. To release the husband from liability for such debts, though he must be joined in the action against her if he be a resident of the Province.

Held also, that the provisions necessary for these purposes being departures from the common law, so far as necessary to give the provisions full effect the common law must be held to be superseded by them, but that the common law cannot be held to be infringed any further than really necessary for obtaining the full measure of relief the act was intended to give.

Held also, that for a conversion of the wife's separate personal property during coverture, the husband may sue without joining his wife as a co-plaintiff.

(Michaelmas Term, 1860.)

The declaration stated in the first count that defendant wrongfully deprived plaintiff of the use and possession of his goods enumerating them, and in the second count—that defendant converted to his own use the plaintiff's goods and chattels.

The pleas were:—1st. Not guilty. 2nd. Goods not plaintiffs.

The case was tried at Berlin, in November, 1860, before Hagarty, J.

The goods were seized in August last, by direction of the defendant on the plaintiff's premises under two executions issued out of the Division Court, in suits, in one of which the defendant was plaintiff, and Barthold Frochly and Dorothea Kraemar, were defendants. Dorothea Kraemar was plaintiff's wife and Frochly is her son-in-law. By the sale more than enough to satisfy these two executions was made and the residue was applied in satisfaction of another execution against Frochly who lived in the same house with plaintiff and his wife. This was because that the bailiff assumed that part of the property seized and for which this action was brought belonged to Frochly, and the bailiff swore that sometimes he would claim the property and sometimes Mrs. Kraemar. It appeared that she had been a widow and plaintiff used to live as a servant with her and afterwards in January, 1860, married her. The plaintiff was present at the sale but said nothing. Frochly swore that the oxen which were seized and sold belonged to the plaintiff before he married the widow, and that the notes sued upon in the Division Court were made after the marriage, and in the absence of plaintiff. That plaintiff got the yoke of oxen from the widow a year before he married her for his wages for the preceding year. Frochly had lived with the widow several years—he worked the cleared land on the farm on shares. The plaintiff was clearing more land for himself and his wife. Excepting the oxen, Frochly swore, the rest of the property in question had belonged to the widow, but that he understood that after marriage she gave it all up to the plaintiff. The notes sued upon were given in lieu of others which became due in the preceding fall. He explained that the threshing machine, waggon and sleigh were hired to him and therefore he claimed them when an execution came against her; if an execution came against himself, he told what was hers and what was his own.

On the defence it was sworn that the defendant's son and not the defendant directed the seizure; that it was the son who bought and not the defendant—though the things, the price of which were endorsed on the execution, as costs, and so accepted by defendant, which things the defendant sold for the son's benefit as part of the son's "share of inheritance" from defendant. The defendant it was however stated by the son was at the sale and bought a whippletree—another witness swore he had purchased the oxen before the bailiff's sale from the plaintiff both from him and his wife after their marriage, giving two notes he held against her for the prices. No time was fixed when he was to take them, and he allowed them to be worked on their farm. He said he thought he could have them when he liked but that he only took them as security for the debt though he was willing to have taken them in payment. There were writings showing the nature of the transaction not produced.

The jury was asked to say whether the defendant directed the seizure, and whether the oxen were the plaintiff's own property, and the learned judge asked them if they found both these points in the plaintiff's favour to assess damages for the taking the oxen separately. He ruled that as the evidence stood the defendant could *not* set up the claim of the the third party to the ownership as an answer to plaintiff. For the defendant it was contended that the wife must be joined with the husband as a plaintiff: and it was agreed that he should have leave to move on this point; and the learned judge directed that the plaintiff might sue alone.

The jury found for the defendant, but valued the oxen at $65.

Thos. Miller in Michaelmas Term obtained a rule *nisi* for a new trial on the law and evidence, and because the verdict was contrary to the learned judge's charge.

M. C. Cameron, shewed cause. He referred to the Con. Stat. of U. C. cap. 73, secs. 14 and 18, *Finch* v. *Hooke*, Salk. 7, *Milnes et al* v. *Milnes*, 3 T. R. 627, *Birch* v. *Leake*, 2 D. & L. 88.

Harrison, R. A. contra.

DRAPER, C. J.—There is no doubt of the general principle that marriage operates as an absolute gift in law to the husband of all the goods and chattels and personal property of the wife.

This action is not brought for the conversion of the goods of the wife before her marriage to the plaintiff, and therefore the cases of *Milnes* v *Milnes*, to which may be added *Morgan* v. *Cubitt* 3 Exch. 612 and *Dalton* v. *Midland Co.*, 3 C. B. 474, do not apply, *Ayling* v. *Whicher*, 6 A. & E. 259, *Caine* v. *Birch*, 7 M. & W. 183, and *Bird* v. *Peagram*, 13 C. B. 649, all are in the husband's favour. Unless the provincial statute makes a difference I think there is no doubt the plaintiff has a right to recover.

The 1st section of that act declares that every women married since 4th May, 1859, shall and may have hold and enjoy all her real and personal property (if there be no marriage contract or settlement) "free from the debts and obligations of her husband, and from his control or disposition without her consent in as full a manner as if she continued sole and unmarried."

The 2nd section applies to the case of women married before 4th May, 1859, makes a similar provision as to real estate not on that day taken possession of by the husband, by himself or his tenants and as to personal property not then reduced into the possession of her husband.

The 14th section enacts that every woman having separate property, real or personal, not settled by any antenuptial, shall be liable upon any separate contract made or debt incurred by her before marriage, if married after 4th May, 1859, to the extent and value of such separate property in the same manner as if she were sole and unmarried.

Section 16 enables every married woman after 14th May, 1859, by devise or bequest executed in the presence of two or more witnesses to dispose of her separate property, real or personal, whether acquired before or after marriage among her children, issue of any marriage and failing any issue then to her husband or as she shall fit in the same manner as if she was unmarried.

Section 18 provides that in any action, &c., by or against a married woman, upon any contract made or debt incurred by her before her marriage, her husband shall be made a party if residing within the province; but if absent therefrom, the action shall proceed against her alone.

This statute does not alter the power of a married woman to make a contract. She is not enabled to bind herself while a feme covert more than she could before it was passed. It appears on the evidence that the plaintiff's wife was sued without her husband being joined on a promissory note made by her afte. marriage. Such fact in my opinion if proved before the judge entitled her to have the action dismissed as against herself. The note was as against her void. If she had been sued on a contract made before the marriage, her husband should have been joined. Her marriage being proved, would have been a bar to the maintenance of the action against herself, inasmuch as her husband resided in the province.

It may be questioned whether on the present pleadings, it was open to the defendant to set up the proceedings in the Division Court as a defence. The point was not taken however for the plaintiff. But if this defence was not available then the defendant appears to have seized property out of the possession of the plaintiff; for *prima facie* this property, if it were all the wife's, was in the *possession* of the husband, and possession alone would enable him to bring this action against a wrong doer.

As to the yoke of oxen the verdict certainly appears to be against the evidence. They were not the wife's at the time of the marriage: and if in fact they were mortgaged to a third party, or even sold, neither of which was legally proved, the defendant shewed no right to take them, unless they were the wife's, and therefore so far the verdict is wrong.

Still a new trial ought not to be granted if the plaintiff cannot maintain the action without joining his wife, unless indeed on the ground that the oxen were no part of her separate property; and if granted on that ground we ought, I apprehend, to say whether if on the second trial it should appear these as well as the rest of the property seized was hers under the Statute the plaintiff alone can maintain the action.

Assuming for the argument's sake that the defendant is a wrong doer as to the separate property, and that the husband can recover the full value in this action, could the wife under any circumstances maintain another action for the same injury after his death pleading her coverture in answer to the statute of limitations if that were set up in bar of the claim? The statute does not allow her to sue alone. Even for a cause of action accruing to herself before coverture the husband must be joined. The 18th section expressly requires her husband to be sued with her if it necessarily prevents the husband suing for such wrong with joining her. The primary objects of this act seem to be: first—resident in the province, though the reason formerly existing, namely, his liability to pay her debts no longer exists under the statute. She does not appear to have any means given her of compelling him to bring an action for injury to her separate estate; and yet it could not have been intended to put every wrong to her separate chattel property on the footing of *choses in action*, belonging to her, which, unless reduced into possession by the husband survived to her, or if it does, I do not then see that protects a married woman in the right to her separate property free from the debts and control of her husband, second—to secure her earnings to herself under certain circumstances, third—to enable her creditors to obtain satisfaction out of her separate property, for debts incurred *dum sola*; and lastly—to relieve the husband from liability for such debts though he must be joined in the action against her if he be resident in the province. Every provision for these purposes is a departure from the common law and so far as is necessary to give these provisions full effect we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the act was intended to give. I do not perceive that any of these provisions either in letter or spirit requires us to hold that chattel property which belonged to the wife before marriage is not by the marriage placed in the hands and under the protection of the husband, though no longer subject to his debts or to his disposal. And if he has the right to the possession, although the right of property is to the extent set forth in the act preserved to the wife, I do not see why he may not sue alone for any injury or wrong inflicted on any part of that property.

I think there should be a new trial without costs.

ROBERT JARVIS HAMILTON AND MILTON DAVIS v. SAMUEL F. HOLCOMB, JOHN MCPHERSON, AND SAMUEL CRANE.

Action on a bill of exchange—Several defendants—Judgment—Ca. Sa.—Arrest and discharge of one defendant—Its effect.

Held, in an action against the drawers and acceptors of a bill of exchange, in which plaintiffs, the holders, recovered a judgment against all the defendants under the Consolidated Statutes of Upper Canada, cap. 42, that the entry of judgment did not create one new and joint liability against all the defendants. *Quære*, as to the effect of plaintiffs issuing a *Ca. Sa.* against all the defendants, under which one of the acceptors was arrested, bailed to the limits charged in execution, and subsequently discharged from custody?

(Hilary Term, 1861.)

On the 7th January last, Burns, J., made an order in this cause, after hearing parties on affidavits, that the writ of *fieri facias* issued in this cause, and directed to the Sheriff of the United Counties of York and Peel, dated the 5th July, 1860, against the goods and chattels of the defendants, and all proceedings had thereon should be set aside, and a memorandum of satisfaction be entered as to the judgment signed in this cause on the 12th January, 1858, for £506 11*s.* 8*d.* damages, and £19 7*s.* 6*d.* costs.*

Mr. Harrison, in Hilary Term, moved against this order in the alternative, either to set it aside altogether, or to set aside so much of it as directs a memorandum of satisfaction to be entered.

Galt, Q. C., showed cause.

DRAPER, C. J.—It appears by the affidavits, that the defendant Holcomb, together with his partner, one Henderson, drew a bill of exchange upon the other defendants, McPherson and Crane, and that the plaintiffs as holders of this bill obtained a judgment against all the defendants, whom they sued in one action under the provisions of the statute of Upper Canada. About the 1st July, 1858, a *ca. sa.* was issued in the cause, on which the Sheriff of Frontenac, Lennox, and Addington arrested the defendant McPherson, who gave bail to the limits. The defendants McPherson and Crane, had, on the 2nd January, 1858, executed a deed of assignment of all their real and personal estate, in trust for the benefit of all creditors who should execute the same. The plain-

* See p. 40 *ante*.

tiffs, by their duly authorised attorney, executed this assignment on or about the 20th July, 1858, and their attorneys in the action signed and sent to the Sheriff, an authority dated the 3rd July, 1858, for McPherson's discharge, and the Sheriff discharged him accordingly. On the 5th July, 1860, the plaintiffs sued out a writ of *fieri facias* against the goods of all three defendants. directed to the Sheriff of York and Peel, endorsed to levy £525 19s. 2d., with interest from 12th January, 1858, £3 for writs, and his own fees; under which the Sheriff levied upon the goods of the defendant Holcomb. The plaintiff Hamilton made an affidavit, that when McPherson was discharged from custody, it was upon the agreement that such discharge should not affect the debt in this suit, or any other remedies on the judgment in any way.

The principal difficulty I have felt in this case is, as to the effect of our statute (Con. Stat. U. C. ch. 42, secs. 23, 24, 25, 26, 31, 32, 35) by which the holder of any bill of exchange or promisory note is enabled, and in one sense, obliged to include drawers, makers, acceptors, and endorsers in one action, for if he bring several suits, there shall be collected the costs taxed in one suit only, at the election of the plaintiff, and in the other suits the actual disbursements only. By forms given for declaring, the plaintiff, after stating his cause of action against all the parties sued, very much in the old form, concludes: "by reason whereof the said defendants became jointly and severally liable to pay the plaintiffs," &c.

The 23rd section expressly enables the plaintiff to proceed to judgment and execution in the same manner as though the defendants were joint contractors, while the 25th provides that judgment may be rendered for the plaintiff against some one or more of the defendandts, and in favour of some one or more of the defendants against the plaintiffs, according as the rights and liabilities of the respective parties may appear, and when judgment is rendered in favour of any defendant, he shall recover costs in the same manner as if judgment had been rendered for all of them. There is no special provision in the statute as to pleading, except with regard to set off; but the practice has uniformly been for each defendant to plead such matters as may constitute his defence, without regard to the others. Making, drawing, accepting, endorsing, as well as presentment or notice of dishonour, may be all put in issue according to the situation of the party pleading. And the 26th section enacts that the rights and responsibilities of the several parties to a bill or note, as between each other, shall remain the same as if the act had not been passed, saving only the rights of the plaintiff so far as they may have been determined by the judgment. And one defendant is entitled to the testimomny of any co-defendant as a witness, if he would have been entitled to his testimony had such co-defendant not been a party to the suit, or individually named in the record.

Taking the foregoing clauses together, I should have agreed readily to the conclusion of my brother Burns, that the moment judgment is entered it becomes one judgment creating one new and joint liability against all the defendants; but the 32nd section provides that any person so sued may set off against the plaintiff any payment, claim or demand, whether joint or several, which in its nature or circumstances arises out of or is connected with the bill or note sued on or the consideration thereof, just as if each defendant had been separately sued; and if the jury, after allowing any set off, find any balance in plaintiff's favour, they must state in their verdict the amount which they allow each defendant as a set off. I suppose the object is, that the verdict may thus enable the defendants to ascertain their rights and liabilities as between themselves; and that the plaintiff will still have a general verdict against all the defendants for the balance, and enter judgment accordingly.

