THE

Local Courts' and Municipal Gazette

VOLUME IV.

FROM JANUARY TO DECEMBER, 1868.

EDITED BY

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TABLE

OF THE

CASES REPORTED IN THIS VOLUME.

DIARY FOR JANUARY.

1. Wed.. *Circumcision.* Taxes to be computed from this date.
2. Th. .. Error and Appeal Sittings.
5. SUN.. *2nd Sunday after Christmas.*
6. Mon.. *Epiphany.* County Court and Surrogate Court Term begins. Municipal Elections. Heir and Devisee Sittings commence.
7. Tues.. Last day for Township, Village and Town Clerks to make returns to County Clerk.
8. Wed.. Election of School Trustees,
11. Sat .. County Court and Surrogate Court Term ends.
12. SUN.. *1st Sunday after Epiphany.*
13. Mon.. Election of Police Trustees in Police Village.
15. Wed.. Treasurer and Chamberlain of Municipality to make return to Board of Auditors. School Reports to be made to Local Superintend't.
18. Sat .. Articles, &c., to be left with Secretary of Law Society.
19. SUN.. *2nd Sunday after Epiphany.*
20. Mon.. Members of Municipal Councils (excepting Co's) and Trustees of Police Villages to hold first meeting.
21. Tues.. Heir and Devisee sittings end.
25. Sat. .. *Conversion of St. Paul.*
26. SUN.. *3rd Sunday after Epiphany.*
28. Tues.. 1st meeting County Council.
29. Wed.. Appeals from Chancery Chambers (except in all cases during Examination Term).
30. Th. ... School Financial Report to Board of Auditors.
31. Fri. .. Last day for Counties and Cities to make returns to Provincial Secretary.

The Local Courts'

AND

MUNICIPAL GAZETTE.

JANUARY, 1868.

1868.

Great changes have taken place in the political aspect of this country during the past year. These changes call for notice from us only so far as they affect ourselves. Upper Canada and Lower Canada are, in name, no more. Nova Scotia and New Brunswick have cast in their lot with us, and *Canada* as a unit, comprising four provinces, has become a dominion.

As the oldest legal periodical in the four provinces, and as the organ of the profession in the largest and wealthiest of them, the CANADA *Law Journal* claims, without fear of contradiction, or, we think, without the danger of being considered presumptuous, the right of representing not only the profession of Ontario, but that of the Dominion at large.

Earnestly desiring also to increase as well the usefulness as the sphere of usefulness of *this* journal, we shall spare no exertion on our part to make the *Gazette* acceptable in the sister Provinces amongst a class of readers, similar to those who form the bulk of our subscribers in Ontario.

Our work has however hitherto been almost entirely a labour of love. We are willing that it should so continue, if need be, but we hope nevertheless that those interested in this publication will do their part of the work with more regard to *our* right to an increased measure of support (not only as to the number of our subscribers, but as to the payment of what they owe after they have subscribed), and with more regard to their *own* interests, by furnishing us with such information as may be interesting and instructive to our readers in general.

Our thanks are due in this respect to many of the County Judges and others who, having their heart in the work, desire to do what they can for the benefit of others.

BLUE BOOKS FOR 1866.

Reading blue books is looked upon somewhat in the same light as reading Johnson's Dictionary—instructive, but if anything a little dry. We have never heard of any one whose courage and endurance carried him through a steady perusal from cover to cover, but at the same time valuable and interesting information may always be gathered even from much abused statistics.

We have approached the subject in the hope of presenting to our readers some facts that may interest them, gleaned from the mass of figures before us. The following table we have compiled from the volume of public accounts for the year ending 30th June, 1866, lately received with a number of other books of the same colour.

The County of Halton does not for some reason appear in the returns.

The table is interesting as shewing the amounts received from the sale of stamps used in law proceedings in all the several courts of civil jurisdiction in Upper Canada, and under three distinct heads, viz.: (1) C. F. or Consolidated Revenue Fund; (2) F. F. or Fee Fund; (3) L. S. or Law Society.

The stamps of the first and third kind (C. F. and L. S.) being used for payment of fees on business done in the Courts of Queen's Bench, Common Pleas, and Court of Chancery. The stamps of the second kind (F. F.) being for payment of fees on business done in the County Courts, Surrogate and other local Courts, and on proceedings under various statutes before the local judges.

Counties.	Con. Rev. F.	Fee Fund.	Law Society.	Total.
Brant	$466 93	$1,370 85	$419 90	$2,257 68
Carleton	703 00	1,890 50	386 66	2,980 16
Elgin	173 37	471 68	143 45	788 50
Essex	116 85	54 63	121 12	292 60
Frontenac	495 51	1,233 61	446 33	2,175 45
Grey	121 41	1,464 62	83 13	1,669 16
Haldimand	114 48	652 47	74 09	841 04
Hastings	553 39	1,306 17	366 24	2,225 80
Huron and Bruce	430 35	1,827 52	342 47	2,600 44
Kent	171 00	707 84	167 68	1,046 52
Lambton	207 10	503 50	311 22	1,021 82
Lanark and Renfrew	223 11	1,988 56	146 29	2,357 96
Lennox and Addington	218 50	1,404 58	137 75	1,760 83
Leeds and Grenville	398 53	918 18	242 25	1,558 96
Lincoln	278 35	1,298 65	261 25	1,838 25
Middlesex	812 25	1,755 13	909 63	3,477 01
Norfolk	114 95	720 76	147 73	983 44
Northumberland and Durham	579 98	1,679 79	495 23	2,754 90
Ontario	181 91	1,279 18	191 91	1,653 00
Oxford	237 51	1,247 35	249 37	1,734 23
Perth	279 68	1,196 05	308 75	1,784 48
Peterboro'	310 17	769 51	264 58	1,344 26
Prescott and Russell	40 85	418 72	30 21	489 78
Prince Edward	187 15	686 37	133 46	1,006 98
Simcoe	275 50	2,682 99	192 85	3,151 54
Stormont, Dundas and Glengary	409 00	1,555 16	368 11	2,332 27
Victoria	220 40	872 29	194 75	1,287 44
Waterloo	101 66	1,049 74	83 60	1,235 00
Welland	173 37	525 83	96 90	796 10
Wellington	329 65	1,854 40	304 95	2,489 00
Wentworth	828 40	1,989 11	847 41	3,664 92
York & Peel, including Toronto	19,125 21	6,003 05	6,957 99	32,086 25
	$28,879 52	$43,378 79	$15,427 26	$87,685 57

The figures in the above table show the amount of stamps sold, to be used in proceedings in the Superior Courts, $44,306 78, and in the County courts and other local courts $43,378 79, or in other words that the income derived from business in the Superior Courts exceeds that from the Local and Inferior Courts by $927 99. But in reasoning upon these figures it must be borne in mind that the general revenue is not chargeable with the expense of court accommodations for the County and Inferior Local Courts, that comes from local sources. Whereas the fact is otherwise in respect to the Superior Courts of Common Law and Equity, the L. S. (Law Society) stamp collection being applicable to interest upon and redemption of debentures issued by the Law Society to cover the outlay for extension of buildings, &c., necessary to make the accommodation required for the Superior Courts at Toronto; and consequently the sum of $15,427 26, being wholly applicable to the purpose mentioned, and there being a counter outlay in the Local Courts which is not represented in this table, the sum named should be deducted from the aggregate of $44,306 77, leaving $28,879 52 against $43,378 75, and showing a contribution to the General Revenue Fund by the County and other Local Courts of $14,499 27 more than contributed by the Superior Courts. And the disparity is much greater even than these figures exhibit. For the clerks of County, Surrogate and Division Courts (nearly 300 officers) are all remunerated by fees payable by suitors of these courts in money, while the whole staff of officers in the Superior Courts of law and equity in Toronto, and the several deputy clerks of the Crown, are paid by salary from the general revenue. But this opens a large question, one too extensive for a single article, and we leave it for the present.

A great disparity will be observed in the amount of collections from the different counties; a desparity it is not easy to account for. This is especially noticeable in respect to the Fee Fund stamps for the Local and Inferior Courts. Not to speak of York and Peel, which gives a sum of $6,004 05, there is the County of Simcoe giving $2,682 99, the County of Wentworth, $1,989 11, the County of Waterloo, $1,854 40, or a total for these three counties of $6,526 50, as compared to a total of $976 85 (or one-seventh nearly) for the following three counties, viz.: Essex, $54 63, Prescott and Russell, $418 72, Lambton, $503 50. There has been a great falling off in the business of the courts this last year i

is true, but a comparison with similar returns ten years back, and before the stamp law came in force, will exhibit somewhat similar results, viz.: $16,748, as compared to $2,500, (one-seventh nearly) in the year 1857. Thus—

Fee Fund for 1857, shows:

Wentworth	$6,878	Essex	$875
Simcoe	5,288	Prescott & Russell	391
Wellington	4,482	Lambton	1,234
	$16,748		$2,500

The statement of the Fee Fund account shows for the whole of Upper Canada a deficit after payment of the salaries of thirty-two County Judges and five Recorders, and $6,400 towards travelling expenses of the County Judges of $47,833 21; and this is the whole deficit, for, as we have already observed, there is nothing left to be paid clerks or other officers. But in other years the fee fund has given a surplus to the general revenue fund. In the year we have already referred to, 1857, there was a surplus of $24,797, contributed by the litigants in the Local Courts (after paying the whole establishment of these courts), to the general revenue of the Province.

So much just now as to law stamps.

MUNICIPAL RETURNS FOR 1866.

The following table, which we copy from one of the Blue Books recently published, will be interesting to many of our readers:

Name of the County.	Number of Acres assessed.	Number of Ratepayers assessed.	Assessed value of Real Estate.	Assessed value of Personal Property.	Total amount of arrears of Taxes.
COUNTIES.			$	$	$
Brant	223,896	5,350	5,147,417	315,042	20,354
Bruce	673,233	7,673	3,870,218	209,555	27,470
Carleton	559,217	5,137	3,151,503	327,950	520
Elgin	436,091	6,282	4,329,711	322,245	21,481
Essex	381,403	5,744	3,243,756	386,666	17,865
Frontenac	470,993	5,778	2,485,006	299,271	10,928
Grey	1,063,386	10,112	4,325,969	331,127	108,702
Haldimand	281,571	4,672	3,477,512	170,000	2,509
Halton	228,315	4,489	4,811,555	279,676	12,844
Hastings (1865)	560,215	7,272	3,054,047	81,460	49,390
Huron	795,468	10,411	8,204,989	334,553	76,657
Kent	535,215	7,038	4,518,999	549,052	21,048
Lambton	655,856	6,425	6,177,527	538,733	25,187
Lanark	622,467	5,973	3,095,542	468,744	20,109
Leeds and Grenville	717,256	10,107	5,576,788	317,096	14,853
Lennox and Addington	328,856	6,421	3,769,372	178,450	3,224
Lincoln	193,598	5,852	6,812,206	777,606	9,940
Middlesex	754,686	11,460	6,466,073	361,819	60,888
Norfolk	372,737	5,387	4,433,153	178,774	14,204
Northumberland and Durham	818,751	12,066	9,651,111	645,537	13,445
Ontario	487,047	8,345	6,905,752	566,533	7,210
Oxford	474,268	8,123	9,329,016	544,933	4,088
Peel	284,262	5,121	6,228,552	403,740	1,800
Perth	519,525	7,264	4,150,871	176,505	14,573
Peterborough	551,402	4,357	2,111,328	182,225	13,325
Prescott and Russell (1865)	558,941	3,919	1,813,088	235,907	4,200
Prince Edward	235,895	4,290	4,156,563	335,225	2,678
Renfrew	533,794	4,563	1,218,565	279,023	2,759
Simcoe	1,056,716	10,032	5,004,934	244,790	91,265
Stormont, Dundas and Glengary	762,073	9,745	5,867,426	992,084	9,492
Victoria	519,792	4,961	2,939,725	188,277	46,350
Waterloo	314,824	6,951	6,270,162	686,750	9,883
Welland	224,520	5,218	5,554,019	523,623	5,379
Wellington	709,784	10,417	9,151,822	1,021,208	16,052
Wentworth	274,097	6,514	6,023,544	457,555	42,637
York	814,957	15,169	18,848,668	1,845,440	7,547
Total, Counties	18,995,107	258,638	$192,076,489	15,257,174	$810,856
Add—Cities	13,196	31,238	38,801,882	10,353,282	421,117
Separated Towns	9,419	7,119	7,823,286	685,531	29,838
Total, Upper Canada, 1866	19,017,722	296,995	$238,201,657	26,295,087	$1,261,811
do. 1865	18,587,793	291,977	232,782,016	25,357,829	1,370,374
do. 1864	18,144,470	278,326	241,063,966	24,955,242	1,765,445

The auditor, in laying the Municipal returns before the Minister of Finance, called attention to the following figures in particular:

	Taxes collected.	Arrears due.
1864.....	$1,917,261	$1,765,445
1865.....	2,868,903	1,370,374
1866.....	2,828,790	1,261,811

And remarked that "the increase in the former column and the decrease in the latter, are a striking and satisfactory indication of the increased prosperity of the country."

SELECTIONS.

MEDICAL EVIDENCE.

We have medical practitioners among us who have a regard for truth which cannot be considered over nice, but we believe that no such instance of medical amiability has ever been developed in this country as was recently brought to light in England in the trial of *Johnson* v. *The Midland Railway Company*. The plaintiff sued for damages for injuries caused by the Company, and his medical attendant gave the three following certificates:

This is to certify that I am attending Mr. Johnson, undertaker, of 8 Hethpool street, Hall-park, Paddington, suffering from severe concussion of the brain, and compression produced by extravasation from a ruptured vessel, caused by the railway accident at Colney Hatch, Aug. 30, 1865, and I have no doubt but that he will feel the effect of it for some time.

J. Morgan, M.R.C.S.L., L.A.C.

Sept. 28, 1865.

I hereby certify that I found nothing serious in the case of Mr. Johnson, 8 Hethpool street, Hall-park, Paddington, and consider him not injured by the accident at Colney Hatch.

Sept. 28, 1865. J. Morgan, Surgeon.

I hereby certify that I found *nothing at all* the matter with Mr. Johnson, 8 Hethpool street, Hall-park, Paddington.

Sept. 28, 1865.

The first certificate was given nearly a month after the accident; during the next two days he had been seen by the surgeon of the company, and something occurred between two different hours of that day to change "nothing serious" into "nothing at all."

And this man writes after his name the mystic and majestic abracadabra: "M.R.C.S.L., L.A.C." Henceforward, what faith can we possibly pin upon M.R.C.S.L., L.A.C.?—*Exchange.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Municipal Law—Rates and Taxes—Landlord and Tenant.—The city council of M. were empowered by statute to order streets to be paved by the owners of the adjoining premises, and, in case of their default, to do the work themselves, and to charge the respective owners with their proportionate part of the expenses; and, as an additional remedy, the council were empowered to require payment from any tenant or occupier, to be levied by distress, and it was made compulsory on the owner to allow such payments to be deducted from the rent. Premises in G. street were demised by the plaintiff to the defendant at a "clear yearly rent," the defendant covenanting to "pay and discharge all taxes, rates, assessments and impositions whatever, which during the term should become payable in respect of the demised premises." Subsequently the council gave notice to have G. street paved. The plaintiff neglecting to do the required work, the council caused it to be done, and the plaintiff paid his proportional share of the expense. *Held*, that the payment having been made by the plaintiff, not for a rate, assessment or imposition, payable in respect of the premises, but for breach of duty imposed on him by statute, he could not compel the defendant, under his covenant, to repay him the amount.—*Tidswell* v. *Whitworth*, Law Rep. 2 C. P. 326.

Municipal Law—Township Council.—In 1854, a Township Council passed a by-law for remunerating the councillors for their attendance at the council, at the rate $20 a year. In 1850, and thenceforward, by-laws were passed providing for the further sum of $10 a year for each councillor for letting and inspecting the roads, in addition to the $20. The by-law passed in 1866, was moved against and quashed by the Court of Queen's Bench, as illegal. On a bill by a ratepayer, filed in the same year, the Court ordered the members who were defendants, to repay to the corporation the $10 a-year they had respectively received; but *held*, that the ratepayers were not entitled to a decree restoring the same actually paid fer the years between 1859 and 1865, except to the extent that such payment exceeded the statutory limit.—*Blaikie* v. *Staple* 67.

A councillor or reeve of a township is entitled as compensation for his services to the *per diem* allowance provided for by the statute only; and any over-payments may be recovered back by the municipality: the word "officer" used in the statute not applying to the reeve or a councillor as parties to whom compensation is to be voted by the ceuncil: he will be entiled, however, to receive from the municipality payment for

moneys out of pocket advanced by him on account of the business of the municipality.—*St. Vincent* v. *Greer*, 173.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

LANDLORD AND TENANT.—One who agrees to let, impliedly promises that he has a good title to let.—*Stranks* v. *St. John*, Law Rep. 2 C. P 376.

In a lease, the lessee covenanted not to assign without license, and the lessor covenanted not to withhold his license "unreasonably or vexatiously." *Held*, that it was unreasonable and vexatious in the lessor to refuse his license to assign to a person wholly unobjectionable, his object in refusing being avowedly his wish to get a surrender of the lease for the purpose of rebuilding. The court decreed the lessor to concur in the assignment, and directed an inquiry to assess the damages to be awarded to the assignee for refusal of the license. *Lehmann* v. *McArthur*, Law Rep. 3 Eq. 746.

PROXIMATE CAUSE—REWARD.—On the trial of an action for reward, offered by the defendant "to any person who will give such information as shall lead to the apprehension and conviction of the thieves" who had stolen watches and jewelry from his shop, it appeared that, about a week after the theft, R., having brought one of the stolen watches to the plaintiff's shop, the plaintiff gave information, and R. was apprehended the same day; that, after two or three days, R., being in custody, told where some of the thieves would be found; that they were apprehended there a week afterwards; that they were subsequently convicted of the theft, and that R was convicted as receiver. *Held*, that the judge had properly left the evidence to the jury, pointing out the remoteness of the information; and that a verdict for the plaintiff ought not to be set aside.—*Turner* v. *Walker* (Exch. Ch.), Law Rep. 2 Q. B. 301.

RAILWAY.—The general manager of a railway has authority to bind the company to pay for medical attendance for a servant of the company injured by an accident on the railway.—*Walker* v. *G. W. R. Co.*, Law Rep. 2 Ex. 228.