Then the next question is whether the taking one of several defendants, against whom a judgment has been recovered in execution upon a *Ca. Sa.*, and afterwards discharging him out of custody, operates in effect as a satisfaction of the judgment as regards all the others, though the plaintiff has received nothing.

Upon this point I still entertain considerable doubt. It appears by the affidavit, that McPherson was admitted to the benefit of the gaol limits; and the Consolidated Statutes of Upper Canada, ch. 24, sec. 37, provide that the party at whose suit a debtor is charged in execution, may, when the debtor has taken the benefit of the limits, sue out a *fi. fa.* against his lands or goods notwithstanding the debtor is charged in execution, and the execution of the *fi. fa.* is not to be stayed, but shall be continued although the debtor be re-committed to close custody. Now if a creditor having his debtor in execution on the limits, obtain satisfaction through a *fi. fa.* against lands or goods, the debtor must *ipso facto* be discharged; and if lands or goods amply sufficient to pay the debt were taken in execution, I cannot believe that by the creditor thereupon consenting to the debtor's immediately leaving the limits, the right to complete the execution would be affected. I find nothing in the act to justify such a conclusion, and it appears to me contrary to reason, and I have great difficulty in drawing a tenable distinction between such a case and the case of an execution against the goods of one defendant where another defendant is a prisoner on the limits. The difference created by our peculiar enactment, in this respect, may take this case out of the principle of the English cases, the dicta in which are not altogether consistent (see *Herring* v. *Dorrell*, 4 Jur. N.S. 800, and the casest here cited). So long, at least, as McPherson was a prisoner on the limits, I strongly incline to the opinion that it could not be held that his custody prevented a *fi. fa.* against the goods of co-defendants, if as to them the *Ca. Sa.* was returned *non sunt inventi*.

There is, however, another ground on which I incline to think the dicision of my brother Burns may be upheld.

The defendant Holcomb has only become liable jointly with the other defendants, by reason of his being sued with them under our statute. Originally he was drawer of the bill, of which McPherson and Crane were acceptors. If the plaintiffs had brought a separate action against the acceptors (and but for our statute they must have done so), and, recovering judgment, had taken McPherson in execution and then discharged him, they could not, as I think, have maintained a subsequent action against Holcomb (see *Hayling* v. *Marshall*, 2 W. Bl. 1235; the marginal note is wrong as pointed out by Lord Eldon in *English* v. *Darley*, 2 B. & P. 62; *Michael* v. *Meyers*, 7 Jur. 1156; 6 M. & Gr. 702, in which previous cases are cited): and in my opinion, as at present advised, the Court are warranted in affording the defendant Holcomb relief upon this ground, notwithstanding the judgment recovered against him, and the 26th section of the act will, I think, uphold this conclusion. The plaintiffs have discharged a party against whom Holcomb would have a remedy over, and thereby, I think, have discharged him.

But as this view is not perfectly clear, and the point itself is new, my brothers think it would be better not to dispose of it on this motion, but that the order should be varied by setting aside the *fi. fa.*, and rescinding so much as relates to the entry of satisfaction. The plaintiffs may then, if so advised, bring an action on the judgment and the question be carried into Appeal.

I concur with them in making the rule absolute in this form, without costs.

CHANCERY.

(*Reported by* THOMAS HODGINS, Esq., M.A., *Barrister-at-Law.*)

ATTORNEY-GENERAL v. DANIELL.

Crown debt—Recognizance—Lien on real estate—Registration—Notice.

One M. gave a recognizance to the Crown, with two sureties, D. and McK. The recognizance was estreated, but had not been registered under the Crown Debts Act. N., the cognizor, about the same time, gave to D., one of his sureties, a mortgage on his lands as security. M. absconded, and died abroad; and then D., under a power of sale, sought to enforce the mortgage against the lands. Upon an information filed by the Attorney-General, it was

Held, 1st, That the recognizance to the Crown bound M.'s lands from its acknowledgment, and that the Crown could enforce its lien.

2nd. That D., being one of the sureties in the recognizance, had actual notice of the lien of the Crown, and that he must be postponed to the Crown, notwithstanding the registration of his mortgage and the non-registration of the recognizance.

This was an information, at the suit of the Crown, to enforce a recognizance given by one Moser to appear at the assizes for the county of Middlesex, to answer certain criminal charges. Moser did not appear, and the recognizance was estreated. To one of his sureties he had given a mortgage on his lands, and under a power of sale in it the mortgagee was attempting to sell. Thereupon the Attorney-General filed the information, the facts of which are set out in the judgment. The cause came on to be heard *pro confesso*, but counsel

for the defendant Daniell appeared and asked to have a lien on the other property of Moser.

Hodgins for the Crown; *Read, Q.C.*, for the defendant Daniell.

Esten, V. C.—On the 29th January, 1859, one Moser, with the defendant Daniell and one McKittrick as his sureties, became bound to the Queen in a recognizance for the due appearance of Moser at the next court of oyer and terminer and general gaol delivery, to be holden in the county of Middlesex, to answer certain charges. On the 26th February, 1859, Moser made a mortgage in fee to the defendant Daniell, to secure to him the payment of the sum of three hundred pounds and interest, of certain lands, known as part of lot number eleven, in the first concession of the township of North Dorchester, containing about one hundred acres. Moser made default in appearing according to the exigency of the recognizance, which was consequently estreated on the 24th March, 1859, and the sheriff was directed to levy the amount due under it from the goods and lands of Moser. The recognizance had not been registered, pursuant to the statute in that behalf, and the sheriff was unable to levy the amount of it from the lands which have been mentioned, because they were covered by the mortgage to Daniell. The present suit was then instituted, in order to obtain a sale of the lands, on the ground that although Daniell had priority at law, by reason of the want of registration of the recognizance, yet, as he must, from the very nature of the transaction, have had notice of the recognizance when he obtained his mortgage, the mortgage ought to be postponed to the recognizance. The mortgage contained a power of sale, which Daniell was proceeding to exercise; whereupon an application was made to me for an injunction to restrain the sale, which I granted. A motion is now made for a decree, and the question is, whether the recognizance or the mortgage is entitled to priority. Moser being dead, his widow, as devisee and administratrix, is a party to the suit. Neither on the motion for an injunction nor on the present occasion did Daniell appear, or give the court the benefit of a discussion of the question. Upon the former occasion I assumed that the recognizance bound the lands of the cognizor from the time of its acknowledgment, previous to the passing of the statutes 14 & 15 Vic. cap. 9. Considering that this statute was merely intended to secure notice to purchasers and mortgagees, I decided in accordance with the cases upon judgments not docqueted, that if they had notice *aliunde*, it was sufficient, and that they should be postponed. According to this determination, I should on the present occasion decree a sale. Daniell does not seem to dispute the propriety of such a decree, but merely suggests that in that case he should stand in the place of the Crown *quoad* the other property of Moser. I should think such an arrangement extremely just, and that both upon the common law of principal and surety, and upon the doctrine of marshalling, Daniell might possibly obtain such relief as he suggests. The difficulty is, however, to understand how it can be administered in the present suit. I have had some doubt, too, upon the main question. Originally, it appears, the recognizance bound lands from the time of their acknowledgment, and goods, in case of the crown, from the *teste* of the writ (Cruise's Dig. 4, p. 104; Chitty's Prerog., p. 284), as judgments bound lands from the time they were signed, and from the teste of the writ at first, and afterwards from its delivery to the sheriff. The statute 5 Geo. II. cap. 7, is considered to have converted lands into goods for the purpose of paying debts, and the crown is named in it. The effect of this statute has been denied in this Province to be to prevent judgments from attaching upon lands until the delivery of the writ to the sheriff, so that a person purchasing be from that time, although with notice of the judgment, free from it. This decision was at variance with the spirit of the act, which was eminently remedial in favor of creditors; but it is understood that it will be respected until reversed by higher authority. I am not aware that any decision has been pronounced upon the effects of the act, as regards the crown; but it seems a necessary deduction from the decision, that judgments of the subject did not attach upon land until the delivery of the writ; that the recognizance of the crown would not bind lands until the teste of the writ, inasmuch as the crown as well as the subject is to have the same remedies against lands as against goods, and the recognizance of the crown binds goods only from the teste of the writ. Supposing this view to be correct, it would, I think, follow that Daniell would be entitled to priority over the crown; and his having notice of the recognizance would be of no importance, inasmuch as it would be notice of an immaterial fact. But the language of the 14th and 15th Vic. cap. 9, sec. 1, seems to me necessarily to imply that the recognizance of the crown previous to that statute bound lands before the teste of the writ, and *ex consequentiâ* from the time of its acknowledgment, as no other commencement could be assigned to it. In this view, the case is precisely similar to that of the undocquetted judgment, of which a purchaser has notice *aliunde*, and to which therefore he holds subject. Following that decision, I must hold that Daniell, having necessarily had actual notice of the recognizance at the time he received his mortgage, was subject to it in equity, although entitled to priority at law, and that the crown is therefore entitled to equitable execution against the lands, of which a sale must be decreed in the usual manner, supposing the bill to contain the necessary allegations. The remaining question is, whether I can give to Daniell the relief he suggests against the other property of Moser in this suit. I have every disposition to do so, but I cannot see my way to it. He may invoke the general right of a surety, and the doctrine of marshalling. Supposing the crown debt to be realized from a sale of the mortgaged lands, Daniell may be said to be in the position of a surety paying the debt. A surety so acting is entitled to all the securities held by the creditor; but on this hypothesis the recognizance is discharged, and no security remains, and the whole effect of the suit being accomplished is at an end. Then how can the doctrine of marshalling be applied? These are not cross funds; so that the junior creditor, seizing the common fund, may be declared a trustee of the other for the disappointed creditor; but a general creditor upon the whole estate fastens upon part of it mortgaged to a surety; which being applied, what remains is not a fund, but the general estate. If Moser were alive, it is clear nothing could be done. He being dead, his estate may be applied, it is true, but only by means of a general administration, for which a separate suit would be necessary, as I should not think it would be right, even if I had the power, to compel the crown to submit to a general administration in this suit, in order to throw its claim upon the residue of the estate, reserving the mortgaged lands for Daniell, and to wait perhaps for years for the satisfaction of its demand, while the general estate is in course of being realized. Without, therefore, expressing an opinion as to whether Daniell could have the relief which he asks, I think it cannot be made a part of the decree. I may add, that Daniell's whole claim is founded upon his mortgage, which has never been in contest, the crown admitting its validity, and merely claiming priority over it.

Todd v. The City Bank.

Injunction—Principal and surety—Discharge.

Where a creditor gives time to the principal debtor, by taking a mortgage from him and agreeing to postpone a registered judgment, without notice to the sureties, the sureties will be held to be discharged.

This was an application for an injunction to restrain the defendant Brown from levying the amount of a judgment recovered against the plaintiffs, under the following circumstances.

The plaintiffs, Messrs. W. & J. Todd, had endorsed a promissory note for £500, for the accommodation of the defendant, George Wright, who discounted the note with the defendants, the City Bank. The note not having been paid at maturity, the City Bank obtained judgment against Wright and the plaintiffs, and the same was duly registered. Subsequently the City Bank sold and transferred this judgment to the defendant, James Brown, who was proceeding by a *fi. fa.* goods to levy the amount from the plaintiffs. Thereupon the plaintiffs filed their bill to be relieved from paying this judgment, on the ground (amongst others) that the defendant Brown had given time to Wright, without the plaintiffs' consent, for the payment of the money. Upon examining witnesses in support of a motion for an injunction to restrain the proceedings of law, the plaintiffs failed to establish the giving of time; but it appeared that the defendant Brown and Wright, without the plaintiffs' knowledge, had entered into an agreement, by which Wright made a mortgage on certain of his lands for the purpose of raising money, and, in order to make it a first charge on these lands, Brown agreed to postpone the above judgment as a lien on the lands to the mortgage. Upon this appearing, the

plaintiffs amended their bill, alleging this fact, and charging that the postponing of the judgment to the mortgage was a discharge of the plaintiffs as sureties.

Fitzgerald for the plaintiffs.

Crooks for the defendants.

The following cases were cited and commented on:—*Mayhew* v. *Crickett*, 2 Swanst. 185, 191, and note (*a*); *Davies* v. *Stainbank*, 6 DeG. M. & G. 679; *Pearl* v. *Deacon*, 3 Jur. N. S. 879 and 1187, in Appeal; *Wright* v. *Sandars*, 3 Jur. N.S. 507; *Mellish* v. *Brown*, 5 Grant. 657; *Watson* v. *Alcock*, 1 Sm. & G. 319; *Capel* v. *Butler*, 2 S & St. 457.

As to the first, whether a creditor can give up any security he obtains subsequent to the original transaction without the surety's consent, and still hold the surety, as was decided by Sir Page Wood in *Newton* v. *Charlton*, 10 Hare, 646, it was contended for the plaintiffs that *Newton* v. *Charlton* was not law, and that a creditor cannot abandon any advantage or any security he has obtained, although the same was obtained subsequent to the entry of suretyship, without the knowledge of the surety; and it was further argued, that even assuming *Newton* v. *Charlton* to be well decided, yet the obtaining and registering judgment on the promissory note was not obtaining any security within the meaning of the rule laid down in this case, and that the defendant Brown could not abandon or postpone the judgment to any other incumbrance on the property, without discharging the security.

The Court were unanimously of opinion that the postponing of the judgment was a discharge of the sureties, and ordered the injunction to issue.

Note.—In a recent case of *Pledge* v *Buss*, 6 Jur. N. S. 695, Sir Page Wood admitted that *Newton* v. *Charlton* was wrongly decided, and that he would not now feel at liberty to follow it. It is clear now, therefore, that a surety is entitled to the benefit of every after-taken security. And see *Lake* v. *Brutton*, 2 Jur. N. S. 839.

FISKEN v. RUTHERFORD.

Injunction—Suppression of material facts.

An *ex parte* injunction will be dissolved, if material facts be suppressed, or misrepresented to the court, on moving for it.

The plaintiffs in this case, upon filing their bill, had obtained an *ex parte* injunction upon affidavits, one of which was made by the plaintiff, John Fisken, in which it was stated that the defendant, Rutherford, was indebted to Ross, Mitchell & Co., in £6000 or thereabouts. The defendant now moved to dissolve this injunction, on the ground (amongst others) that the same had been obtained in consequence of untrue statements in the affidavits of the plaintiffs, and that they had suppressed material facts. The defendant showed to the Court, that of the above £6000 only £150 was due to the plaintiff, the balance being due to certain Banks to whom Rutherford's notes had been transferred by Ross, Mitchell & Co., and the proceeds of which they had received. The plaintiff Fisken was cross-examined, and admitted this state of facts.

Fitzgerald for the defendant.

Blake for the plaintiff.

The argument occupied two days. The Court dissolved the injunction on the above ground, and ordered the plaintiffs to pay the costs.

GOODHUE v. WHITMORE.

...tice—Parties—Bankrupt mortgagor—Imperial Act 12 & 13 Vic. cap. 106.

A mortgagor who has made a mortgage on lands in this Province, and who afterwards becomes a bankrupt in England, is not a necessary party to a bill to foreclose by force of the English statutes relating to bankruptcy.

This cause came up on further directions. The principal question involved was, whether the mortgagor, who had become a bankrupt in England, should be a party as well as his assignees.

Roaf, for the plaintiff, asked for the usual decree of foreclosure.

Hodgins, one of the defendants in person, submitted that the bankrupt mortgagor was a necessary party. The English statute required registration of the title of the assignees, but no such registration had been made here. He had filed a bill of his own, and had obtained a decree, in which the mortgagor was a party; and on coming into this suit asked his costs, as in *Allan* v. *Dougall*, 6 U. C. L. J. 64.

Fitzgerald, *English* and *S. Blake*, for other defendants, submitted that the bankrupt mortgagor was a necessary party.

The following cases were referred to:—*Bradley* v. *Brooke*, 26 L. J. Ch. 74; *Warren* v. *Hodson*,; *Kenwick* v. *Lafferty*, 7 Sim. 317; *Whitworth* v. *Davis*, 1 Ves. & B. 545; *King* v. *Martin*, 2 Ves. 641; *Collins* v. *Skiely*, 1 R. &. M. 635.

SPRAGGE, V. C.—It seems clear, under the authorities, that the bankrupt is not only not a necessary party, but that he would not be a proper party to a suit for foreclosure. The provision in the 12 & 13 Vic. cap. 106, sec. 143 (Imperial act), does not seem to affect the question, unless the bankrupt ought to be made a party for the purpose of enjoining him from a sale of the property; but a *lis pendens* would protect the parties, and the statute does not seem to have been held a sufficient reason in England for making the bankrupt a party. As to the costs of defendant Hodgins, they should be governed by the case of *Allan* v. *McDougall*, 6 U. C. L. J. 64.

PRACTICE COURT.

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

IN THE MATTER OF ARBITRATION BETWEEN JOHN KNOWLSEN AND FRANCIS INGLIS.

Award—Want of finality—Arbitrators—Excess of authority.

Where differences arose between the parties to a building contract as to extra work, and in consequence a reference was made of the matters in difference to arbitrators, and they awarded on matters in regard to the original contract not relating to extra work, and the bad part of the award could not be separated from the remainder, the award was set aside on the ground of excess.

(M. T., 1860.)

In this case a contract was entered into by Inglis to build and complete a dwelling house, carriage house, stables and wood shed, and other outhouses, on certain premises of the plaintiff in the Town of Lindsay, according to plans and specifications furnished to him by Knowlsen, and subscribed by each of the parties.

The contract was dated the 14th April, 1857, and by it Inglis agreed to do and perform all the said work in a good, sufficient, neat, substantial, and workmanlike manner, for the sum of £425 of lawful money of Canada, and to complete the dwelling house by the 1st day of November then next ensuing, and the carriage house, stables, sheds, and other outhouses, by the 1st day of December next ensuing, the date of the contract.

In that contract it was stipulated that Knowlsen should be at liberty during the progress of the work to make any alterations either in addition or diminution to or from the work as described in the plans and specifications, such alterations to be paid for in case an increase of work should be occasioned, or a deduction to be made from the price to be paid should the work be less in consequence of such alterations, the value of such alterations to be settled for on such terms as should be mutually agreed to between the parties.

The submission to arbitration bearing date the 15th Dec., 1859, recited, that whereas differences had arisen between the parties respecting the *extra work* done, and the alterations made by the orders of John Knowlsen, under the authority of the contract or agreement entered into on the 14th April, 1857, between the parties, and it was thereby agreed between the parties thereto, to refer *all such matters of difference* between them to the award, order, arbitrament, final end and determination of William Grant of Port Hope, builder, Thomas Fee of the town of Lindsay, carpenter, and Robert Brooks of the town of Peterborough, architect, the decision or award of any two of them to be final.

These arbitrators on the 28th December, 1859, made an award between the parties, and though by the terms of the contract all the work to be done under it was stipulated to be completed by the 1st December, 1857, the arbitrators found and declared that the time for the completion of the works referred to in the original agreement of April 14, 1857, was *extended* to the date of the award. They further declared that the times and modes of payment provided for in the original agreement, should be determined and regulated by the date of the award, and that the purchase of land provided for in the original agreement by Inglis from Knowl-

sen, should be carried out as originally intended, so far as relates to the price and mode of payment, but that the purchase and dates of payment of purchase money should take effect and be dated from the date of the award, the said Inglis to give Knowlsen a mortgage on the said land, to secure the sum of two hundred dollars in four annual instalments with interest.

They then found and declared that any loss sustained by Inglis in discounting notes received from Knowlsen, for work done under the original agreement should be borne by Knowlsen, unless at the time of giving such notes Inglis had been paid up all that he was entitled to receive from Knowlsen on the contract.

After awarding on several other matters, they declared in the award, that the total amount to be paid by the said Knowlsen to the said Inglis, was the sum of three thousand one hundred and nine dollars and twenty-one cents, save and except such sums as the said Knowlsen should from time to time have paid the said Inglis,—and for which he could produce good and sufficient receipts. They then awarded to themselves the sum of ninety five dollars, for their services as arbitrators, to be equally paid by the parties, and resolved to defer the publication of the award until the same should be paid.

In Easter Term a rule *nisi* was obtained by Knowlsen, calling upon Inglis to shew cause why the award should not be set aside on the following grounds.

1st. That the conduct of the arbitrators was irregular in refusing to receive evidence tendered on the matters in dispute.

2nd. That the award was not final as it did not decide the matters referred, but referred certain matters to future settlement

3rd. That the award was uncertain, not specifying the amount to be paid, but leaving disputed accounts unascertained.

4th. That the arbitrators exceeded their authority in deciding on matters provided for by the original agreement between the parties, whereas the reference was of matters respecting extra work and alterations not provided for by such agreement; also in directing the extension of time and the effect of the agreement, and in prescribing and directing the performance of certain things by the parties, for which no authority was given by the submission.

During last term, *Hector Cameron* showed cause.

McLean, J.—It is difficult to imagine how three persons, selected no doubt by the parties for their fitness to decide upon the value of any extra work or alterations, which was all that was referred to them, could fancy themselves at liberty to enter into the consideration of the whole contract between the parties, and to declare that though all the work to be performed under it was by its terms to have been completed by the 1st December, 1857, the time for such completion was extended to the date of the award, and that the time of payment of £50, agreed upon to be paid in *three* annual instalments with interest, by Inglis to Knowlsen, shall take effect and be dated from the date of the award, so that the first instalment shall be due in twelve months from the date of the award, and that Inglis shall give Knowlsen a mortgage to secure the sum of two hundred dollars in four annual instalments with interest.

They seem, however, to have considered themselves clothed with authority to make all such arrangements between the parties as they might consider proper, without being in any way guided by the original agreement, and they have decided on matters which were clearly understood and settled by the original contract, as if they were matters in difference referred to them. But if they had satisfactorily disposed of the matters actually referred to them, all that has been awarded which is not sanctioned by the submission might have been set aside, leaving the decision of the matters referred to stand.

Unfortunately, however, instead of making their award as to the value of the extra work, they have named as the amount to be paid by Knowlsen to Inglis the sum of $3109 21c., except such sums as he may have from time to time paid for which he can produce sufficient receipts. It is clear that they must have included in that sum the whole amount to be paid under the contract for all the work to be done (£425), and they must have added to that sum $352 61c., to make up the large amount which they have declared to be payable by Knowlsen to Inglis, less the amount of such payments *as he holds receipts for*. Whether the extra sum of $352 61c. was for extras or for the work to be done under the contract, it is impossible to tell; but it is difficult to suppose that such an amount of extra work should be done on a house and all the buildings, the original cost of which was to be only £425.

The whole matter remains as much unsettled as it was before the reference; and it appears to me that the award, even if it could be sustained, would make matters more confused and complicated between the parties. The rule must therefore be made absolute for setting it aside.

Per Cur.—Rule absolute.

ELECTION CASES.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-Law.*)

(Before the Chief Justice of Upper Canada.)

The Queen on the relation of McVean v. Graham.

Copy of roll—Qualification of voters—Several voting—Residence of householders—British subject—Returning Officer—Costs.

Held, where a township Councillor was unseated, a new election ordered, and the Returning Officer supplied for the purposes of the new election by the township clerk with a second copy of the Assessment Roll of the township, that the Returning Officer was at liberty to use the copy of the roll supplied to him for the purposes of the first election.

Held also, that under an assessment of "Thomas Burrell and Sons" the Returning Officer did wrong in receiving the votes of the father and the three sons, as the latter could not be said to be "severally rated" on the roll within the meaning of sec. 76 of the Municipal Institutions Act.

Held also, that the Returning Officer did wrong in receiving the vote of Thomas Burrell who at the time of the election was not either a freeholder of the Municipality or a householder resident therein for one month next before the election.

Held also, that in the case of a householder residence in the particular ward where the party tenders his vote is not essential—residence in any part of the township being for the purposes of voting sufficient.

Held also, that a person born in New York in 1830, the son of a British subject who had emigrated from Ireland a short time previous, and a year or two after his birth came to Upper Canada when he was only about two years old, and where he has ever since lived is himself a British subject within the meaning of sec 75 of the Municipal Institutions Act.

Held also, that a person living with his father on the land of his father having no interest of any kind in the land is not entitled to be assessed in respect of the land either as a freeholder or householder.

Held also, that although the conduct of a Returning Officer in some particulars be irregular in consequence of which he is made a party to a *quo warranto* summons yet if his motives were pure and his conduct free from corruption or partiality he is entitled to his costs.

(March 1860.)

McVean, the relator complained against the election of defendant as Councillor for Ward No. 2 in the Gore of Toronto, on the following grounds:

1st. That the Returning Officer did not and would not, though requested, make use of the assessmsnt roll delivered to him by the clerk of the township for the purpose of the said election.

2nd. That the Returning Officer received the votes of the following persons who were not entitled to vote—viz.: Thomas Burrell, Austin Burrell, John Burrell and Thomas Burrell (junior.) The first because he was not at the time of the election a resident inhabitant of the township nor a freeholder therein. The three others, because they were none of them *named* on the last revised assessment roll of the township. And also the vote of Joseph Brown, who was neither a freeholder, nor householder in the Ward, nor a resident therein. And also of James Shaw, who was an alien, and so not entitled to vote.

3rdly. Because the Returning Officer refused to receive the vote of William Harrison for the relator, though he was duly qualified to vote, and tendered his vote for relator.

4th. That Graham had only 16 good votes instead of 23, which was the number recorded for him. And that instead of their being only 18 votes polled for the relator, Harrison's vote ought to have been added, which would have made his number 19.

R. A. Harrison for relator.

McMichael for defendant.

Blevins for Returning Officer.

Robinson, C. J.—Having considered the affidavits, I am of opinion that it cannot be held that the Returning Officer did wrong in acting upon the copy of the revised assessment roll as first certified after final revision, and as certified to the Council, or in rejecting the vote of William Harrison on the ground that his name was not on that roll.

As to the vote of the four Burrells: Thomas Burrell, sen., was disqualified, not being a freeholder of the Municipality, nor a householder resident therein for one month next before the elec-

tion. And his three sons were not entitled to vote, not being severally rated on the last revised assessment roll.

Joseph Brown, is objected to by the relator, because he was not at the time of the election a freeholder, nor householder *in the Ward*. The proof is that he was for many months before the election, and at that time, a householder of the township, though not of the Ward No. 2, and sufficiently rated on the roll. His vote was legal, I think, under the 75th clause.

James Shaw, objected to as being an alien, I think the Statute 4 Geo. II. ch. 21, makes James Shaw a British subject, being born in New York some time before 1830, the son of a British subject, who had emigrated from Ireland, a short time before, and in a year or two after his birth passed on to Upper Canada, when he was about two years old. He has lived here ever since. If he were resident in Upper Canada on 1st March, 1828, he would be clearly a British subject, under our own statute 4 & 5 Vic., ch. 7, sec. 5. It is not clear whether the father came to Upper Canada so early as on 1st March, 1828, I should think most probably not from the evidence, though that is not clear.

Of the relator's votes, William Wiley, was disqualified as being neither a freeholder, nor householder of the Municipality. The father owned land in the Ward which his two sons lived on, having no legal interest in it so far as appears. One brother was married, the other (the voter) was single and lived with him. There is nothing to shew that this was the one entitled to be treated as the householder and the other not. Patrick Phelan is objected to as not being resident within the *ward*, but he was qualified and resided within the Municipality.