WATERCOURSE—FOULING.—Where there is a prescriptive right to foul a stream, the fouling cannot be considerably enlarged to the prejudice of others; and the fact that the stream is fouled by others is no defence to a suit to restrain the fouling by one.—*Crossley & Sons* v. *Lightowler*, Law Rep. 2 Ch. 478.

C., wishing to prevent a river's being fouled by some dye-works, purchased from the owners of the works some land on the river, without telling them his object. *Held*, in the absence of any express reservation, by the owners of the works, of the right of fouling, C. could maintain a suit to restrain it.—*Ib.*

Where dye-works had not been used for twenty years, and had been allowed to fall into ruin, and there appeared no intention of erecting new ones, *held*, that the right of fouling a stream attached to them had been abandoned, and lost.—*Ib.*

FIRE INSURANCE—POLICY NOT UNDER SEAL—AGENT'S POWER TO BIND CO. BY PAROL—WAIVER OF CONDITION—PLEADING.—One of the conditions of a fire policy, not under seal, issued to plaintiff by defendants, an Insurance Co., was, that no suit of any kind should be sustained in any Court against the Co. for the recovery of any claim, unless brought within six months after damage occurring to the insured. Within this time plaintiff presented his claim for loss, when it was agreed by parol between him and one D. acting for defendants, that if plaintiff would not prosecute his claim until S. returned from England, defendants would pay the same and take no advantage of the limitation clause above referred to. The insurance had been effected by and through D, and the premiums paid to him, or to S., who was associated with him in the management of the Co., and the policy signed by D. as "manager for the said Co. in Upper Canada," under an express authority from the directors, two of whom subscribed their names to the same opposite a seal, with the name of the Co. upon it. It also appeared that after the expiration of the six months, there had been an actual tender of payment, though of a lesser sum than that claimed, by the agent of defendants to plaintiff: *Held*, that D. had power to bind the Co. as their agent, and that what had taken place between him and the plaintiff amounted to a waiver in law of the six months' condition, and that the plaintiff was therefore entitled to recover.

Remarks upon the impropriety of Insurance Companies setting up defences of the kind indicated, instead of any *bona fide* reason that may exist for resisting claims made against them.

Observations on the premature introduction into the declaration of the averment as to the six months' limitation of time, instead of leaving it to be pleaded by defendants.—*Brady* v. *The Western Insurance Co.* (*Limited*), 17 U. C. C. P. 597.

ONTARIO REPORTS.

COMMON PLEAS.

(*Reported by* S. J. VANKOUGHNET, Esq., *Barrister-at-Law, Reporter to the Court.*)

MURRAY v. DAWSON.

Fence-viewer's Act (C. S. U. C. ch. 57)—Non-compliance with award—Restriction to statutory remedy—Pleading.

The declaration was against the defendant as owner of a lot adjoining the plaintiff's land, alleging the existence of a large quantity of surplus water upon both lots; that both parties disputed as to their respective rights and liabilities under the Fence-viewers Act (C. S. U. C. ch. 57), and steps were thereupon taken to procure an award under said Act, which was accordingly done, and an award made in the presence and with the assent of both parties. The declaration then went on to recite the award verbatim, which directed two ditches to be made by the parties, one by each, and concluded thus, "said ditch to be made before the 1st October, 1865." Plaintiff then averred performance of the award on his part, but a neglect and refusal to perform it on the defendant's part, and claimed damages for such neglect and refusal: *Held*, on demurrer, that the declaration was not bad as failing to disclose a case which gave the fence-viewers jurisdiction, which it sufficiently did, but that it was bad as setting out an award which did not fix the time each party should have, within which to perform his share of the ditching, or direct where such ditching should be made; and also for not shewing that a demand in writing had been made on the defendant to perform the award, the non-compliance with which would have entitled the plaintiff under the Act to have completed the ditch and sued for the price fixed, instead of bringing an action for damages, which could not be maintained.

The eleven sub-sections of section 16 of the above Act. refer to ditches and water-courses as well as fences.

[C. P., M. T., 31 Vic. 1867.]

The declaration is sufficiently stated in the head note.

The defendant pleaded a plea, which was demurred to, and to which it is unnecessary further to refer, as the judgment of the Court turned on the following, among other exceptions to the declaration, which were given notice of by the defendant:

1. That the declaration does not set out such a case of action, as gives jurisdiction to fence-viewers under the Statute.

2. It does not appear that the fence-viewers were satisfied that the defendant was duly notified of the meeting.

3. The length of time the plaintiff and the defendant had respectively to open the ditches does not appear to be stated in the award, which is consequently bad.

5. That no demand in writing appears to have been made on the defendant to perform the award, and had such been made the plaintiff might and ought to have finished the ditch and sued for the price.

7. That the place to dig or open the water-course is not definitely stated in the award.

McMichael, for the plaintiff, referred to and commented upon the Fence-viewers Act, secs. 13, 14, and Russell on Awards, 505.

Read, Q. C., contra, referred to secs. 3, 14, 16, of the above Act, and B. & L.'s Prec. 424.

J. WILSON, J., delivered the judgment of the Court.

The declaration is objected to on several grounds. As to the first, we think it does set out a case which gave the fence-viewers jurisdiction. It sets out all the circumstances mentioned in the seven sections of the 22nd Vic., ch. 57, and that a dispute had arisen in regard to the rights and liabilities of these parties, as mentioned in the fifth section.

We think there is nothing in the second objection: the proceedings of the fence-viewers are alleged to have been conducted, and the award made in the presence of both parties, and with their assent.

We think the third objection is good. The twelfth section requires that the fence-viewers, shall decide what length of time each of the parties shall have to make his share of the ditch. The award says, "Said ditch is to be made before the first day of October, 1865." On reading it two ditches are spoken of; one to be made by the plaintiff, another by the defendant, beginning at the same fence. The last ditch spoken of in the award is the defendant's. If the time applies to hers, there is no time for the plaintiff to make his; if it applies to the plaintiff's ditch, there is no time specified for the defendant to make hers. It does not appear by the award that it is to be one continuous ditch, but rather two ditches, and is bad for not appointing the time for both parties to make it, and where it is to be made

The fifth objection we think well founded, and it puts an end to the action. In *Berkeley* v. *Elderkin*, 1 El. & B. 805, the principle is recognized, "that where new rights are given, with specific remedies, the remedy is confined to those specially given." Much that was said by Lord Campbell applies with great force by analogy here. In clearing our forests, much inconvenience was felt in many places from the land being wet, and as the tracts granted to settlers were small, it was frequently impossible to drain one lot without trespassing upon another, or for one man to drain his land without the assistance of others equally interested in draining theirs, while without such drainage the land could never have been cleared and cultivated. In view of this the Legislature, in providing for the rights and liabilities of adjacent proprietors with regard to fences, provided for a simple and cheap system of opening ditches or water-courses, by the 8th Vic. cap. 20, secs. 12. 13. 14. This Act imposed the duty on those who were interested in drains to contribute a just share; it gave the right to make ditches across the lands of those who were not interested, and where disputes arose, it enabled the parties to apply to the fence-vicwe rsto award concering their disputes. It providedthat if any party neglected or refused, upon demand made in writing, to open, to make and keep open, his share awarded to him by the fence-viewers, within the time allowed. either party, after completing his own part, might open the part of the party neglecting or refusing, and be entitled to recover not more than two shillings per rod from the party neglecting or refusing to open his share, in the same manner as the Act provides for payment of line and division-fences.

But our attention has been called to the fact, that, in the consolidation of this Act by the 22 Vic. cap. 57, while section 16 enacts that to ascertain in the amount payable by any person, who, under the authority of this Act, makes or repairs a fence, or makes, open, or keeps open any *ditch* or *water-course*, which another person should have done, and to enforce the payment of such amount, the following proceedings shall be taken, the eleven sub-sections refer to fences

only, and ditch or water-course is omitted, upon which, it is contended that there is no remedy to recover the amount payable in respect to a ditch or water-course

We do not think so. When we see that this section, as well as those which precede it, respecting ditches or water-courses, gives the right to recover from the dafaulting party the amount of work the other performs, upon his default, not exceeding in price per rod fixed by the Statute, we think we should not be justified in holding that, because in prescribing the proceeding for its recovery, the Legislature had omitted to repeat the word ditches or water-courses, it intended to withhold that which it had so clearly given. Looking at the provision of the original Statute and of this, we are of opinion that the proceedings mentioned in the eleven sections of section 16, have reference to ditches or water-courses, as well as to fences. In *Doe Murray* v. *Bridges* 1 Bar. & Ad. 858, it is said by Tenterden, C. J.: "We are to look at the Act to learn by what mode the intention is to be carried into effect."

In this view of it, it follows that this plaintiff had his remedy under this Statute and no other; that he ought to have demanded of this defendant performance of this award, and if she made default, that he ought to have opened her ditch, and compelled her to pay for it under the provisions of this Act: *The Vestry of St. Pancras* v. *Batterbury*, 2 C. B. N. S 477. Cockburn, C. J., at page 486, says: "Where an Act of Parliament creates a duty or obligation, and gives a remedy for a breach of it by a peculiar proceeding, a question arises whether the remedy so provided is the only one to be had recourse to, or whether it is cumulative."

Here, as in that case and for similar reasons, we think the Legislature intended that the summary proceeding pointed out should be the only one.

To hold otherwise would, we think, open an appaling source of litigation ruinous to all concerned in it, and opposed to the spirit and intention of the Legislature, which, we think, was, to place in the hands of either party interested the right to specific performance of the the relief sought, but not damages by suit for non-performance of it.