Joseph Dawson objected to by Graham, the sitting member, as not being a freeholder or householder in the municipality at the time of the election: and it is proved that he was not, and his vote is not supported.

The result is, that Graham, the sitting member, has his 22 votes reduced by striking out all the Burrells, four in number, leaving 18 votes for him. And this still leaves him in a majority over the relator, whose 18 votes are to be reduced to 16 by striking out Wiley and Dawson.

I think the Returning Officer should have his costs, for I find nothing in his conduct that looks like corruption or partiality, and indeed nothing that can be said to have been done irregularly, except the carrying out the names of the Burrells, as if they had been severally on the poll book, and that was evidently done with no improper motive, but openly and under his sense of duty, supposing that they came under the name Thomas Burrell and Sons, which was on the poll book, and which the Returning Officer supposed entitled him to vote, when it was proved to him that these were the sons that occupied the alleged farm.

It weighs with me too in the view which I take of this case, both as regards the Returning Officer and the sitting member, that there is strong evidence of the relator having given up the contest, which occasioned the poll being closed on the first day. If it had not been so closed, which it hardly would or could have been, we can not tell that the reception of other votes would not have made the sitting member's right too clear to be disputed as regards the number of good votes. It is true that the relator denies in a manner his having given up the contest, and acquiesced in Graham's return, but it is rather an equivocal denial, and there is direct evidence from several witnesses that he did retire on the first day, and in such a manner as would be quite inconsistent with his afterwards entering into a scrutiny of votes.

In my opinion, the sitting member must retain his seat. And his costs, and those of the Returning Officer must be paid by the relator.

Judgment for defendant with costs.

(Before the Hon. Mr. Justice McLEAN.)

THE QUEEN ON THE RELATION OF JOHN C. HYDE VS. JOHN BARNHART, THE YOUNGER.

Municipal Institutions—Incorporated Villages—Election of Reeve—Day therefor—Absence of Councillors.

It is by sec. 130 of the Municipal Institutions Act enacted, that the members of every Municipal Council (except County Councils) shall hold their first meeting at noon on the third Monday of the same January in which they are elected, or *on some day thereafter, at noon.*

It is also by sec. 132 of the same Act enacted, that the members elect of every Council (except a City or Town Council) being at least a majority of the whole number of the Council when full, shall at their *first meeting* after the yearly elections, and after making the declarations of office and qualification when required to be taken, organize themselves as a Council by *electing one of themselves to be the Warden or Reeve of the Corporation.*

The Incorporated Village of Streetsville is represented by a Council of five members. On 21st January (being the third Monday of January) two members of the Council met at the Town Hall and qualified, but in the absence of the three remaining members of the Council were unable to proceed to business. On 23rd January the three remaining members met, and having qualified, organized themselves as a Council, in the absence of the other two of the Council, by electing one of themselves to be Reeve.

Held, that the election was legal, and in the absence of proof of fraud could not be set aside.

The Relator complained that John Barnhart, the younger, of the Village of Streetsville, Doctor of Medicine, hath not been duly elected and has unjustly usurped the office of Reeve in the Incorporated Village of Streetsville, in the County of Peel, under pretence of an election held on the 23rd of January last at the said Village of Streetsville, and declared that he the Relator has an interest in the said election as a Councillor of the said Village of Streetsville, and as a candidate at the said election

He shewed the following causes why the election of John Barnhart, the younger, to the said office should be declared invalid and void.

1st, That the said election was not conducted according to law in this, that the said pretended election did not take place at any regular or adjourned meeting of the said Council.

2nd, That the said Barnhart pretended to have been elected by three out of the five Councillors of the said Municipality, who met together without the knowlege of the other two Councillors of the said Municipality, and without any notice having been given to the said other two Councillors either of the said meeting or of the time when or place where the same should take place, and that the three so meeting without the knowledge or consent of the other two, and without their having had notice, could not in their absence and without notice to them elect a Reeve.

3rd, That if the said election should stand it would be without the other two Councillors having had an opportunity of voting either for or against the said Reeve, and the said election would be an election by three and not by a majority of the Councillors of the said Municipality.

The affidavits filed on the part of the relator shewed that he was elected a Councillor for the Village of Streetsville at the election held on the 7th and 8th days of January; that on the 18th January he received from the Town Clerk notice to be at the Town Hall on Monday then next, 21st January, for the purpose amongst other things of electing a Reeve for the Municipality. That on the 21st, the day appointed by law, being the third Monday in January, he attended at the Town Hall in Streetsville at 12 o'clock, pursuant to the notice received, but none of the Councillors were present except Henry Kerr and the Relator. That the Village Constable was sent to two other Councillors, Robert Leslie and John Barnhart, the younger, to request their attendance, but that they returned no definite answer and did not attend. That there being only two Councillors present no meeting of the Council could be held or business transacted. That Dr. Crumbie, the other Councillor elected, was absent from the Village on professional business. That on Wednesday, the 23rd January, the Relator had occasion to be absent from the Village of Streetsville and to come to the City of Toronto, and that Henry Kerr, another of the Village Councillors, was also in Toronto and absent from the Village on that day. That during the absence of the Relator and Kerr on the 23rd January the three other Councillors assembled at the Town Hall in Streetsville, and that they then and there declared the said John Barnhart Reeve. That the Relator had no notice or knowledge whatever of that meeting, and that though the Village Constable was sent to his place of residence, and that of Henry Kerr, that the other Councillors must have been well aware at the time that they were absent from the Village. That the Relator was a candidate for the office of Reeve at that election, Henry Kerr having promised to nominate him at the meeting of the 21st January, and that he would have done so had there been a quorum present at that time. And that he would have nominated him on the 23rd January, and the Relator would have tried to be elected for that office at that meeting had the said

Kerr and himself received notice or been aware of such meeting in time so that they might have been present That the Relator has since been told by Defendant that the reason he and Leslie did not attend the meeting on the 21st January was because he knew that at that meeting they would be in the minority.

On the part of the Defendant it was shown that no meeting of the Council took place on the 21st January, being the third Monday of the month That on that day only the Relator and Henry Kerr were present That the Relator desired in the absence of a quorum to take minutes and to adjourn the Council till some time in February, but that the Clerk refused to consent to such proceedings, not considering it competent for two members to transact any business. That on the 22nd January none of the Councillors attended at the Town Hall in Streetsville, the usual place of meeting of that body, but that on the 23rd, about a quarter of an hour before twelve o'clock, three members, Messrs. Barnhart, Crumbie and Leslie, appeared at the Town Hall, and the Constable was sent to the residences of the Relator and Henry Kerr to inform them that the other members of the Council were at the Town Hall and to request their attendance. That the Constable returned with the information that the Relator and Kerr were not at home, and thereupon the Clerk called the Council to order, the members present having previously at that meeting made and subscribed the declarations of qualification and office according to law. The absent members, John C. Hyde and Henry Kerr, having made and filed with the Clerk their declarations of qualification and office on the 21st January, when attending for the purpose of a meeting at the Town Hall. That on the Council being called to order, the Clerk presiding, it was moved by Councillor Leslie, seconded by Councillor Crumbie, that John Barnhart be Reeve of the Village of Streetsville for the current year, which motion was carried unanimously. That the Reeve having taken the oaths required by law, and the Council being regularly organized, proceeded to business.

The affidavits of the two Councillors who were present with Mr. Barnhart when he was elected Reeve were filed, and in them each of the Councillors swore very distinctly that he would not have voted for the Relator as Reeve had he been present, and "*will not vote* for him should the election which has taken place be declared void."

The affidavit of Dr. Crumbie shewed certain other facts which led strongly to the belief that the Relator was well aware of the views of the other Councillors in the matter of the election of a Reeve, and that being so aware he was willing to have recourse to contrivances to prevent the views of the majority being carried out.

Dr. Crumbie swore that on the morning of the third Monday in January he was called to visit a patient upwards of thirty miles distant from Streetsville, and did not return till the next day about ten o'clock in the morning. That about noon he went to the Town Hall, but found none of the Councillors there. That on the 23rd January, a majority of the Council being present, and notice being sent to the places of residence of those who were absent, the proceedings prescribed by law were had, and the defendant unanimously elected Reeve. That the Relator did not tell him he was a candidate for the office of Reeve, and that he would not have voted for him and "will not vote for him to be Reeve." That on Friday evening previous to the election of Reeve the Relator called on him and urged him to accept the office of Reeve which he refused. That the Relator then informed him that if he would stay away from the election of Reeve on Monday, 21st January, he, the Relator, "could get all he wanted accomplished," that he requested him not to attend at the meeting on the 21st, and that he "verily believes that John C. Hyde, the Relator, was concerned in getting him away from Streetsville on the morning of the 21st, as the party who called him away is related by marriage to him, and notwithstanding he went a distance of thirty miles the patient he went to see was from home when he arrived there."

McMichael for Relator; *Robert A. Harrison* for Defendant.

McLean, J.—It appears that the Relator who complains of the election of Reeve by the majority of the Councillors in the absence of himself and another Councillor who was favourable to his views, was quite willing to induce one of the Council to neglect or rather abandon his duty, so that he, the Relator, could get all he wanted accomplished. What he wanted is shewn by his own affidavit, in which he says he was a candidate for the office of Reeve, and would have been proposed by Henry Kerr on the 21st had there been a quorum of the Council present, and on the 23rd had they been present at the election. The failure of the attempt to induce Dr. Crumbie to remain away from the meeting of the Council on the 21st leads very strongly to the conclusion that his absence was procured by an unworthy and despicable trick on the part of some one who desired that the Relator might get all he wanted accomplished during his absence.

Had Councillors Barnhart and Leslie attended on the 21st, as requested, the Relator, according to his statement to Dr. Crumbie, would have succeeded in his object of being elected Reeve, inasmuch as the four Councillors present would have been equally divided on the question of the election of Reeve, and the Relator, as the highest rate-payer as to amount, would have been entitled to a casting vote in his own favour. But the Councillors opposed to the election of the Relator as Reeve, seeing, as he declares in his affidavit, that they would be in the minority if they did attend declined by their presence to promote the election of one who was not the choice of the majority of the Councillors, and by staying away frustrated the Relator in getting all he wanted accomplished.

This in fact appears to be the chief cause of complaint, though the ground of objection to the election of Defendant as Reeve is also taken,—that he was elected in the absence of the Relator and Henry Kerr, and without any notice to them of the intended meeting on the 23rd January.

It appears by the affidavit of Mr. Hope, the Clerk of the Council, that none of the Councillors attended at the Town Hall on the 22nd January. Had the election taken place on that day the Relator could not have reasonably complained (though he might have done so with as much reason as he now does) that it took place without notice to him and without his knowledge, for on the 22nd it appears that the Relator was present at Toronto, and filed in the office of the Clerk of the Counties Council his *certificate of being Reeve* of the Township of Toronto for the present year, and sat in the Council as the representative of that Township.

The Relator in his affidavit states, that on Wednesday, the 23rd January, he had occasion to be absent from the *Village of Streetsville, and to come to the City of Toronto*, thus inducing a belief that he came to the City of Toronto on the 23rd. It would have been more candid to have stated that he absented himself from the Village of Streetsville on the 22nd for the purpose of assuming his position as a member of the Counties Council as Reeve of the Township of Toronto, and that he continued absent as the representative of that Township on the 23rd when the election of Reeve of Streetsville took place. The affidavit appears intended to convey the idea that the three Councillors, by whom the election was made, took advantage of the casual absence of the Relator and Henry Kerr in Toronto to do what they did in electing a Reeve; when the fact is, that the Relator absented himself on the 22nd, and remained absent on the 23rd, expressly for the purpose of representing another Municipality.

Viewing all the circumstances it is impossible to believe that the Relator and Henry Kerr could have hoped or believed that the election of Reeve of Streetsville would be deferred to suit their convenience, or that it would await their return from Toronto; but if they did really entertain any such notion they could scarcely have supposed that their presence would have made any difference in the election of Reeve, if the affidavits filed are entitled to any credit.

The 130th section of the Municipal Institutions Act, chap. 54, Consolidated Statutes, provides, that the members of every Municipal Council (except County Councils) shall hold their *first meeting* at *noon* on the *third Monday* of the same January in which they are elected, or *on some day thereafter* at *noon*, and the members of every County Council shall hold their first meeting at noon or some hour thereafter, on the *fourth Tuesday* of the same month or on some day thereafter.

Then the 132nd section provides, that the members elect of every Council (except a City or Town Council), *being at least a majority of the whole Council when full*, shall at their *first meeting* after the yearly elections, and after making the declarations of office and qualification when required to be taken, organize themselves as a Council, by electing one of themselves to be Warden

or Reeve of the Corporation, and such person shall be the head of the Council.

Under the first mentioned section the 21st was the day (being the 3rd Monday of the month of January) on which all Municipal Councils (except County Councils) should have held their meeting, but the section does not make it imperative to meet on that day. It declares that such Municipal Councils shall meet on that day *or on some day thereafter at noon.* So that as in this case if a meeting from any cause, whether accident or design, has not been held on the 21st it might legally be held on some day thereafter at noon.

The Council of Streetsville did not meet on the 21st, but a majority of the whole number of the Council when full met on the 23rd of January, and then organized themselves as a Council by electing one of themselves to be Reeve of the Corporation. This they were required to do at their *first meeting*, and though two members of the Council were absent, and it may be true that they had no knowledge or notice of the meeting, the meeting and the election of Reeve seem to have been in strict accordance with the provisions of the statute.

The want of notice of such meeting affords no sufficient reason for setting aside the election of Reeve, for it does not appear to have been the duty of any one to give such notice, and though the Clerk of the Council gave notice on the 18th January of the intended meeting on the 21st, it was not as a matter of duty that he did so, for no such duty is imposed upon him by law, and he could not be expected to give notice of a subsequent meeting of which he may have been ignorant himself till the time when the members presented themselves at the Town Hall.

If indeed any number of members had taken pains to conceal from others the time intended for their first meeting, or had met at any other than the usual and proper place of meeting of the municipality, there might be grounds for contesting proceedings of so irregular a character; but no such grounds exist in this case, and when the Relator left Streetsville on the 22nd to assume the duties of Reeve of the Township of Toronto in the Counties Council, he must have been well aware that those of the Council of Streetsville whom he left behind were under no obligation to send him notice of a meeting to be held on the following day for the purpose of organizing the Council of Streetsville, but that they were quite competent to elect a Reeve in his absence. They might very well assume that the Relator, by taking his seat in the Council, had made his election to continue as the Reeve of the Township of Toronto, and that he could no longer aspire to the apparently incompatible office of Reeve of Streetsville.

It appears to me that while the Relator has by this proceeding called forth evidence calculated to throw some degree of discredit on his own views in relation to the election of Reeve, he has wholly failed to establish any ground on which the election of the Defendant to that office can be set aside or declared to be null and void.

I do therefore adjuge, that the Relation and Statement be dismissed with costs, to be paid by the Relator to the Defendant.

Judgment for Defendant with costs.

(Before His Honor JAMES ROBERT GOWAN, Esq., Judge County of Simcoe.)

THE QUEEN, ON THE RELATION OF DANIEL RICHMOND, AGAINST ALEXANDER TEGART.

Municipal Act—Qualification of Councillors—Overseers of Highways disqualified—Notice to Electors—Effect thereof—Costs.

Held, that a person in the year 1860, by by-law of the township of Nottawasaga, appointed an overseer of highways—which office he accepted—was, within the meaning of sec. 73 of the Municipal Institutions Act, "an officer of the municipality, and as such not qualified to be elected a councillor of the municipality" at the election held in January, 1861.

Held, also, that notice of the disqualification having been given to the electors at the time of the election, relator, who claimed the seat, was entitled to be seated.

Held, also, that relator was entitled to costs as against defendant.

(March 2, 1861.)

A summons, in the nature of a *quo warranto*, had been issued in this case upon the *fiat* of Judge Gowan, calling on the defendant to shew by what authority he usurped the office of councillor for ward No. 3 of the township of Nottawasaga, and why the relator should not to be seated in his place.

The grounds upon which the summons was issued were, that Alexander Tegart—who had been elected at the annual municipal election for the ward as councillor—was disqualified, as holding the office of pathmaster or overseer of highways for the township of Nottawasaga; and that he was also disqualified on account of receiving "an allowance" from the corporation as such overseer. It was also made a part of the statement that relator, at the nomination, had objected to Tegart as being disqualified as such overseer; and that the returning officer had expressed his opinion to the effect that Tegart was disqualified; and that the electors having had notice of the alleged ineligibility of Tegart that the relator should be seated.

The facts appeared to be, that in May of 1860, the municipal council of Nottawasaga appointed Tegart (the defendant) overseer for one of their divisions, by by-law, which appointment he, Tegart, had accepted. At the election for the ward, holden on the 7th and 8th January last, Richmond, Tegart and one Jonah Long were put in nomination. Upon Tegart being proposed Richmond objected to him as being disqualified, on account of holding the office of overseer. The returning officer, on being appealed to, read the clause in the act disqualifying persons from holding the office of councillor, and expressed his opinion that Tegart was disqualified. Tegart, however, insisted upon running, and said, "That he would run the risk, and in the event of his being unseated would pay the costs." Long having withdrawn, the polling commenced, and at four o'clock upon the second day, Tegart declared elected by a majority of one—the numbers polled being for Tegart 41, and for Richmond 40. Several affidavits were put in on behalf of relator, showing that both the electors present at the nomination and those who, not then present, afterwards voted, were aware of the objection that had been made to Tegart's candidature. On behalf of the defendant, it was sworn by some of the electors that what they understood by the objection was, that Tegart was protested against as receiving an allowance as overseer.

McCarthy, for the relator, contended that Tegart was "an officer of the corporation," as being overseer of highways, and therefore disqualified by sec. 73 of cap. 34 Con. Stats. U. C. from being a councillor for the township. He referred to sub-secs. 2 & 3 sec. 243 of same act, and 5 U. C. L. J. p. 44; that being appointed and having accepted the office of overseer, he continued such officer, in the absence of anything in the by-law appointing him to the contrary, until removed by the council, sec. 174; that his duties as overseer and councillor were clearly incompatible, and his was such a case as was within the spirit of the act; that he received an allowance in not having to perform his own statute labor, and was on that account disqualified, referring to *Regina ex rel Coleman* v. *O'Hara*, 2 U. C. Prac. R. 18; *Regina ex rel Moore* v. *Miller*, 11 U. C. Q. B. 465; that it was clearly a case—supposing Tegart to be disqualified—for the relator to be seated, because the electors had express notice of the facts, and also from the returning officer's statement of the law: *Regina ex rel Clarke* v. *McMullen*, 9 U. C. Q. B. 467; *Regina ex rel Harvey* v. *Scott*, 2 U. C. Cham. R. 88; and further as to costs, *Regina ex rel Lutz* v. *Williamson*, 1 U. C. P. R. 94; *Regina ex rel Dexter* v. *Cowan*, 1 U. C. Prac. R. 107; *Regina ex rel Davis* v. *Carruthers*, 1 U. C. Prac. R. 114.

Moberly, for the defendant, argued that as by sec. 150 of the Municipal Act it was compulsory to appoint a certain class of officers there enumerated—such as clerk, treasurer, and by sec. 243, under which overseers were appointed—it was discretionary that a difference was to be made between the two classes of persons to be appointed; that under the by-law, which was entitled, "For appointing overseers for the year 1860," the defendant had ceased to be an officer upon the last day of the year; that the affidavits of the treasurer and others completely disproved the allegation of Tegart receiving an allowance from the corporation; and that it was not a case for a new election, the electors being ignorant of the objection taken.

GOWAN, Co. J.—The fact of the defendant's appointment as one of overseers of highways of the township, in May, 1860, does not appear to be questioned. It is stated in more than one of the affidavits filed, and a certified copy is filed of the by-law appointing

him and others to that office. It appears, moreover, that he accepted the office and entered upon its duties.

The by-law referred to is called "A By-law for the appointment of Overseers of Highways on the several Concession and Side Lines within the Township of Nottawasaga, for the year 1860." The enacting part, however, is more general; so far as material is in these words: "The following persons shall be and they are hereby appointed overseers of highways for the several divisions, &c."

This by-law was passed in council on the 1st of May, 1860, and it is urged that it was for that year only. The appointment appears to me to be a general one; and the title I think cannot, according to the established rule of construction, be allowed to restrict the enacting part of the by-law, to limit the appointment, so that it would expire on the last day of the year 1860. But even if it did, sec. 174 would, as was argued for the relator, have the effect of continuing overseers of highways in office at all events until after the first meeting of the council in 1861. Sec. 174 provides that "all officers appointed by a council shall hold office until removed by the council." The words are sufficiently broad to take in the present case, and the particular office is one within the mischief which the section was designed to guard against—the public injury and mischief that would result in case a municipality was left without officers. So that if an overseer of highways is an officer of the municipality, *within the meaning of section* 73, the defendant holding that office was disqualified.

As early as 1793 the office of overseers of highways was created by statute in Upper Canada, and it has lasted ever since. Town or township officers were then chosen by the inhabitants, who assembled yearly for the purpose: (33 Geo. III. cap. 3.) In various statutes since that time, and down to the first District Council Act, the officer was recognized, and in the present law the Legislature in speaking of officers must be assumed to have spoken of existing facts, and to have had overseers of highways in mind. Indeed this would appear on the face of the act, for in sec. 243 sub-sec. 2 overseers of highways are expressly termed officers of the corporation, and councils are authorized to appoint them. The words used in sec. 73 are, "No officer of any municipality," &c., "shall be qualified to be a member," &c. Overseers of highways are appointed by councils, hold a post or place under and are accountable to them, have certain powers conferred and duties made incident to the appointment—surely this of itself constitutes an office—the incumbent an officer. And I must think now, as heretofore, overseers of highways are officers of municipalities.

But are they *such* officers as were intended to be disqualified under sec. 73? So far as the particular office is concerned, a reason for disqualification would be found in the incompatibility of the office of overseer of highways with that of township councillor; and that incompatibility would certainly exist if under any circumstances the individual would in one of his capacities be subject to his own correction in another; if the duties of both offices could not be carried on with efficacy and impartiality, at common law a disability for office in the holding of some other office incompatible therewith.

Now if overseers of highways could be called to account before township councils for the exercise of their duties, or the disposal of public monies or property coming into their hands, they could not occupy that free, unencumbered and independent position which a member of bodies such as our municipal corporations, with their large powers for local legislation and control, ought to be placed in, and in which the Legislature designed they should be freed from irregular influences.

Looking at the duties of overseers of highways as prescribed by the repealed statutes we see what the office was designed for, and what is its range of duties. They were to make and keep in repair the highways, call out persons bound to labor, and to superintend the same; expend monies receivable for re-constructing roads—their general duties being, with the means within their control, to keep the roads clear. But specific statutory duties are not now traced out for them; that is left to the municipality. Sec. 174 of the Municipal Act enacts that all officers appointed by a council shall perform all duties required of them by the by-laws of the council *having jurisdiction over such officers*—in other words, by the council appointing them.

Turning to the by-law of the municipality of Nottawasaga appointing defendant, I find that certain "duties of overseers of highways" are referred to, and incorporated, as it were, with it; and to this code of regulations overseers of highways are subject. This paper of duties of overseers of highways—which appears to have been printed for the use of officers—is divided into distinct paragraphs: the first fifteen particularly regulating the duties of this officer. By the second section, so to term it, the ordinary duties are to be performed by the first of September; it reads thus: "He must cause all statute labour, and money in commutation of statute labour, and all money that may come into his hands by virtue of his office, to be expended between the 10th of May and the 1st day of September." It is urged for the defendant, that as his duties are to be completed on that day, he cannot be regarded as an officer after his work is done. This I think an erroneous view. It probably would be so held in the case of an assessor, who has certain duties defined by statute to perform, and who is *functus officio* when the last is completed, and who is not liable to be again called on to act. Overseers of highways stand in a very different position. In a climate such as ours, the roads, particularly in the spring and fall, may in a single day be so injured as to be impassable or dangerous, and, unless travel is to be stopped, require immediate repair; and in winter may be blocked up with snow drifts; and it is particularly necessary, at such times, to have an officer whose duty it becomes, and who has the means under his control, to repair the damage or remove the obstruction. And sec. 3 in the overseer's regulations is evidently framed to meet such contingencies. It is as follows: "In case of any sudden obstruction or damage to a road, or for the purpose of putting up marks to guide travellers over frozen waters, the overseer is required to expend any money in his hands, or to call out statute labour under his direction, at any other time than between the 10th of May and the 10th of September; and if he has no money or labour unexpended he shall nevertheless call out persons residing in his division, apportioning such labour as equally as may be amongst the inhabitants; and he shall immediately give in an account of the labour so performed to the township clerk."

Looking at these regulations as a whole, sec. 2 evidently relates to ordinary and regular duties; sec. 13 to extraordinary duties, rendered necessary by some sudden obstruction or damage to a road. And the latter section assumes that the officer may have monies in his hands after the 1st of September; and if he has no labour or money unexpended, he is to call out the persons in his division to work, apportioning the labour amongst them, and immediatly after give an account thereof to the township clerk. Thus he may be called upon to act, and there is no other person that can act in the way spoken of at any time up to the first meeting of the new council in January: and if so, he might be placed in the position before referred to — subject in one of his capacities to his own correction with another.

I must think, therefore, an overseer of highways is an officer within the meaning of the 73rd section. At common law the acceptance of the second office could doubtless act as a surrender at law of the former. By express provision in the Municipal Act the individual being disqualified by holding the office, the election as councillor is void.

Is the relator, who is under no disqualification, and who stood within one of the defendant in the votes given at the election, to be declared duly elected, or a new election to be ordered? Upon the evidence before me I find that the objection was publicly taken at the time of the election, and insisted upon by the relator; that the returning officer publicly read the clause in the statute, and gave it as his opinion that the defendant was disqualified by reason of his being an overseer of highways; and that the electors had full opportunity for hearing all that passed, and there is every reason to believe, from the affidavits on both sides, that the electors generally had knowledge of the objection; and were aware that the defendant sought election, taking the risk of its being set aside; and that there was apparently a full vote in the ward, the relator receiving within one vote of the defendant. I do not think a new election should be had; and though the cases cited in our courts which are referred to in Mr. Harrison's valuable work the "Municipal Manual," do not go the length of seating the candidate having the next highest number of votes to the parties dis-

qualified, yet the principles to be collected from them warrant the conclusion I have arrived at.

I have referred to several English cases, and collect from them that if an election be made of a person who is disqualified; that is incapable of being elected; and notice of disqualification be given to the electors, every vote afterwards is considered as not being given at all. The effect of which is, the candidate having the next highest number of votes is elected—the election of the disqualified person being void. Every man is bound to know the law with reference to every act he undertakes to perform; and where an elector is apprised of the fact of disqualification of a candidate, and yet votes for him, he assumes the risk of throwing away his vote, in case his construction of the law is wrong. The law applied to the present case shows that the relator is entitled to be admitted to the office.

As to the question of costs, in view of the decided cases in our courts, and of the declarations made by the defendant himself, as stated by the township clerk and others, that "he would run the risk, and if his election was declared invalid, would pay the costs," I do not think I should withhold costs from the relator. I regret very much that the defendant did not avail himself of the right given him by law to disclaim; but he does not appear to have taken any steps to obtain advice after the election, but acted on his own judgment.

My judgment is, that the defendant hath usurped and does usurp the office, and that he pay the relator his costs; and I adjudge that the relator was duly elected to the office of councillor for the township, and be admitted thereto.

Judgment for relator with costs.

(Before his Honor the Judge of the County of Kent.)

THE QUEEN ON THE RELATION OF NORTHWOOD v. C. J. S. ASKIN.

Municipal Institutions Act—Qualification of Candidates—Property—Lease—Assignment.