Judgment for defendant on exceptions to declaration.

COMMON LAW CHAMBERS.

(*Reported by* HENRY O'BRIEN, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.*)

BROOKE v. THE BANK OF UPPER CANADA.

Corporation—Forfeiture of bank charter—Effect on tenure of office by president and directors—Service of process.

Service of process was made upon A. as president of a bank. The last election of officers was in June, 1866, when A. was elected president for one year. No election of directors or president had taken place since then, and A. never in fact resigned his office as president. In September, 1866, the bank suspended specie payment, and before 60 days thereafter they assigned their property and assets to trustees, and from thence had ceased to do business as a bank. It was provided by the charter, amongst other things, that a suspension of specie payment for sixty days, or an excess of the debts of the bank by three times the paid up stock and deposits, &c., should operate as a forfeit of the charter, &c.

Held, 1. That the total annihilation of the bank was not contemplated by these provisions, and it does not follow from the loss of the charter that there must be a dissolution for all purposes.

2. That some formal process is necessary finally to determine and put an end to all the functions of a corporation.
3. That notwithstanding the suspension and assignment, the bank was still a corporate body, liable to have its property sold or administered for the satisfaction of debts.
4. That A. must still be looked upon as the president of the bank, and an application to set aside the service upon him was discharged with costs.

[Chambers, October 10, 1867.]

This was a summons to set aside the service of process made upon Mr. Allan, who was served as president of the Bank of Upper Canada, upon the ground that the bank having suspended specie payments for more than sixty days consecutively, a forfeiture of their charter had been created, and that there existed no such corporation as the defendants were represented to be, and that even if there were such a corporation, that Mr. Allan was not the president, or an officer of the bank.

It appeared from the affidavits filed that the last election of officers was in June, 1866, when Mr. Allan was elected president for one year, and that the bank suspended specie payments in September, 1866; and before sixty days therefrom, the bank (on the 12th November, 1866) assigned, with the consent of the shareholders, all their property and assets to trustees, and had ceased from that period to do any business as a bank. That no meeting was held in June, 1867, for the election or directors and president, and that Mr. Allan had never in fact resigned his office of president.

Maclennan shewed cause. He contended that the bank did exist in fact as a corporation, notwithstanding the forfeiture of the charter; that properly its corporate powers could not be determined, whether by suspension of specie payments or by the assignment of its assets, except by proceedings taken for that purpose, and that the officers last elected, and who had never resigned, must be considered to be the proper officers of the bank for service of process and other purposes. He referred to the act of incorporation, 19 & 20 V. c. 121, secs 7, 8, 33, 35, 36; Grant on Banking, 462, 539; *Stewart* v. *Dunn*, 12 M. & W. 655; Grant on Corporations, 283, 295, 301, 305, 306, 309; Angell & Ames, on Corporations, sec. 777.

G. D. Boulton supported the application, and argued that the forfeiture of the charter, which, it was expressly declared by statute, should follow in the event of suspending specie payments, was in fact a dissolution, or was equivalent to a dissolution of the corporation; and, in such a case there could be no longer any officers of the corporation, for the corporation itself was utterly gone and determined, and the service itself was therefore irregular. *Slee* v. *Bloom*, 19 Johnston, 456; Kyd on Corporations, 447, 515; 1 Bl. Com. 500, 501; Angell & Ames on Corporations, sec. 779; 19 & 20 Vic. secs. 2, 7, 8, 32.

ADAM WILSON, J.—By sec. 7 of the act, ten directors are to be elected annually at a general meeting of the shareholders, to be held annually on the 25th of June, and the directors elected shall be capable of serving as directors for the ensuing twelve months; and at their first meeting after such election the directors shall choose out of their number a president and vice-president, who shall hold their offices during the same period.

By section 8, if an election of directors be not made on the day fixed, the corporation shall not be taken or deemed to be dissolved, but such election may be made at a general meeting of the shareholders, to be called for that purpose; and the directors in office when such failure of election takes place, shall remain in office until such election is made.

By section 33 a suspension by the bank of payment on demand in specie, of the notes or bills of the bank payable on demand, shall, if the time of suspension extend to sixty days consecutively, or at intervals within any twelve months, operate as and be a forfeiture of its charter, and of all and every the privileges granted to it by this or any other act.

By section 35, in case the debts of the bank exceed three times the stock paid in, and the deposits made in the bank in specie and government securities for money, or in case the total amount of the bills or notes of the bank intended for general circulation shall at any time exceed the amount by the act directed, the charter and all the privileges of the bank shall be forfeited, and the directors, under whose administration the excess shall happen, shall be liable jointly and severally in their private capacity; but such action or actions shall not exempt the said bank or its lands, tenements, goods or chattels, from being also liable for such excess.

By section 36, in case the property of the bank become insufficient to liquidate the liabilities thereof, the shareholders in their private capacity shall be liable for the deficiency thereof, but to no greater extent than to double the amount of their respective shares.

By section 38, if the bank shall advance or lend to or for the use of any foreign prince, power or state, any money or security for money, "then and from thenceforth the said corporation shall be dissolved, and all the powers, authorities, rights, privileges and advantages granted to it by this or any other act shall cease and determine."

The section which declares that the charter shall be forfeited in case the debts of the bank shall exceed three times the paid up stock and deposits, expressly provides for *the bank*, as well as the directors individually who are culpable, being proceeded against, and the lands and chattels of the bank being also followed.

The total annihilation, therefore, of the corporation is not contemplated by this section, and I see no reason why it must necessarily be annihilated under the other section relating to the suspension of specie payments, where the same kind of language is used as to a forfeiture of the charter.

The language in both of these sections is different from that used in the 38th section, which prohibits the lending to foreign powers. In this last case, "the corporation is thenceforth to be dissolved, and all its powers, &c., are to cease and determine." It does not follow that there must in all cases be a dissolution for all purposes: *Mayor of Colchester* v. *Brooke*, 7 Q. B. 382; *Woodbridge Union* v. *Colneis*, 13 Q. B. 285, and I think it would require a process of some kind formally to determine the corporation.

It would not surely be permitted to a defendant who was sued on his promissory note to the bank to plead in bar of the action a forfeiture of the charter by reason of the suspension of specie payments for sixty days, or that the bank debts exceeded three times its paid up stock and deposits, or that the bank was dissolved because it had made a loan to a foreign power.

There are appropriate remedies prescribed for each case, and nothing could be more inconvenient, perplexing and dangerous than to try so important a question upon a merely collateral issue, and I think the cases show that this will not be allowed: *The Queen* v. *Taylor*, 11 A. & E. 949; *The Attorney-General* v. *Avon*, 33 Beav. 67; 9 Jur. N. S. 1117; 9 L. T. N. S. 187; *Reg.* v. *Jones*, 8 L. T. N. S. 503.

When all the members of a corporation are dead, so that there is no one to proceed against, and there is no corporate body in fact or in law remaining, there must be an absolute dissolution without any process, from the actual necessity of the case; but as a general rule nothing short of a determination by some judicial power will, it seems, put an end to the existence of the functions of a corporation.

In my opinion the Bank of Upper Canada is notwithstanding the suspension of specie payments for more than sixty days and notwithstanding the assignment made to trustees, still a corporate body, liable to be sued and to have its property sold or administered for the satisfaction of debts, because it has not formally been dissolved, and because, although not formally dissolved, I am not satisfied it might not still be a corporation for the purpose of being wound up, or sued for the purpose of reaching its property and effects in satisfaction.

The general purport of the act is to enable depositors and other creditors, notwithstanding a forfeiture of the charter, to recover their debts, while the argument for the bank is that such persons have absolutely forfeited their claims, or that their only redress is now against the trustees.

I think this is not so. Then it was argued that at any rate the service upon Mr. Allan, for the reasons before stated, was invalid.

It is clear by section 8 that the directors last elected still remain in office, at any rate until they resign it, and Mr. Allan, it is said, has not resigned; and it is clear by section 7 that the president whom the directors elect is to remain in office as such president *during the same period* as the directors remain in office, so long, at any rate, as they remain in office under the 7th section, which is for the ensuing twelve months from the annual meeting and election of directors on the 25th of June. But I am opinion that on a fair construction of the act the president, who must also be a director, remains in office as such president when a failure to elect directors has taken place, until the new election of directors, and the appointment of a new president has been made.

If this were not so, great difficulty might perhaps be occasioned by the loss of an integral part of the corporation.

If I am in error on either point the application can of course be reversed in the full court.

In the meantime I discharge the summons, and as it was moved with costs I discharge it with costs.

Summons discharged with costs.

ENGLISH REPORTS.

CROWN CASES RESERVED.

Reg. v. Jarvis.

Evidence—Confession on inducement—Admissibility.

The prosecutor called the prisoner to his room, and said, "Jarvis, I think it is right I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police, and I should advise you that, to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue." A letter was then produced which Jarvis said he had not written, and the prosecutor then added, "Take care Jarvis, we know more than you think we know." *Held*, that the answer of the prisoner in the nature of a confession was admissible in evidence.

[Nov. 23, 1867.—17 L. T., N. S., 178.]

Case reserved for the opinion of this Court by the Recorder of London, at a session of the Central Criminal Court held on the 8th July 1867 and following days.