On 1st May, 1859, J. D. demised by lease under seal certain premises to E. B. D. for the term of five years. This lease contained a covenant that the lessee should not assign without leave of the lessor. Subsequently to its date the lessee with the assent of the lessor assigned the lease to the Defendant for the remainder of the term then unexpired. Defendant then verbally assigned his right to the term and sublet to one R P. who entered into possession of the demised premises. *Held*, that the assignment of and by Defendant to R. P. being by parol and being without the knowledge of the lessor J. D; that defendant was notwithstanding it properly assessed in respect of the demises premises.

(April 9th, 1861.)

The relation in this matter set forth that the defendant usurped the office of Councillor for Ebert's Ward, in the Town of Chatham, for that he the defendant was not duly elected or returned as such Councillor, in this, that he defendant was not at the time of his supposed election, seized or possessed of the property qualification to qualify him to be elected to, and returned to serve in the said office.

Secondly, that the defendant did not before entering upon his duties as Councillor, nor within twenty days from the date of his supposed election, take and subscribe the necessary declaration of qualification, and office; but on the contrary thereof only declared in his said declaration of qualification that he was seized or possessed of a part of Lot No. nine on the west side of King street, in the said Town of Chatham, which, from the Assessment Roll for the said Town, for the last year, 1860, appears to be assessed to him as tenant, at the yearly value of eighty dollars, and no more.

The affidavit of the relator accompanying the relation, set forth that on examination of the Assessment Roll, the relator found the defendant assessed in Eberts Ward as a tenant or householder only, of part of Lot No. nine on King-street, one John Sheriff being the owner thereof—at the annual value of eighty dollars—and also as tenant or householder of part of Lot No. eighty-nine, on King-street, one John Degge being owner, at the annual value of eighty dollars; and in Chrysler's Ward as owner or freeholder of Lot No. Ten in block (B) on Cross-street, half an acre, at the annual value of thirteen dollars—and that deponent is well acquainted with the said part of Lot Number Eighty-nine, King-street, so assessed to the said defendant, and that he knew that one Rowley Pegley, surgeon, has been in the possession or occupation thereof, as he the deponent was informed, in his own right, as tenant thereof, since about the first of December, 1860, and that said defendant had not since the last named time, been in the occupation or possession of the said part of Lot Eighty-nine in any way whatever, and was not in the occupation or possession thereof at the time of said election.

In reply to the relation, the defendant, by affidavits says that he appears on the Assessment Roll for the Town of Chatham, for the year 1860, as assessed for the several properties set forth in the relator's affidavit, that he paid the taxes for the same for that year, to the amount of sixty dollars, or thereabouts. That the property known as part of Lot No. Eighty-nine, King-street, so assessed to him, had been held by one E. B. Donnelly, druggist, by indenture, for the term of five years from the first of May, 1859, from one John Degge, the owner thereof; that the said Donnelly assigned said lease to him (the defendant) with the assent of the Lessee, Degge for the remainder of said term; and that he, the defendant, now holds the said house and that he has paid the rent and taxes thereupon up to the present time.

Thirdly—That he placed Rowley Pegley in possession of the said premises without the knowledge or consent of the said Lessee Degge, and the said Pegley now has no lease or other writing from the said Degge, or from him the defendant, of the said premises, and that he the defendant, still holds the key of the same, and held the same at the time of his election to the office of Councillor, at the last election for the said town.

The defendant corroborated his own affidavit, by the affidavit of Duncan McColl, Clerk of the Municipality of the Town, which states that the defendant is assessed for three properties in the Town on the last Revised Assessment Roll for 1860, more than sufficient to qualify him for the office of Councillor for the said Town; and that the defendant appears by the Collector's Rolls, to have paid for taxes in that year, on the said properties the sum of forty-one dollars and twenty-eight cents.

The defendant, further put in the lease from John Degge to E. B. Donnelly of the part of Lot No. Eighty-nine, on King-street, and the affidavit of the Lessor, that the above named defendant holds the original Lease made by him to E. B. Donnelly of the premises, by assignment from the said E. B. Donnelly to the defendant. That he, Degge, has never given a lease of the said premises to any one else, nor has he given consent to the said defendant to sub-let the premises.—That the said defendant has paid him the rent for said premises up to the first of February, 1861, and that he has always paid such rent since the said assignment of lease to him.

At the last hearing, Rowley Pegley appeared on subpœna, and and on being sworn, said—"That he knows Lot No. Eighty-nine, on King-street, with the Drug store on it; that he is in possession of the premises; has been in such possession since the eighth of November last; got possession from defendant, who has not been entitled to interfere with the possession; at least, he thought not; knows Degge the Lessor; made arrangements with regard to paying him the rent three or four weeks after he, Pegley, was in possession. It was not in writing; I was to occupy the house for a year; did not agree to pay rent to any one else; Degge did not object to witness having possession; he has paid Degge nothing. As Degge says in his affidavit, he had received the rent from defendant up to February last; he witness cannot say that he is liable for rent up to that time to him. He supposed he is liable for rent to the defendant up to February last. He has had exclusive possession of the premises since November last; Degge and he were to have a written lease of the premises; I was to pay him thirteen dollars per month; this was agreed on in a cursory conversation."

The lease was a statutory one, under an act to facilitate the leasing of lands and tenements, embodied in Con. Stat. p.913, clause 7. One of the covenants of the lease was, that the Lessee would not assign or sub-let without leave of the Lessor.

In the course of the hearing the relator admitted that the defendant was assessed for all the lots above mentioned, *including the premises in dispute.*

McCrea for relator; *R. S. Woods* for defendant.

WELLS, Co. J.—At the hearing on the 22nd of Feb., last, an objection was taken by the defendant's counsel that the defendant was not bound to answer, owing to a true copy of the relation

not having been served on the defendant, and the objection prevailed. At the next hearing on the 19th March ult, the defendant's counsel again denied the right of the relator to proceed on account of no new order or summons having been obtained—that the former order had lapsed. The point having been reserved until the Judgment should be made up—I now decide that the former hearing having been disallowed on a a clerical error in the copy of the relation, and the summons having been originally made returnable on the eighth day after the day on which the writ was served, no new summons, or order for the time, was necessary.

The qualification for a Councillor for towns required by the 70th Sec., Mun. Ins., Con. Stat., p. 530, is that he has at the time of the election, in his own right, or in the right of his wife, as proprietor or tenant, freehold or household property, rated in his own name on the last Assessment Roll of such municipality, to the value of eighty dollars, per annum, in freehold, or one hundred and sixty dollars, per annum, in leasehold; and in the same proportions where the property is partly freehold, and partly leasehold. The affidavit of the Town Clerk does not specify the property or properties on which the defendant is assessed so as to more than qualify him, as he states, for the office of Councillor; but other evidence, and the admission of the relator, put it beyond doubt that the defendant was sufficiently assessed to enable him to be elected such Councillor. The other question, as to the "right," at the time of the election of the defendant to the properties for which he was so assessed, must be decided upon strictly legal grounds, opening out some of the most intricate points in respect to the laws governing the holding of real property. The 70th Sec. above cited, does indeed declare that the qualification of all persons, where a qualification is required under the Act, may be of an estate either legal or equitable. It cannot, however, be made applicable to the defendant's case, as there are no equities alleged in his favour, if his strictly legal right to any of the holdings fail him.

The question of possession, raised by the relator, would be determined, it would seem, by the Assessment Roll of the year before the electon. It may, however, be one of the necessary elements in determining the question of "right," raised by the evidence, and therefore cannot be properly ignored.

The premises in dispute, 89 on King Street, were leased by the owner John Degge, to E. B. Donnelly or assigns, on the 1st May, 1859, for five years, at the yearly rent of thirty-six pounds, payable in quarterly instalments of nine pounds each, in advance. The lessee Donnelly assigned the premises to the defendant for the residue of the term, who was assessed for the same for the year 1860, and who paid the rent of the premises up to the 1st Feb last, some three weeks after the return of the defendant as a Councillor of the Town. It is one of the defects in this mode of procedure that without a personal examination of the parties or witnesses, *viva voce*, instead of a reliance being placed upon affidavits, many particulars cannot be arrived at without great delay, which may be required in the adjudication of the case. The rent was however to be paid quarterly in advance, and it is to be supposed that the defendant paid the rent some two months and a half before the election took place, although the date of payment is not stated in the affidavits. The defendant, besides going into possession of the premises, paying the rent for the same, being assessed for them, and paying the taxes on them for the last year, states that he held the key of the same at the time of the election, and still holds it, although he placed Rowley Pegley in possession of the premises, without the knowledge of the lessee Degge, and without any lease or other writing from the said Degge or himself. The witness Pegley, testifies that he has sole possession, as he believes, and in equity he may make good his claim, if that be important to him. As the case now stands, however, it is quite certain that the defendant has the right to them, of which he has never divested himself, or been divested, and that he can maintain an action for the enjoyment of the same in any Court of Law, of competent jurisdiction.

By the 4th sec. cap. 90, Con. Stat., it is enacted, "*that a partition and an exchange of any land, and a lease required by law to be in writing of any land, and an assignment of a chattel interest in any land, and a surrender in writing of any land, not being an interest which might by law have been created without writing, shall be void at law, unless made by deed.*"

A lease may be made by a verbal agreement, if the term be not for more than three years; but if it do exceed three years, then, by the statute of Frauds, 29, Car 2, cap. 8, sec. 1, it must be in writing, signed by the lessee or his agent, and that agent must himself be authorised by writing to do so. By this statute, the lease from Degge to Donnelly, being for five years, required to be in writing, and by our own Statute above cited, a lease then required by law to be in writing, "*shall be void by law, unless made by deed,*" or under seal. The lease being in writing and under seal, was therefore valid, and we are now to enquire whether any pretended assignment from the defendant to Pegley was also legal, the assignment from Donnelly to defendant being shewn without question. By the above mentioned Statute of Frauds, 29 Car. 2, c. 3, it is enacted that "*all assignments of leases for terms for years, shall be by deed or note in writing signed by the party assigning or his agent thereunto lawfully authorised by writing.*" Even were the original lease only for three years, and verbal, as it might have been *assigned*, save in writing,—the exception in the statute not applying to assignments, as it does to leases.

The right to the premises in dispute, must therefore be considered to be in the Defendant,—the party occupying the same being here under no title recognisable in law, holding at best a joint possession with defendant, who has not, so far as is shewn, been ousted or disseized. Allowing the defendant a qualification for one half the yearly value of the premises, he would be more than qualified as a Councillor, including his other properties concerning which there is no question.

There is an apparent irregularity in the form of the declaration of office, made by the defendant in the specification of the estate upon which he qualified; but he declared substantially that he was seized or possessed of such an estate as qualified him to act in the office. The declaration was irregular, but was not a nullity, such as to operate a forfeiture of office, even were not the 175th clause requiring the declaration, in a certain form, merely directory and mandatory.

It was intimated by the Chief Justice of the Common Pleas, in *Reg. McGregor* v. *Kerr*, Law Journal, March, 1861, that he was inclined to support the election of the defendant, and to go as far as the facts would allow, for the purpose of reconciling the mode of rating, if he (the defendant) had really a legal qualification. Under this ruling I should feel it my duty not to ignore an election by the people, unless no doubt could exist in law as to the absolute necessity of the same having to be done.

Judgment for the defendant, with costs.

DIVISION COURT CASES.

(In the First Division Court of the County of Carleton.)

SIMON FRASER, ESQ., SHERIFF, &C., v. G. B. L. FELLOWES, AN ATTORNEY, &C.

Liability of Attorney to Sheriff for fees on writs of mesne process.

An attorney placing writs of mesne process in the hands of the Sheriff is personally responsible for the amount of Sheriff's fees. The Sheriff is not bound to look to the parties to the suit, but for such fees may at once sue the Attorney.

(28th December, 1860.)

This was an action to recover the sum of £9 13s. 5d., and interest, for services rendered by the plaintiff in the service of process, &c., as Sheriff of the county of Carleton.

The defendant admitted that the services were all rendered and the charges correct, but contended that he was not liable to the Sheriff for the service of process put into his hands by the defendant, as the attorney of other parties, but that the Sheriff must look to the parties, plaintiff or defendant (as the case may be), for whom the process may have been served; and also that he had given the plaintiff notice that he would not be responsible as the attorney of other persons.

The account was from 1856 to the Fall Assizes in 1859, and contained charges to the amount of £1 16s. 6d. for fees in two cases in which defendant was the plaintiff himself.

ARMSTRONG, Co. J.—The only question referred to me is whether an attorney who puts process into the Sheriff's hands in this

country is liable personally for the fees accruing to the Sheriff for such services. I have no hesitation in saying that I think he is, and that such is the law in this country. It was so held in the case of *Corbett* v. *McKenzie*, 6 U. C. Q. B. 605.

In every case where the Sheriff is employed by the Attorney, there is an implied contract on the part of the Attorney to pay the fees incurred; and it would be very inconvenient to Sheriffs, and unreasonable, to suppose that they should be forced to look to suitors, who may be in distant and foreign countries and with whom they seldom have any communication. Although sheriffs in England may not have an action against an attorney, which I do not find very clearly settled, yet in numerous cases it is held that the bailiff who serves the process may recover from the attorney in the suit.—*Wallbank* v. *Quarterman*, 3 C. B. 94; *Maule* v. *Maud*, 2 Ex. 608. And in this country, as the sheriff is the officer immediately employed by the attorney, I think he has a right to look to his employer for his fees.

There was evidence on the part of the defendant, that he gave the sheriff some years ago a general verbal notice that he should look to the defendant's clients and not to him for his fees, but has since paid him some fees, as other attornies have done, and placed writs, &c., in his hands, in the usual way of the profession. I do not think such a notice sufficient to relieve the defendant from his liability. It is the general practice of attornies to charge in their bills sheriff's fees on all process, &c., served in the case; and if they do not in all cases recover the amount themselves, that is no reason why they should not pay the sheriff in such cases as they may choose to employ him.

I give judgment for the plaintiff for £9 13s. 5d., and order execution to issue in six days.

UNITED STATES LAW REPORTS.

COMMON PLEAS, PHILADELPHIA.

(From the Philadelphia Intelligencer.)

COLLADAY v. BAIRD.

In Equity.

A person who has appropriated to himself a particular label, sign or trade mark, indicating that a certain article is made or sold by him or his authority, and with which label or trade mark the article has become identified, is entitled to the protection of a Court of Equity, which will enjoin any one who attempts to pirate upon the good will of his friends or customers by using such label, sign or trade mark without his authority; but there must be, between the genuine and fictitious marks, such general similarity or resemblance of form, color, symbols, designs, and such identity of words and their arrangement, as to have a direct tendency of misleading buyers who exercise the usual amount of prudence and caution; and there must also be in such a distinctive individuality in the mark employed by the counterfeiter as to procure for him the benefit of the deception resulting from the general resemblance between the genuine and the counterfeit labels or trade marks.

Motion for Special Injunction.

The following opinion was delivered by

LUDLOW, J.—The complainant, in his bill, alleges that he is the manufacturer of a certain style of goods known in the market as "Aramingo Check;" that, at great labor, care and expense, he has been able to produce a superior article, which he now manufactures and sells in large quantities, especially in the city of New York; that in the year 1854, he devised and adopted a certain trade mark, or name, to wit, the words "Aramingo Mills," and that he caused tickets, or labels, bearing the said trade mark, to be lithographed and printed. These labels, or tickets, the complainant used, by placing one of them outside of each piece of goods forwarded to market for sale; and thus the trade mark became identified with the goods manufactured by the complainant, although his name does not appear upon the label as manufacturer. The complainant further alleges, that the defendant, intending to deprive him of the exclusive use and benefit of his trade mark, cunningly devised a label upon which the words "Aramingo Mills" appear; and thus, by a colorable artifice succeeded in defrauding him of a portion of his well-earned reputation and profit, having introduced an article of check, into the New York market, and sold the same, in appearance similar, but in fact inferior, to the article manufactured by him, the complainant.

The defendant declares that true it is that the goods so manufactured are so made at a place called the "Aramingo Mills," but that these Mills have long been known by that name, and that the complainant has no exclusive right to the use of the name as a trade mark; that the defendant also manufactures his goods at the same establishment, being in fact the lessor of the complainant; he further denies that he ever, in any way, intended or did introduce his goods into the market by a fraudulent device; and that, although upon the label now used by him the words "Aramingo Mills" appear, yet that he has a perfect right to use them, especially as he intends to succeed in business by his own name and fame as a manufacturer, and has, therefore, among other things, inserted his name in full upon the label.

This brief statement of the bill filed, and the affidavits presented, will enable us clearly to understand the true principle involved in this case, and while we have been unable to discover, in print, any adjudged case of authority in Pennsylvania, yet the subject is not new, and has repeatedly received the attentive consideration of justice both in this country and in England. The principle has been firmly established that while a manufacturer has no copyright in a label, he yet may adopt a trade mark, which so far becomes his own property as to entitle him to the protection of courts of law and of equity.

In *Partridge* v. *Menk*, 2 Sandf. Ch. 622, the principle is stated, and we think, accurately, thus, "The Court proceeds upon the ground that a complainant has a valuable interest in the good will of his trade or business, and having appropriated to himself a particular label, sign, or trade mark, indicating that the article is made or sold by him or by his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to pirate upon the good-will of his friends or customers, or the patrons of his trade or business, by using such label, sign, or trade mark, without his consent or authority."

The leading English cases at law and in equity upon this subject, will be found collected in a note to *Coats* v. *Holbrook*, 2 Sandf. Ch. p. 599. Also *Clement* v. *Maddick*, 16 Leg. Intg. p. 236. While in *Taylor* v. *Carpenter*, decided by Judge Story, and said to be badly reported, in Law Reg. 437; in *Coats* v. *Holbrook*, *Taylor* v. *Carpenter*, (a New York case,) *Partridge* v. *Menk*, 2 Sandf Ch. p. 586 to 628, as also in *Coffeen* v. *Brunton*, 4 McLean, 516, *Howard* v. *Henriques*, 3 Sandf. S. C. 725, when the name of a hotel was treated as trade mark, *Davis* v. *Kendall*, 11 Am. L. Reg. 680. *Dayton* v. *Wilkes*, 16 Leg. Int. 292. *Coats* v. *Platte* 19 Leg. Int. 213, will be found the leading American views upon this subject, down to a recent period of time, and which fully sustain the principle which we have heretofore stated.

While the general principle is thus established a difficulty frequently arises in determining the particular circumstance of each case; or as in this instance in determining how far one may use a *name* adopted by another, as a trade mark, and yet not conflict with his legal or equitable rights.

It may be remarked in general, that while an imitation or facsimile or a mere colorable artifice will bring the offending party clearly within the rule, no decision has ever yet declared the right of a manufacturer to be absolute in a *name* as a *name* merely; it is only when that name is printed in a particular manner upon a particular label, and thus becomes identified with a particular style of goods, or when a name is used by a defendant in connection with his place of business (and not his manufactured goods), under such circumstances as to deceive the public, and rob another of his individuality, and thus destroy his fame and injure his profits, [see *Howard* v. *Henriques*, 3 Sandf. 725, a case which will be be hereafte commented upon], that it becomes a *trade mark*, or in the nature of a trade mark, and as such entitles its possessor or proprietor to the protection of courts of justice. Hence the true rule to test the question of a piratical use of a name is not simply to discover that a *name* has been used in a particular manner by a defendant, but to determine how far the use of it in the manner said to be piratical, has either in fact deceived the public or is calculated to deceive persons of ordinary intelligence.

In *Croft* v. *Day*, 7 Beavan, 88, the Master of the Rolls lays down the following rules:

1st. There must be such a general resemblance of forms, words, symbols and accompaniments as to mislead the public.

2nd. A sufficient distinctive individuality must be presented so as to procure for the person himself the benefit of that deception

which general resemblance is calculated to produce. The Vice-Chancellor in *Patridge* v. *Menk*, 2 Sandf. Ch. 624, applies the following tests:

1st. The Court will not interfere when ordinary attention will enable purchasers to discriminate.

2nd. It must appear that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article in question, would probably be deceived.

These principles run through all the cases, so that while one, who ignorantly or by design uses an imitation or fac-simile of the trade mark of another, is within the rule, so also is that defendant who employs a colorable artifice, not strictly speaking a fac-simile or imitation. And to this last point, see *Coffeen* v. *Brunton*, 4 McLean, above cited. Let us now apply these principles and tests to the case in hand.

The label of complainant is printed upon paper of a pinkish hue, bearing at the top thereof in large capitals, and in a semi-circular form the words:

ARAMINGO MILLS.

Immediately beneath these words is a circular vignette, supported upon each side by two oval vignettes; below, in large capitals, are the words "CHECKS" and "WARRANTED," and then in small capitals, "INDIGO BLUE."

The label of defendant is printed upon paper of a "buff" tint, with a fanciful and deep pink border, within which is an oval space and on which the following words are printed and arranged thus:

SUPERIOR
DOMESTIC
POWER LOOM GOODS,
Manufactured by
WILLIAM BAIRD,
At Aramingo Mills,
FRANKFORD, PA.
Warranted Fast Colors.

The words "AT ARAMINGO MILLS," are printed in small capitals.

The most casual observer will at once discover that these two labels differ in many important particulars.

The label of complainant is nearly one-third larger than that of defendant, the color of the ink used is different, as well as the size of the letters, the one has three distinct vignettes, the other none whatever; the words upon each of the labels, except the two "Aramingo Mills" are different; the most ignorant person must at once, at a glance, detect these differences so far as they relate to the general appearance of the labels—even the objectionable words themselves present marked features which cannot escape the observation of any one. In the complainant's label they strike the eye at once, because they are printed, we before said, in large capitals, at the top of the label, and in black ink, while in the defendant's they are introduced near the end in small capitals, of a pinkish tint, and although distinct, present no striking peculiarities.

The label of the defendant cannot be said to be in any sense an imitation or *fac-simile* of that of complainant; nor can it be said to be even a colorable imitation, device or artifice. If, then, we sustain the present motion, we are driven to the position that the mere use of the words "Aramingo Mills" *upon the label of defendant*, renders him liable for the piratical appropriation of a trade-mark.

That the legal effect of such a position would be doubtful, appears, we think, by an application of the principles and tests heretofore referred to in this opinion.

If, from abundant caution, we were disposed to adopt a most liberal doctrine—one radical in its practical operation—and grant this motion, a particular reference to a few of the adjudged cases, presenting facts most strongly in favor of the complainant's views, will convince us that the decision would be one of doubtful propriety.

In *Patridge* v. *Menk*, the name "A. Golsh" was the valuable portion of the label, because the friction matches made by him had acquired an extensive reputation with the trade as "Golsh's Matches," and although it appeared that the defendant had printed, certainly upon one of the labels used by him, the same name but in connection with the words "*late chemist for*," in small capitals; yet the Vice Chancellor dissolved the injunction upon the ground that a purchaser seeking for the Golsh match, would at once, upon, reading the label, discover the difference between the maker of that and any other article. The Chancellor upon appeal affirmed this decision.

So in *Spottswood* v. *Clarke*, an English case, reported in Sand. Ch. 638, the Lord Chancellor dissolved *an injunction* which the Vice-Chancellor had granted, with liberty to the plaintiff to bring an action at law, where the plaintiff in the case was the owner of a publication called "The Pictorial Almanac," and the defendant of one called "Old Moore's Family Pictorial Almanac," although the covers of each book were to a certain extent similar, both being decorated with a pictorial representation of the Observatory at Greenwich, and in the title as printed on the cover, making use of nearly the same expressions.

The two strongest cases which can be cited in favor of the complainant are *Coffeen* v. *Brunton*, 4 McLean, 516, and *Howard* v. *Henriques*, 3 Sandf. 725. In each of these the principles applicable to the subject under consideration were carried much further than in any other of the adjudged cases. In the first, the plaintiff insisted upon his right to the use of the name "Chinese Liniment," and that his right had been interfered with by one who printed the words "Ohio Liniment" upon his label. Judge McLean granted the injunction, but upon the ground that "from the body of the label and of the directions for the use of the medicine, it is clear that the language of the defendant so assimilated to that of the plaintiff as to *appear to be the same medicine*. The alterations being only colorable." This case is clearly distinguishable from the present, here the differences between the two labels as to the words "Aramingo Mills" are such as to guard the purchaser.

In *Howard* v. *Henriques*, the Court went one step further, and declared that the proprietor of an hotel, called the "Irving House" or "Irving Hotel," had—*although the name did not appear upon the building*—such a right to it as to secure the protection of the Court against one who endeavored to use it in connection with and upon his place of business.

This case, strong as it is, can, we think, easily be distinguished from the present. The "Irving House" or "Hotel" became identified with a particular building; here the goods are identified, not with the "mills"—that is the building—but with the label bearing the words "Aramingo Mills." They are known in the market by the label, and the label alone. Besides, while the principles established before the decision in *Howard* v. *Henriques* may have been correctly extended to meet that case, yet, in weighing its authority it ought not to be forgotten that the circumstances attending it were peculiar, for the name in dispute was that of an hotel, and although not displayed upon any particular part of the building, was, as a matter of fact, as well known as "the City Hall" or "the Trinity Church," and the assumption of the name under the circumstances was a palpable fraud, and so considered by the Court.

In the Omnibus Case, *Knott* v. *Morgan*, 2 Keene R., 213, the device was clearly colorable, for, in addition to the fact that the omnibuses bore the same external decorations, the carriages were named "The London Conveyance Company," and "The London Conveyancer Company," an artifice well calculated to deceive a transient traveller.

In conclusion, having endeavored to show that this case does not fall within the principles applied to cases involving the use of a trade-mark by means of an imitation fac-simile, or colorable artifice, and which relate to personal property, to manufactured articles, and to such things as are necessarily moveable. We might refuse this motion, because the complainant puts his case upon the ground that he has been injured by the piratical use of his label; willing, however, to go further, and grant the relief sought, if the facts established required it, we have examined the law upon the question of the use of a name merely, and for the purpose of illustrating the principles, we have cited at length the leading cases upon the subject. The result of this examination has been to lead the mind to a serious doubt. This doubt has been strengthened from a knowledge of the fact, that the defendant manufactures his goods at the "Aramingo Mills," or in an

establishment occupied by the complainant, and which, for some years, has been known by that name.

Without, therefore, deciding the question, (which is also a matter of doubt,) as to the real intention of the defendant in using the objectionable words upon his label in the present state of the law, we are not prepared to say absolutely that the use of the name printed as it in fact is upon defendant's label is a violation of the law. We must therefore adopt the judicious course pointed out in *Patridge* v. *Menk*, and *Spottswood* v. *Clarke*, and leave the complainant to maintain his right by an action at law. We refuse to grant this motion.

The motion for a special injunction is refused.

GENERAL CORRESPONDENCE.

Bill of Exchange—Qualified acceptance—Notice to drawer.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—A draws a bill of exchange upon B (who is resident and carries on business at the town of M.), without naming any place of payment in the body of the bill. B accepts, payable at the Bank of Upper Canada, at the town of N., distant seven miles from the town of M., although there are Bank agencies at said town of M., and B has no residence or place of business at said town of N. Of the character of this qualified acceptance, A, the drawer, receives no notice from the holder of the bill. The bill, at maturity, is presented for payment at the Bank of Upper Canada, at the town of N., but not to B personally, and is dishonored and protested in the usual manner.

Query: Is such presentation good in an action upon said bill against A, the drawer?

The question will turn upon locality;—whether the circumstance that the place appointed in the acceptance for payment of the bill was not located in the same town as the residence of the acceptor, relieved the drawer, in the absence of notice of such qualified acceptance, of his liability.