Frank Jarvis, Richard Bulkley, and Wilford Bulkley were tried upon an indictment for feloniously stealing 138 yards of silk and other property of William Leaf and others, the masters of Jarvis.

There was a second count in the indictment for feloniously receiving the same goods.

William Leaf was examined, and said,

"The prisoner Jarvis was in my employ. On the 13th of May we called him up, when the officers were there, into our private counting-house. I said to him, 'Jarvis, I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police, and I should advise you that, to any question that may be put to you, you will answer truthfully, so that if you have committed a fault, you may not add to it by stating what is untrue.' I produced a letter to him which he said he had not written, and I then said, 'Take care Jarvis, we know more than you think we know.' I do not believe I said to him 'You had better tell the truth.'"

Counsel for the prisoner Jarvis objected to any statement of his, made after the above was said, being received in evidence, and referred to *Reg.* v. *Williams*, 2 Den. 433; *Reg.* v. *Warringham*, 15 Jur. 381; and *Reg.* v. *Garner*, 1 Den. 329; *Reg.* v. *Shepherd*, 7 C. & P. 579; *Reg.* v. *Muller*, 3 Cox C. C. 507.

Counsel for the prosecution referred to *Reg.* v. *Baldry*, 2 Den. 430; *Reg.* v. *Sleeman*, Dears. 259; and *Reg.* v. *Parker and others*, L. & C. 42.

I decided that the statement was admissible.

The jury found Jarvis guilty, adding that they so found upon his own confession, but they thought that confession prompted by the inquiries put to him.

At the request of counsel for Jarvis, I reserved for the Court for the consideration of Crown Cases Reserved the question whether I ought to have admitted the statements of the prisoner in evidence against him.

If I ought not to have done so, the conviction should be reversed.

Russell Gurney, Recorder of London.

Coleridge, Q.C. (*Straight* with him), for the prisoner.—It is submitted that the prisoner's confession ought not to have been received in evidence. The rule is that every confession must be free and voluntary on the part of the accused: but if it is induced by any promise or threat on the part of the prosecutor, it is not receivable in evidence; *Reg.* v. *Baldry*, 19 L. T. 146. It is incumbent on the prosecution to show that the confession was free and voluntary, per Parke, B. (see note to report of *Reg.* v. *Baldry*, 2 Den. 430). The motive or intention of the prompter is immaterial, the question being what effect the inducement had or was likely to have on the mind of the accused. Different reasons for the rule have been assigned by Eyre, C. J., in *Warickshall's case*, 1 Leach C. C. 298, and by Pollock, C. B., in *Reg.* v. *Baldry*. Now, in the present case, the prosecutors were extremely anxious to get some information from Jarvis to criminate the other two persons, the Bulkleys, and it must be remembered that Jarvis was only a youth. The substance of what passed amounted to this: That the prosecutor intimated that if he did not tell the truth it would be worse for him, and if he did it would be better. If what passed had any influence, however slight, on the prisoner's mind, the confession was inadmissible. In *Reg.* v. *Baldry* the words used left it to the prisoner to speak out or not, as he chose. *Reg.* v. *Garner* is also a clear case on the opposite side of the line to *Reg.* v. *Baldry*. The learned counsel then referred to *Reg.* v. *Williams*, 3 Russ. on Crimes 377; *Reg.* v. *Sheppard*, 7 C. & P. 579; *Reg.* v. *Warringham* (*supra*); *Reg.* v. *Parker*; Leigh and Cave, 42.

Giffard, Q.C. (*Grain* with him), for the prosecutor was not called upon to argue.

Kelly, C.B.—I have always felt that we ought to watch jealously any encroachment on the principle that no man is bound to criminate himself, and that we ought to see that no one is induced, either by a threat or a promise, to say anything of a criminatory character against himself. So, on the other hand, I watch jealously every attempt to break in upon those rules and decisions that have been laid down for public justice. In this case I have listened to the very able argument of Mr. Coleridge, but when I look at the question before us I entertain no doubt upon it. Do the words used by the prosecutor, when substantially, fairly, and reasonably considered, import a threat or promise to the accused, according as he should answer? To my mind, they appear to operate only as a warning to put the accused on his guard as to how he should answer, and not as a threat or promise. In the first place, they are not so much an exhortation to confess as advice given, and the reason of the advice is also given. It amounts to this: "We are going to put certain questions to you, and I advise you that if you have committed a fault you do not add to it by stating what is untrue." So far the words used are not within any rule of law that would prevent the answer from being admissible in evidence. Then we come to the rest of the words. A letter was then produced by the prosecutor, which the accused said he had not written, and the prosecutor then said, "Take care, Jarvis, we know more than you think." That was only an additional caution to the prisoner not to add the guilt of falsehood to the other fault. In many of the reported cases the words used seem to have acquired a technical signification; but the words used in this case have no such meaning; they seem to me to import advice only to the accused,

and not a threat or promise. The conviction, therefore, must be affirmed.

The other judges concurred.

Conviction affirmed.

QUARTER SESSIONS CASES.

REG. v. LAYARD.

Turnpike—Exemption of clergymen.

The exemption from toll containing in the General Turnpike Act (9 Geo. 4, c. 126, s. 32) of a clergyman going to visit a sick parishioner within his parish does not extend to exempt other members of his family in the same vehicle. *Sed quære*, whether the exemption would not extend to one person required to take charge of the carrage while he was in the performance of his duty.

[Edgeware, Nov. 6, 1867—44 *Law Times*, 64.]

The defendant was summoned for refusing to pay toll at Sheepcote turnpike gate on two occasions. By consent, the two offences were charged and heard together.

Greatorex appeared for the defendant.

The facts were not disputed. The Rev. C. C. Layard was the minister of Sudbury, near Harrow. He had occasion to visit a sick parishioner, at the other extremity of the parish He could go to her by roads running entirely through his parish, but the nearest route by a mile was by the turnpike road, which lay out of the parish, and upon which was the turnpike gate in question. He travelled in a pony carriage. On one day he had with him in the carriage his son only: on another day he was accompanied by his wife and two daughters.

Greatorex for the defendant contended that the language of the statute differed in defining the exemption of volunteers and yeomanry going upon duty and clergymen travelling upon their duties. The Act said that the carriage containing the volunteer, &c., should not be liable; but the exemption of the clergyman ran that *he* should not be liable. Now, the only person liable to toll in a carriage was the owner or driver, and if he was exempt, the toll could not be collected from any of those with him. If, however, the exemption were held not to extend to all, as in the first summons, he could contend that it included one person, for without somebody to take charge of the carriage how could the clergyman perform his duty ?

The CHAIRMAN referred to the *Volunteer case*, in which it had been held that, although the Act exempted the carriage *eo nomine*, such carriagee was liable to toll if it carried any person besides the volunteer; much more where the statute had exempted the clergyman personally, and not the carriage that conveyed him. If any inference were to be drawn from this remarkable difference of terms, it would be what the Legislature designed to make the exemption of the clergyman a personal privelege. The argument that if he was exempt no other person could be liable was ingenious, but the answer to it was that, although he was not liable for himself, *he* was liable *for them*. The charge was not that he had passed the gate, being himself liable for the toll, but that he had driven through it a carriage containing somebody that was liable, and for which toll he thereby, as the driver, was the party responsible, although hew as personally exempt. The Bench had more doubt about the point raised on the other summons, although he was strongly of opinion that even one other person could not be carried under an exemption that was merely personal. But as it was desired that both the points raised should be determined by a Superior Court, the Bench would convict on the first case, and dismiss the second with a nominal penalty, without costs, and would, if desired, state a case for the opinion of the Q. B.

[N. B.—The case is going to the Q. B.—ED. L. T.]

UNITED STATES REPORTS.

SUPREME COURT OF INDIANA.

BLOCH v. ISHAM ET AL.

An agreement between adjoining owners of a town lot, A. and B., that A. might build a party-wall equally upon the land of both, and that whenever B. should build upon his lot so as to use the wall, he would pay one half of the cost thereof, is not a covenant running with the land so as to entitle C. who had purchased A's lot, upon the performance of the condition as to the use of the wall, to sue B. for the money.

[7 Am. Law Register, N. S., 8.]

The opinion of the Court was delivered by

GREGORY, J.—The case made by the complaint is this: Schenck and Isham, being the owners of adjoining lots in Valparaiso, entered into a written agreement whereby Schenck acquired the right to build one of the walls of a brick store, then in process of erection on his own lot, with one-half of its thickness resting on the lot of Isham; and Isham acquired for himself, his heirs and assigns, the right to use the wall by joining a building thereon, and agreed for himself and them to pay one-half of the original cost of the wall when he or they should use it. Schenck completed the brick store on his lot, with one-half the width of one of its walls standing on Isham's lot. Afterward Schenck conveyed his lot and store to Bloch and others, and Bloch subsequently became the sole owner of the lot and its appurtenances; and while he was such owner Isham built a brick building on his own lot, and used the wall in question.

A demurrer was sustained to the complaint. The only question raised below, and here, is, whether Bloch or Schenck has the right to the pay for the wall used by Isham.

The case turns upon the solution of the question as to whether Isham's agreement to pay for one-half of the party-wall is a covenant running with the land.

There is some conflict in the authorities on this point. In *Burlock* v. *Peck*, 2 Duer (N. Y.) 90, the Superior Court of New York held that such a covenant passed to the grantee of the premises on which the building of the covenantor was erected. It is otherwise held in Pennsylvania: *Ingles* v. *Bringhurst*, 1 Dallas 341; *Todd* v. *Stokes*, 10 Barr 155; *Gilbert* v. *Drew*, Id. 219; *Hart et ux.* v. *Kucher*, 5 S. & R. 1. It is claimed that the cases in Pennsylvania turn on a statute. That statute simply provides that "the first builder shall be reimbursed for one moiety of the charge of the party-wall, or for so much as the next builder shall use before he breaks into the wall." There is nothing in this statute which is not embraced in the agreement of the parties in the case in judgment.

Brown v. *Pentz*, 1 N.Y. Leg. Obs. 24, was never officially reported, and we do not recognise it as an authority. But we think that the ruling of the Supreme Court of Massachusetts in *Weld* v. *Nichols* 17 Pick. 538, is conclusive on this question. It was there held that the liability to pay for the party-wall was a mere personal liability, and not repugnant to a covenant in a deed that the land was free from incumbrances.

The easement which passed from Schenck to his grantees was the right to the support of the party-wall afforded by that part thereof which rested upon the land of Isham.

Schenck and Isham were not tenants in common of the party wall, but each owned that part thereof on his side of the line; Schenck advanced the money to build Isham's moiety, on the agreement of the latter that he or his heirs would repay it when he or they should have occasion to use the wall. This is clearly a mere personal covenant, in no wise connected with or affecting the enjoyment of the lot conveyed to Bloch.

Judgment affirmed with costs.

Note by Editor of American Law Register.

In the assize of Buildings, by Henry Fitz Elwyne, first Mayor of London, (1 Richard I, A. D. 1189), it is enacted that "when it happens that two neighbors wish to build between themselves a stone-wall, each of them ought to give one foot and a half of his land; and so at their joint cost they shall build a stone-wall between them, three feet in thickness and sixteen feet in height. And, if they wish, they shall make a rain-gutter between them, at their joint cost, to receive and carry off the water from their houses, in such manner as they may deem most expedient. But if they should [not] wish to do so, either of them may make a gutter by himself, to carry off the water that falls from his house on to his own land, unless he can carry it into the king's highway.

"They may also, if they agree thereupon, raise the said wall as high as they may please, at their joint cost. And if it shall so happen that one wishes to raise such wall and the other not, it shall be fully lawful for him who so wishes it to raise the part on his own foot and a half as much as he may please, and to build upon his part, without damage to the other, at his own cost; and he shall receive the falling water in manner already stated.

"And if anyone shall build of stone, according to the assize, and his neighbour through poverty cannot, or perchance will not, then the latter ought to give unto him who so desires to build by the assize, three feet of his own land; and the other shall make a wall upon that land, at his own cost, three feet thick and sixteen feet in height; and he who gives the land shall have one clear half of such wall, and may place his timber upon it and build.

"But this assize is not to be granted unto any one so as to cause any doorway, inlet, or outlet, or shop, to be narrowed or restricted, to the annoyance of a neighbor.

"This assize is also granted unto him who demands it as to the land of his neighbor, even though such land shall have been built upon, provided the wall so built is not of stone.

"Also, no one of those who have a common stone-wall built between them, may, or ought to pull down any portion of his part of such wall, or lessen its thickness, or make arches in it, without the assent and will of the other.

"If any person shall wish to build the whole of a wall upon his own land, and his neighbor shall demand against him an assize, it shall be at his election either to join the other in building a wall in common between them, or to build a wall upon his own land and to have the same as freely and meritoriously as in manner already stated:" Liber Albus of the City of London, Book III., Pt. 2, p. 278 *et seq.*, edited by Henry T. Riley, under the direction of the Master of the Rolls, London, 1859.

This assize or ordinance from which we have quoted at some length, as the volume is believed to be not generally found in the libraries of this country, exhibits a remarkable degree of efficiency for that early and turbulent day in the police regulations of that great city which, as LORD CAMPBELL says, was "a sort of free republic in a despotic kingdom:" Lives of the Lord Chancellors, I., 8. The recent destructive fire in the reign of King Stephen, alluded to in Liber Albus, had led to a great improvement in a building by the subtitution of stone-walls and tiled roofs for the wood, thatch, and straw previously used, and in the course of this change much dispute had probably arisen as to party-walls and the rights of support and roof-drainage depending thereon. Hence, this assize was ordained, as the preamble states, "*per discretiores viros civitates, ad contentiones pacificandas*" It is probable, however, that it only consolidated and enacted into positive law, the previous custom of the city. To this custom, the independent growth of the convenience and necessittes of a large and compact city, we prefer to look for the foundation of the present law of party-walls, rather than to the urban servitude of the civil law, *tigni immittendi*, though similar circumstances produced similar laws in both cases, and in later times, no doubt, the just reasoning and mature wisdom of the civil law had great influence in developing the English law of party-walls as well as of other easements.

The custom of party-walls, developed by time and regulated by various statutes, was introduced into this country, together with the process of foreign attachment, the custom of *feme sole* traders, and other customs of London, by the first settlers in Philadelphia under William Penn, and in 1721 the legislature of Pennsylvania passed an act, still in force, regulating in detail the whole subject of party-walls in the city of Philadelphia. Under this act it has been held that the builder's right to compensation for one-half the party-wall is not a lien on the adjoining land, but a mere personal charge against the builder of the second house, and does not run with the land against his assignee: *Ingles* v. *Bringhurst*, 1 Dallas 341; *Hart* v. *Kucher*, 5 S. & R. 1. Therefore if the first builder be paid before the second house is built the right to compensation is gone; it is neither a hereditament nor an appurtenance to land and does not pass by a conveyance of the house: *Hart* v. *Kucher*, 5 S. & R. 1; *Davids* v. *Harris*, 9 Barr 501; *Todd* v. *Stokes*, 10 Id. 155; *Gilbert* v. *Drew*, Id. 219.

By statute, however, the right to compensation for use of a party-wall is now made an interest in the realty and passes by a conveyance of the

house unless excepted in the deed: Act of 10th April 1849, Pamph. L. 600; *Knight* v. *Beenken*, 6 Casey 372

Only a few of the general principles governing party-walls independently of statutory enactments have been discussed in this country.

1. Without a contract or statutory authority no owner has a right to build his wall beyond his own line, and if he does so the adjoining owner may treat it as a trespass and compel it to be taken down, or he may use it as a party-wall without paying anything for it; *Sherrerd* v. *Cisco*, 4 Sandford 480; *Orman* v. *Day*, 5 Fla. 385. The observations of WOODWARD, J., in *Zugenbuhler* v. *Gilliam*, 3 Clarke 391, that at common law the adjoining owner by using the wall makes it a party-wall and becomes liable for the value of half the wall, are not supported by authority, as the passage cited from 2 Bouvier's Inst. 178 is based on the statute of Pennsylvania. This case, therefore, except so far as founded on the statute of Iowa, cannot be regarded as sound law.

2. *Primâ facie* the wall and the land on which it stands are held in England to belong to the adjoining owners in moieties as tenants in common, but this presumption is rebutted when the amount of each one's ownership can be ascertained, and each is then owner in severalty of his portion: Gale on Easements 411 (3d London ed.) And the American courts are said to lean towards this latter presumption: *Sherrerd* v. *Cisco*, 4 Sandford S. C. 480. Each half, however, is subject to an easement of support for the other.

3. If two adjoining owners build a wall partly on each lot, and by express agreement or by continuous use for twenty years, treat it as a party-wall, it becomes a technical party-wall and each has an easement of support for his half: *Webster* v. *Stevens*, 5 Duer 553.

4. So, if an owner of adjoining lots build upon them a wall partly on each, intended and necessary for the support of both, a conveyance of either house and lot with its appurtenances, grants an easement for the support of the house in so much of the wall as stands upon the other lot: *Eno* v. *Del Vecchio*, 4 Duer 53; 6 Id. 17.

5. After such a grant and continued use of the wall for twenty years neither can remove the wall or deal with his half so as to impair the support of the other's house: *Eno* v. *Del Vecchio*, 4 Duer 53; 6 Id. 17; *Potter* v. *White*, 6 Bosworth 644; *Phillips* v. *Bordman*, 4 Allan 147. In *Potter* v. *White*, one who took down a party-wall and built a new one without the consent of the adjoining owner, was held liable for loss of rent, and expenses of repair, &c., made necessary by the removal of the old wall and building of the new. In *Phillips* v. *Bordman*, the Supreme Court of Massachusetts granted an injunction to restrain one owner of an ancient party-wall from cutting away a portion of its face and erecting a new wall on his own land two inches from that part of the old wall left standing, and connected with it and supporting it by occasional projecting bricks and ties.

And in *Eno* v. *Del Vecchio*, *ubi sup.*, it was said that if either wishes to change the wall he may do so within the limits of his own lot, provided he does not injure the other, and for such purpose he may shore up the whole wall for a reasonable time while the changes are in progress, but if he does this without the consent of the adjoining owner he does it at his own peril, as the question of negligence does not come in at all, and no degree of care or skill will relieve him from liability if injury is actually done.

The Supreme Court of Ohio, however, have held the contrary, and that where owners of adjoining lots build a party-wall by express agreement for the support of their houses, but without any stipulation as to the continuance of the wall, either party or his grantee has a right to take down his part of the wall, after notice and using sufficient care—although it may have been used as a party-wall for twenty-one years; and where the wall fell down, notwithstanding the care, it was held that there was no cause of action: *Hieatt* v. *Morris*, 10 Ohio State 523.