In a judgment recently delivered in the United States Supreme Court, in term, the court decided (the then justices present concurring in opinion): "If the Bank of Upper Canada, where this bill was made payable by the acceptor, was located in the same city, town or village where such acceptor resided, the acceptance, payable at such Bank, would have been entirely proper;" and that "a qualified acceptance, making the bill payable at another town, taken by the holder without the assent of the drawer, would discharge the drawer."

Will you please be good enough to consider the above point, and give an opinion upon it in your next number?

Yours, &c.,

LAW CLERK.

Port Hope, 18th April, 1861.

[If A, who drew the bill upon B, did not think it necessary to name any place of payment in the body of the bill, we cannot see what right he has to complain that B accepted the bill payable at a particular place, though in a different town from the one in which he resided. Of this the holder might have had cause to complain, and to it might have objected; but he did not do so; he was satisfied with the acceptance. We do not think there was any obligation upon the holder to give notice of the acceptance to the drawer. We speak, of course, without reference to decided cases. We know of no case in point, decided either in England or in Canada. The American case, to which our correspondent refers, appears to conflict with our views of the law. We should like to have a more particular reference to it. It certainly does not square with our ideas of the law, so far as at present we understand it.—EDS. L. J.]

Articled Clerks before 10th June, 1857—Requirements before admission.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—In reading the reported case, *In re. Hume*, U. C. Q B. Rep. vol. 19, p. 373, the following questions arose in my mind, and I think your answer to them will be of great importance to students pursuing the study of the law.

1st. Is it necessary for a clerk, whose articles bear date before the 10th June, 1857, to have such articles filed, according to the Act 20 Vic. cap. 63, sec. 7?

2nd. Is it also necessary for said clerk to attend two terms of the sittings of the Courts of Queen's Bench and Common Pleas?—Same Act, sec. 3.

3rd. Is it also necessary for said clerk to be examined in the books prescribed by the Law Society, under the authority given them in same Act, sec. 3?

The above are three important questions to the articled clerk. We all are aware that service of clerks to attornies under their articles was regulated by the Acts 25 Geo. III cap. 4, 37 Geo. III. cap. 13, and 2 Geo. IV. cap. 5, 1822, which last mentioned Act was the principal one. In 1857 the statute 20 Vic. cap. 63 was passed (10th June, 1857). It is now held by a great many students and lawyers, that every articled clerk, whether articled before or after the passing of the Act 20 Vic. cap. 63, should have their articles filed according to the provisions of said Act, attend the sittings of the Courts of Queen's Bench and Common Pleas, and pass the examination by paper and *viva voce*.

It looks unreasonable and unjust to the articled clerk, who bound himself under his articles, under the powers given him by the Act 2 Geo. IV. cap. 5. Can it be the intention of the Legislature to compel such clerk, by an act passed after he is bound by a former act, to attend, at great expense, two terms of the courts at Toronto? The Act 20 Vic. cap. 63, sec. 7, states that "every person bound in contract after the passing of this act shall file articles," &c. All very well, so far; but then comes the Consolidated Statutes of Upper Canada, wiping out all former acts (see Con. Stat. U. C. cap 35), and distinctly stating that every person seeking admission as attorney shall comply with said chapter.

By answering the above in your next issue, you will much oblige a number of clerks who are in the same state of perplexity as myself.

Yours truly, ARTICLED CLERK.

Hamilton, April 17, 1861.

[1st. It is not possible to read either s. 7 of 20 Vic. c. 63, or sec. 11 of Con. Stat. U. C. cap. 55, with which it corresponds,

as applicable to articles of clerkship entered into before the 10th June, 1857. In the first place, as noticed by our correspondent, sec. 7 commences, "Whenever any person *shall*, after the passing of this act, be bound," &c., showing that the section was designed to apply only to articles of clerkship entered into after the passing of the act. In the second place, though these precise words do not appear in sec. 11 of the consolidated act, yet as that section, like the former, requires the affidavit mentioned in it to be made "within three months after the date of the contract," it follows that where the contract was entered into more than three months before the passing of the act, it is quite impossible to comply with its provisions. We do not know whether the Law Society has made any regulation affecting the filing of articles entered into before the 10th June, 1857, but, whether or not, would advise an articled clerk so circumstanced, as a matter of precaution, to file his articles at the earliest possible time, and at all events at least fourteen days next before the first day of the term in which he intends to seek admission.

2nd. We think that a clerk articled before the 10th June, 1857, where time permits, is as much bound to keep the terms under sec. 3 of the act of 1857 (Con. Stat. U. C. cap. 35, sec. 3, subsec. 2), as a clerk articled since that date. In the doing of this there is no impossibility, as in the former case, and the act seems to require it. We refer especially to sec. 23 of the act of 1857 (Con. Stat. U. C. cap. 35, sec. 23).

3rd. Yes. It is not possible to read the whole act, and come to any other conclusion.—Eds. L. J.]

Law and Lawyer.

To The Editors of the Law Journal.

Kingston, 5th April, 1861.

Gentlemen,—As I believe your valuable Journal advocates as well the interests of Law-Students as of the Profession at large, I am induced to indite this epistle to you, *de profundis* of a country office in extensive practice, in the hope that it may call forth from you ere long, a vigorous Editorial on the subject. You must not suppose that my remarks apply to the mere imaginary grievance of a discontented individual. Grave dissatisfaction has for a long time prevailed among studiously disposed Law Students, on account of the indifference shewn by their Employers in performing their duties by them in accordance with the usual undertaking contained in their Articles. This neglect, serious as are its consequences to the Student, cannot, I am convinced, be owing to anything but the want of consideration on the part of the Bar.

The inconvenience which practising lawyers might suppose would attend their efforts to indoctrinate their students into the mysteries of their profession, would be very slight indeed, and would I am sure, be more than compensated by the increased attention and accuracy of the latter. There could surely be no great difficulty in explaining to a student the effect of a Deed or a Pleading which he is about to copy, as to deter any one from attempting it; and if in addition the Principal could devote half-an-hour *per diem* to reading with his students the Books of practice and explaining to them the effect of our Provincial Statutes, the good effects of this course would ere long be perceptible.

I know of several offices where little or no attention whatever is paid by the principal to this province of his duties, and the consequence that such students as are articled but unsalaried, become early discouraged, and finding that they can learn little or nothing from their office work, avoid it as much as possible; spend no more time in their Employers office than they can help. They think, and with *reason*, that *their* contract should be carried out *literally* or not *at all*.

The best remedy for such a state of matters would be the one I have above suggested, and hoping that you will endeavour to bring it before the Profession and Public, I remain

Yours &c,

A Law Student.

Attorney—Delivery of bill before action—Items—Statutable defence.

To the Editors of the Law Journal.

Gentlemen,—Will you oblige me with your opinion on the following questions, in the next number of your Journal.

A, an attorney, brought an action for B against C; recovers a verdict, taxes his costs, enters judgment, &c. C, during the progress of the suit, becomes insolvent; the sheriff returns the execution *no goods*; A sues B for his costs, and makes out his claim as follows:

To amount of costs taxed in *suit of B v. C*...	$56 53
To costs proving claim chancery suit G *v.* E.	12 80
Costs of *fi. fas.*, &c.....	11 85

At the trial B moves for a nonsuit, on the ground that the bill had not been delivered in detail, as required by sec. 27 of the Con. Stats. U. C. page 419.

B made an affidavit of the amount of debt and costs *due him*, and proved his claim in the chancery suit above referred to. A bill, as above stated, was delivered a month before action brought.

1st. Should *A* have delivered a bill in detail before suing, or should *B* have applied for it within the month?

2nd. Is B's defence a statutable one, and if so, could he set it up at the trial without giving six days' previous notice? (Con. Stat. U. C. page 151, sec. 93.)

3rd. B having made an affidavit of the amount of debt and *costs due him*, and having assigned the judgment to D—*quære*: Would this obviate the necessity of delivering a bill a month before suing?

By replying to the above in your next issue you will oblige

Your obedient servant,

Sarnia, 24th April, 1861. S. P. Y.

[1. The bill delivered was not, in our opinion, sufficient. It should have been of the items in detail. We refer to *Drew et al* v. *Clifford*, 2 C. P. 69; and *Philby* v. *Hazle*, 29 L. J. C. P. 370. It is the duty of the attorney before action to deliver the bill—not of the party liable to demand, as supposed by our correspondent. The statute reads, "No suit at law or equity shall be brought for the recovery of fees, charges, or disbursements, &c., *until* one month after a bill thereof, &c.,

has been delivered, &c." In proving compliance with the act it is not, however, necessary, in the first instance, to prove the *contents* of the bill. It is sufficient to prove that a bill was delivered. It then devolves upon the party liable to shew that the bill delivered is not such a bill as constitutes a *bonâ fide* compliance with the act. (*See* Con. Stat. U. C. cap. 35 s. 36.)

2. We certainly think the defence is a statutable one, within the meaning of Con. Stat. U. C. cap. 19 sec. 93.]—EDS. L. J.

Dower—Seisin—Sufficiency of evidence.

TO THE EDITORS OF THE LAW JOURNAL.

BELLEVILLE, 24th April, 1861.

GENTLEMEN,—As a reader of your invaluable Journal, and one having frequent recourse to its pages for information, more particularly that portion of it devoted to the consideration and publication of knotty questions, submitted to you, under the head of "Correspondence"—your remarks upon which are of immense benefit to the law student—I take the privilege of asking your opinion upon a matter relating to the right of dower; respecting which I have been unable to satisfy myself from works bearing upon that subject (which are not very voluminous), neither can I find any decision that will throw any light upon it. It is this:

A purchases 500 acres of land from B, from whom he receives a bond for a deed. A goes into possession, and gets married; and, in accordance with the conditions of the bond, regularly makes the required payments, until there is only due thereupon say £200. A has large business transactions with one C, with whom B also has dealings. B says to C, you have an open account with A, give me credit for so much, and I will authorize you to collect the balance of £200 due on the bond from A. This arrangement is completed, and C induces A to give a mortgage for this £200, and other sums due him upon the 500 acres. A, at the time of the execution of the mortgage, had been married nine years, but had never received a deed. No action is taken on the mortgage for 15 years from its date, when a suit of foreclosure is instituted; and A loses possession, after having held it, with his wife, for 24 years before proceedings taken.

Will the 24 years' possession establish such a seisin in the husband as will entitle the wife to dower; or will the mortgage militate against the computation of the 20 years?

Park on Dower says, "That a right or title to property, however complete in other respects, will never furnish a foundation for a claim of dower, if unaccompanied with that which is technically termed seisin." He subsequently states, "That in the application of the rule requiring a seisin in the husband, it is material that the law does not require an *actual* seisin, or seisin *in deed*; but that it is sufficient to satisfy the rule that the husband have a seisin *in law*.

I take it that over 20 years' possession of the land, before any action, will amount to a seisin at law, although the husband never had a deed; and that the mortgage cannot operate unfavourably—more than twenty years having elapsed before bill filed; and that the widow will therefore be entitled to dower.

Your answer to the above query will greatly oblige,

Your obedient servant, A. R.

[The rule of law is, that a widow is entitled to dower out of all lands whereof her husband was seized during coverture.

If seisin be denied, the widow is not driven of necessity to produce and prove her title deeds. She might, we apprehend, rest her case on proof that he died in possession; that he had been in possession, as owner, twenty years or upwards; or that her husband was in possession, and while in possession made a conveyance in fee simple. (*See* remarks of Draper, J., in *Towsley* v. *Smith*, 12 U. C. Q. B. 555: *see*, also, *Lockman* v. *Nesse*, 5 U. C. O. S. 505.)

The mortgage from A to C, though not so stated, was, we presume, the ordinary one in fee simple. When it was executed A was in possession. C accepted it, and, as it appears, subsequently foreclosed it. Proof of these facts, together with the other facts stated by our correspondent, would, we think, be sufficient evidence of seisin in an action for dower brought by the widow of A against C, or his privies in estate. (*See* Com. Dig., Estoppel, B: *see*, also, *McLean* v. *Laidlaw*, 2 U. C. Q. B. 222.)]—EDS. L. J.

REVIEWS.

THE WESTMINSTER REVIEW. The opening article of this quarterly for April is a review of a lecture on the study of History, by Charles Kingsley, in which are laid before the reader the opposite systems pursued in the treatment of the favourite subject of the lecturer. We next meet one of the many interesting papers to which the recent events in Southern Europe have given birth, under the heading of the Sicilian Revolution. Voltaire's Romances and their moral present a criticism upon the lighter literary efforts of one of the most distinguished men of his own time. The paper upon Cotton Manufacture will be read with much interest at the present moment in view of the troubles now existing in the Southern States of America, which may temporarily, at least, very much affect the supply of that great staple commodity, usually obtained in that portion of the world. The usual extended review of contemporary literature brings to its close a number which sustains the high reputation freely conceded to the master-pieces of English Review literature.

THE UNITED STATES INSURANCE GAZETTE contains a large collection of Reports of various Insurance Companies throughout the United States and Canada.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

GEORGE MANNING FURBY, of Port Hope, Gentleman. (Gazetted, April 6. 1861.)

GEORGE D'ARCY BOULTON, of Toronto, Esquire, Barrister-at-law. (Gazetted, April 6, 1861.)

JONH WRIGHT, of the Town of Port Hope, Esquire, Attorney-at-law. (Gazetted, April 6, 1861.)

WILLIAM HEPBURNE SCOTT, Esquire, Attorney-at-law. (Gazetted, April 6 1861.)

REGISTRAR.

WILLIAM S. SCOTT, of the Town of Prescott, Esquire, to be Registrar of the County of Grenville, in the room of John Patton, Esquire, deceased.

CORONER.

HENRY JAMES TAYLOR, of the Township of Escott, Esquire, to be Associate Coroner for the United Counties of Leeds and Grenville. (Gazetted April 6, 1861.)

TO CORRESPONDENTS.

"CHARLES DURAND"—"PAUL DUNN"—Under "Division Courts."

"LAW CLERK"—"ARTICLED CLERK"—"A LAW STUDENT"—"S. P. Y."—"A. B."—Under "General Correspondence."