The rules above enunciated in *Eno* v. *Del Vecchio* and other cases do not, however, apply to a party-wall built by tenants for years of adjoining lots, so as to affect the reversioners or their grantees: *Webster* v. *Stevens*, 5 Duer 553. And the right to use the party-wall is only the right to use it *as it has been used*. Thus, A. conveyed a house to B. with a reservation, "the owners on both sides to have mutual use of the present partition-wall." The wall was entirely on the lot conveyed to B., and only a portion of it was used as a partition-wall. A. subsequently conveyed the adjoining lot to C., who enlarged the house and used a greater part of the wall than was so used at the time of the conveyance to B. Held that he was liable to B. for damages in so doing: *Price* v. *McConnel*, 27 Ill. 255.

6. How long the easement of support acquired by lapse of time or by contract not specifying the term for which it is granted, continues, is still an unsettled question. That it continues so long as the wall remains safe and well adapted to the original purpose, appears to be conceded by all the cases except *Hieatt* v. *Morris*, 10 Ohio State 523, already cited (*supra* 5). When however, the wall becomes ruinous and unsafe or unfit for its purpose of support. either party has a right to take down his half in a skilful manner, after due notice to the other party. And if one-half cannot be taken down without danger, the owner may take down the whole, and such right is not affected by the nature of the use or occupation of the other building: *Campbell* v. *Mesier*, 4 Johns. Ch. 334; *Partridge* v. *Gilbert*, 3 Duer 184; s. c., 15 N. Y. 601.

But whether the right of support continues longer than the existence and fitness of the old wall is questionable. In *Campbell* v. *Mesier*, 4 Johns. Ch. 334, Chancellor Kent appeared to think that the easement was in fee, and where one owner pulled down an ancient party-wall which had become ruinous, and rebuilt it, the Chancellor held the adjoining owner liable to contribute rateably to the expense, provided that if the new wall should be higher or of more expensive material than the old one, the builder should pay the extra expense. But in *Sherrerd* v. *Cisco*, 4 Sandford 480, it was held that if the wall be destroyed by fire or accident the adjoining owners are not bound to rebuild it. The land becomes freed from all servitude in relation to the party-wall as in case of two adjoining lots without buildings. And in *Partridge* v. *Gilbert*, 3 Duer 184, 15 N. Y. 601, Denio, C. J., was of opinion that the right to support ceased when the wall

became unfit, whether from age or accident, and that each owner was then remitted to his original unincumbered title to the division-line, citing *Sherrerd* v. *Cisco*, and dissenting from the views in *Campbell* v. *Mesier*. In the same case, however, Shankland, J., seemed of the contrary opinion and approved *Campbell* v. *Mesier*.

7. In regard to the right to compensation for the use of a party-wall, the cases differ. In Pennsylvania, in the cases cited above, it was held, until the Act of 1849, that it was a personal right of the builder against the person using the wall and did not run with the land, either in favor of the first assignee of the first builder or against the assignee of the second builder. To the same effect is the principal case. In New York, however, the decisions are otherwise. Thus, in *Burlock* v *Peck*, 2 Duer 90, A., owning two adjoining lots, conveyed one of them with the privilege to the grantee of building a party-wall on the division-line one-half on each lot, and covenanted to pay for one-half the wall when used. A.'s grantee built the wall and then conveyed to B. A. then conveyed the adjoining lot, and his grantee used the wall. Held that B. could recover of A. or his executors the value of one-half the wall. And, also, that B. having died after the use of the wall by the grantee of the adjoining lot, the action was properly brought by B.'s administrator, not his heir.

In this case the question of the liability of the grantee of the second lot, who actually used the wall, was not raised, but in *Keteltas* v. *Penfold*, 4 E. D. Smith 122, a covenant by A. for "himself, his heirs and assigns," to pay for half a party-wall when used, was held to run with the land so as to charge A.'s devisee. And in *Weyman's Ex'rs.* v. *Ringold*, 1 Bradford 52, a covenant to pay one-half the value of a party-wall when used, to the builder, "his executors or assigns," was held to run with the land in favour of the grantee of the covenantee. In the last case it was expressly agreed that the covenant should bind the lands "and the successive owners thereof," but the surrogate was of opinion that the covenant ran with the land independently of this agreement.

See, also, *Giles* v. *Dugro*, 1 Duer 331, where A. covenanted with B., his vendee, that the premises sold were clear of "all former or other grants, bargains and incumbrances whatsoever," but, in fact, A. had previously conveyed to C. the right to use a wall as a party-wall, and it was held that this was an incumbrance, and the use of the wall a partial eviction of B. who was entitled to recover from A. a sum having the same ratio to the purchase-money as the value of the land so occupied by C. bore to the value of the whole.

J. T. M.

CORRESPONDENCE.

Setting off judgments.

To the Editors of the Local Courts' Gazette.

St. Mary's, December 18, 1867.

Gentlemen,— On the 8th day of March, 1866, A. sued a note in the Third Division Court for the County of Perth, made by one B. in favor of Messrs. C. & D., upon which note A. obtained judgment against B. for $21 63 and costs, upon which judgment, execution was issued and returned *nulla bona*. On the 2nd day of November, 1867, B. the above named defendant, sued one E. in an action for damages, upon which he recovered a judgment for $30 without costs, payable in 10 days. On the 16th day of November, 1867, the son of E. called at my office, asking me to set off the judgment of A. against the judgment B. v. E.

E. being the actual plaintiff in this suit, I declined to set off this judgment, contending that I had no power to do so, as the judgment was not in his father's name, although I was well aware his father was the actual plaintiff in this suit. On the 18th day of November, 1867, the son of E. again called at my office, requesting me to set off the judgment A. v. B. against the judgment B. v. E., leaving at the same time an assignment dated 18th November, 1867, from A. to his father, of the judgment against B. and paying into Court the difference of the amount of the judgment. I took the assignment and money from the son of E. giving him a receipt for the money as paid on account, refusing to give him a receipt in full, at the same time stating to him that I did not think B. would trouble them any more on account of his judgment, and that I would get Mr. B. to receipt his judgment in full against E. I spoke to Mr. B. about the payment into Court and the assignment of judgment, when he stated he would not consent for his judgment to be set off against the judgment A. held against him, but requested me to issue an execution against E. I immediately notified E. that B. would not consent to that arrangement and that I would have to issue an execution the same day, but if paid the same week, no further costs would be made. The son of E. then applied to the judge for a summons to B. to shew cause why the judgment should not be set off. Upon this application the judge granted a summons for B. to attend at the next sittings of this Court, to shew cause why the judgment should not be set off.

My object in writing the above, is to ascertain whether it would have been in accordance with the rules of the Court for me to have set off the judgment A. v. B. against the judgment B. v. E., though E. is actually the plaintiff.

Yours respectfully,

James Coleman, *Clerk D. C.*

[We could not with propriety, however interesting in itself, answer a question at present before the judge for adjudication.—Eds. L. C. G.]

The Question of Division Court Costs.

To the Editors of the Local Courts' Gazette.

Gentlemen,—I observe in the December number of the *Local Courts Gazette*, a long and elaborate article, from the pen of your Brampton correspondent, Mr. Agar. He seems to have taken upon himself the championship of all the clerks and bailiffs of Ontario, and moreover, writes as if some one had done these officials a grievous wrong. He has set up an imaginary opponent, and for the pure delight of the thing, has, *shillalah in hand*, struck about him in all directions; even going so far as to allude to the ghost of the departed. There are some persons so constituted, that they cannot argue on a mere abstract question, or discuss a subject, without getting into a passion with the opposing party. There are some persons who think mere rant, argument, and have no idea of the logical effects of their assertions. Your correspondent seems to think that because my name is concealed and his known, an advantage lies on my side. I do not perceive the force of this. And if any one is to blame for obtruding his name before the public, surely your fertile correspondent is the one. He came out, *as large as life*, with *name, locality and office.* The motive for so doing may be judged. Some people who try to break the heads of others, are sure to break their own. Your readers cannot care a straw, whether a *learned division court clerk* is arguing, or a writer who signs himself by a fictitious name. If they are capable of appreciating an argument, they will examine the assertions, arguments and conclusions. Your correspondent is at fault too in other respects, in supposing that your readers *are all interested, as he is*, in *increasing Division Court fees;* and are as ignorant, as he seems to be, of the principles of the Common Law.

I suppose, in writing my letters, that your readers, are, to a considerable extent, persons acquainted with legal principles. In my first and second letter on "the *question of Division Court costs*," I mentioned that there were two well known principles of law that might be looked at in this discussion. One was that in construing acts of Parliament, creating courts of inferior jurisdiction, courts of law were always careful not to extend their powers by *implication.* They are bound to act strictly within their *positively defined provisions.*

Another principle was, that, *as at common law, costs were not given*—or that costs were the creature *of positive statutes*—so neither superior or inferior courts could create *tariffs, or items of costs*, of their mere motion, and unless empowered to do so. I do not know whether your correspondent can see the force of this line of reasoning. At all events in his two long letters he has ignored it. I wrote my first letter for the purpose of disposing of, or setting right, vexed questions as to costs, in the Division Courts. I had no idea of quarrelling with any one, alluded to no one in partieular, had not the remotest idea of hitting your very *hot Brampton Clerk on the head*, nor of getting into a *wrangle with so learned a man.* My object was entirely patriotic, disinterested and even favorable to the officials in Division Courts. For whilst I pointed out the error and illegality of such people making a tariff of costs for themselves, I admitted that the law in many things wronged them, pointing out some grievances. Your correspondent by his letters, flies into half abuse of me for this, and would rather that I had done the last and *concealed the former!* Such a view betokens a mind warped by mere *present interests.* In my first letter your correspondent says, that I asserted that some clerk had charged me a *fee fund* fee for a certificate of a judge, on an execution, endorsed under the exemption of property act of 1861. My assertion of the fact was positive, and your correspondent in his first letter, *politely says he does not believe it!* Yet in his last letter he thinks he has not been guilty of any discourtesy. This reminds me of the Irishman at Donnybrook fair, who seeing the bald *pate* of a *friend, knocked him down* from the mere love of the thing! I do not know whether your correspondent is an Hibernian or not. This reminds me of what he says about charging "*nulla bona fees* on *his executions.*" He replies to my assertions "that his late Judge Boyd did not allow his bailiffs to charge fees for returning executions "*nulla bona.*" He says I always was in the habit at my court (at Berwick, I suppose) of charging (or allowing to the bailiffs) these fees, and Judge Boyd never forbade it. But (says he) *it is true, I never asked him the question, whether it was right or wrong!* Pray then, how does he know that Judge Boyd would have allowed them? Is this his idea of the duty of a public officer? Is this his idea of honesty in making charges? Upon a parity of reasoning he might have charged *one dollar* for

every execution or any other imaginary or got up fee, and said, "Judge Boyd did not know that I charged it, but *then he never forbade me!*" This reminds me of the story of the prisoner who, when asked for rebutting proof, (he being on his trial for larceny) told the Judge that he could produce a witness who would swear "*that he did not see him steal the cow!*" Is not such *Hibernian logic* on a par? Had he taken the trouble to ask his judge the question, if he will now take the trouble to ask that judge the question, he will be told that such charges *are not legal!* Your correspondent sticks to his "*nulla bona fees.*" He brings up the name of Judge Harrison. Judge Harrison allowed these fees he says, therefore I thought them right. Now he could not pretend to say that his proof against Judge Harrison is stronger than that against Judge Boyd. Did he ever test the question before Judge Harrison, or did any bailiff ever do so? I stated in my second letter the extent to which Judge Harrison went, and I brought the question before him and spoke to him pointedly on the subject. He never allowed any *nulla bona fees at all*; but he said he had sometimes, under *special circumstances of hardship*, where bailiffs had been sent by execution creditors out of their way, to levy on property that did not exist, allowed mileage to them. He told me that he understood that Judge Gowan, of Simcoe, took that course too. But at the same time he said this was a mere *exception not a rule.* He believed that *nulla bona fees were not legal.*

I think I can say this is also Judge Gowan's opinion. Judge A. Macdonald of Wellington, is (by the profession) looked upon as a very careful and learned judge in Division Court matters, and in a conversation with him lately, he told me that he considered such charges by bailiffs *wholly unwarranted by law!* But such opinions, are perhaps, (like my own) worthless with your correspondent. I also in one of my letters mentioned that years ago. the *Law Journal* had held these fees illegal, When I was very young, I recollect reading the fable of *the ox and the frog*, and all will remember the end of the latter. Your correspondent may also recollect the saying "a little learning is often a dangerous thing." I am told that I must not say anything against Judge Harrison, by your correspondent, otherwise I will have all the clerks of Peel and York down on me. Such a caution was entirely gratuitious. My acquaintance with that learned judge was perhaps in length of time, twice that of your correspondent, and no one knew or appreciated his excellent qualities of "head and heart" more than I did. Yet he and I have often joked over differences of opinion, as to the proper mode of deciding certain suits in Division Courts. He was for taking, in certain cases, a broad and equitable view of them, setting aside at times mere statutory rules, whereas I thought it safer to follow the well defined principles of law. I allude now to the questions of notices to endorsers of notes—the necessity of strictly enforcing the statute of frauds, the statutes of limitations, &c. In two things the judge was very particular, that is, as to the *scienter* in owners of dogs charged with killing sheep, and in making hired servants stand to their bargains. Well there is only one other point to which I will allude in your correspondent's letter, except one, that relates Messrs. Editors, to yourselves.

Your correspondent laughs at my assertion about the expense of suits in Division Courts, as compared with those of County Courts. When he writes about costs in County Courts, he is at sea, but I am not.—What I said in my first letter, or meant to say, was that costs in Division Courts, in proportion to the amounts sued, were higher. I could not mean that costs were higher in fact.—Now take these cases, which I have seen occur as facts within a few months past. A creditor sues a debtor for $4—gets a judgment, issues an execution, and collects the money — the mileage being about six miles—and the whole costs without any sale exceed the debt by $1. Again A. sues B. for $2, the mileage being 8 miles, and B. pays it before court, and no witness fees are charged in this or the other case, yet the costs in the last case are $1 84.

Yet another case, a replevin suit is entered, for less than $20, and for the trial, saying nothing about witnesses, and the costs are $5 at least. An interpleader suit is tried, and the costs are one-fourth of the debt. Now in the County Court, the costs are no greater on the collection of $400 than on $100. Then if there is no defence in County Court suits, (even on $400) the costs are small (say about $12), even with some mileage,—whereas in Division Court suits for say $100, where there is no defence, the mere fact of obtaining judgment by

default or confession with some mileage, would never be less than about $4.—As to sheriff's costs on returns of "*nulla bona*" on executions, your correspondent is again wrong. The ifee for "*nulla bona*" is only 35 cts., which is ncreased to 85 cts., by the sherriff's charging a fee of 50 cts. for a warrant made out, as they say, to some of their bailiffs. The sum of 50 cts. is for the warrant, not for the *fi. fa.*, and is not always charged, but only when the warrant is made out.

You never find suits in County Courts cost, *in costs*, more than the actual amount sued for, unless it be in actions of tort, or where a large bill is added for witness fees. Then, in pro portion to the amount sued for, the Division Courts are more expensive than County Courts.

Now, lastly, your correspondent thinks he caught me on the "horns of a dilemma," when he accuses me of setting up my opinion as he says against that of "*our best judges.*" I will quote the words in my letter in the October number of the *Local Courts' Gazette.* We will see if they bear fairly the construction Mr. Agar puts to them, and then I have a word to say about it. Here they are:

"It is in my opinion questionable, whether there is any authority for a fee fund charge on a Division Court judge's order of this kind, though I understand that some of our best judges think that there is."

I had been alluding to the certificate endorsed by a judge upon an execution in order to do away with the effect of the Exemption Act of 1861, which does not apply to contracts made before May 1860. This certificate must be endorsed on the execution by the judge, or the exemption law applies, and such certificates are endorsed by County Court judges and Queen's Bench judges, upon executions in their Superior Courts, but no fee fund charges are ever made in those courts, nor should it be made in the Division Court. The certificate is not an order in or out of court, and I happen to know from actual practice, before perhaps, twenty County Court judges in Canada, as well as before judges of Superior Courts, that such a fee fund charge has not been insisted on in my cases. —But nevertheless, it was, as I have before stated, insisted on by one clerk and one Division Court judge.—And I had to pay by his order about $1 in fees of this kind.

Now it will be seen that Mr. Agar in his first letter, "courteously of course," tells me he does not believe this. It is one thing to quote fairly, and another to distort. I merely said, (or am made to say by the compositor), that the allowance of a *fee fund in such cases is questionable*, though I understand that some of our best judges think that there is authority for it. But the words as put in my letter of October, were not in the original manuscript, and as I did not correct the proof, went in without my knowledge, and are there, doubtless, by some one of the many accidents that writing going through printer's hands is liable to. I never intended to say, and I now deny, that *any of our best judges* sanction this charge. I only know of one judge that did so, and he a newly appointed one. Then again, your correspondent uses these words, which I cannot allow to pass over, because they are not only untrue, but unfair in every respect. "'Communicator' has done well to wait until our honoured friend, Judge Harrison, was gathered to his fathers *before he dared to accuse him of unfairness in his judicial capacity.*" "Sir, I suspect who 'Communicator' is," he says. Now let your readers peruse my two prior letters, and see if they can find *one line, one letter*, in which I accuse Judge Harrison of *unfairness in his judicial capacity.*— I therefore pronounce this assertion not only *fabricated*, but beneath my notice. Such a thought (on my part) of making such an accusation against one of my most cherished legal friends, against one whom I always considered to be the most impartial of judges, is the last thing that could have entered my mind.

It is one thing to differ with a judge on a mere point of law, *but quite another* to accuse him of *judicial unfairness.*

If your correspondent, Mr. Agar, feels aggrieved by anything I have said in this or prior letters. he must remember that *unattacked by me, yea, unthought of*, he has thrust his head into *a written wrangle, officiously and offensively*, and like many others in like cases, must take the consequences.

"COMMUNICATOR."

Toronto, Jan. 18, 1868.

[As to the merits of this controversy, which, as "Communicator" has exercised his right of reply, must now cease, our readers can judge. We are not aware that the matter of his former letter, as printed, differed from the manuscript. But we are quite willing to believe that it may be so, for we should be very sorry to be obliged to decipher without fear of mistakes a very large proportion of the manuscript that passes through our hands.—EDS L. C. G.]