DIARY FOR AUGUST.

1. Tues ... *Lammas.*
6. SUN ... *8th Sunday after Trinity.*
10. Thurs. *St Lawrence.*
12. Sat .... Articles, &c., to be left with Sec. Law Society.
13. SUN ... *9th Sunday after Trinity.*
16. Wed. ... Last day for service for County Court.
20. SUN ... *10th Sunday after Trinity.*
21. Mon ... Long Vacation ends.
24. Thurs. *St. Bartholomew.*
26. Sat .... Declare for County Court.
27. SUN ... *11th Sunday after Trinity.*
28. Mon ... Trinity Term begins.

NOTICE.

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

The Local Courts' AND MUNICIPAL GAZETTE.

AUGUST, 1865.

THE OFFENCE OF CONSPIRACY.

It has been remarked, and not without some reason, that when a criminal act can be brought within no other branch of the criminal law, an indictment for conspiracy may be maintained, so broad is the range of the legal definition of what is included in the term "conspiracy." With the same object we had in view in laying before our readers some brief gleanings on the law of False Pretences, short notes are intended to be set down on the law of Conspiracy.

We premise by stating that which most magistrates know, that conspiracy is not an offence punishable on summary conviction, but, like the other indictable offences, must be sent for trial by a jury at the Quarter Sessions or Assizes.

What is a conspiracy, then? *It is a consultation and agreement between two or more persons, either falsely to charge another with a crime punishable by law, or wrongfully to injure or prejudice a third party or any body of men in any other manner; or to commit any offence punishable by law; or to do any act with intent to pervert the cause of justice, or to effect a legal purpose with a corrupt intent by improper means.*

The law has been thoroughly examined in a number of reported cases in England, and there have been some cases disposed of in our own courts. It is by brief notes from these several cases we hope to give a clear view of the nature of the offence, and what acts bring a party within it. "It has," remarked the very learned Chief Justice Tindal, "always been held to be the law, that the gist of the offence of conspiracy is the 'base engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not.'" But a bare contrivance to commit a civil trespass is not, it has been held, an indictable offence.

It will be noticed that one person alone cannot commit the offence; yet if a conspiracy be formed, and one joins in it afterwards, he is equally guilty with the original conspirators: nor is a prosecution for it maintainable against a man and his wife only as conspirators, because they are esteemed but as one person in law, and the wife of one defendant to an indictment for conspiracy is incompetent as a witness for another defendant. Where two conspire, and one dies, the survivor may still be indicted for the conspiracy.

The first branch of the definition does not require to be much enlarged on: we mean falsely charging another with a crime: thus, where a reward was offered for the apprehension of a robber, and certain persons conspired together to charge a man with being the robber, merely for the corrupt purpose of obtaining the reward for his apprehension, the offence was held to be a conspiracy.

(*To be continued.*)

INSOLVENCY—CONFLICTING ASSIGNEES.

A much debated point has just been decided in the Court of Chancery under this act, with reference to the respective force and validity of a voluntary assignment made since the act, but not under its provisions, and proceedings under the act for compulsory liquidation.

Sec. 3, 1 (*i*) of the act provides that a debtor shall be deemed insolvent, and his estate subject to compulsory liquidation, if, amongst other things, he has made any general conveyance or assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by the act. This provision was generally considered (and it was so held in *Hogge's* case by the learned judge of the County Court of York and Peel) not to apply to assignments made previous to the time the Insolvent Act came into force, and which

were valid, under the law as it then stood, as general assignments for the benefit of creditors; from which it would follow that assignees appointed under them are still liable and compellable to wind up and distribute the estates entrusted to their care. It would also seem to follow that if an assignment made before the act were bad in point of law as against creditors, it could not prevail against subsequent proceedings under the Insolvent Act; and in discussing this it would be material to consider whether the assignee under the act would have a *locus standi* to contest it, there being no special provision in the act which would make him stand in the stead of the creditors generally.

If making an assignment contrary to the provisions of the act is an act of insolvency, it would seem to follow as a natural consequence that such an assignment could not be permitted to stand in the way of proceedings taken under and in accordance with the act, unless indeed three months should elapse from the time of committing this act of insolvency before the commencement of such proceedings: (Sec. 3, subsec. 5.)

His Lordship Vice-Chancellor Mowat, in giving judgment in *Willson* v. *Cramp*, the case in which the point came up,* considered that any construction of the act which would prevent an assignee appointed under the act from receiving and administering the property of the insolvent, would render futile the enactment which makes such an assignment an act of insolvency, and would deprive the creditors of the advantages which the statute gives them for the winding up of the estate of an insolvent debtor. His Lordship also thought that it would be objectionable to let the assignment stand, as it put the debtor's property under a different course of distribution amongst his creditors from that which is contemplated and provided by the act—as, for example, in not giving any priority to the claims of clerks and other servants of the insolvent.

The scope of section 8, with reference to impeding and delaying the creditors of the insolvent, was also referred to as in itself sufficient to warrant the decision of the Vice-Chancellor, that such an assignment as that referred to was of no avail against subsequent proceedings under the act, and on this point he cited cases in England under analagous statutes there.

The law on this point having now been judicially determined, it will be necessary for all assignees of voluntary assignments since the act, but not under it, to govern themselves accordingly; and should any such refuse to comply with a proper request to deliver up the books and property of the estate, they would become personally responsible for the costs of any suit that might be brought against them to compel them to do so.

* A report of this case is given on page 217 of the July number of the *Law Journal*, and will hereafter appear in the *Gazette*.

SELECTIONS.

EVADING TOLLS.

A very ingenious mode of evading the payment of toll at Whalley-bridge-gate, has been turned to a profit by a certain innkeeper, who made use of the evasion for the purpose of attracting customers to his house. It appears that the keeper of the White Hart has a field adjoining the inn, and between the inn and the entrance to the field, stands the Whalley-bridge-gate. Mellor, the appellant, who is a farmer, was driving 120 sheep from Teddington to Stockport along this turnpike-road, and the sheep were driven into the field in question before passing through the gates. Mellor passed the night at the White Hart, and next day drove the sheep out of the field at the opposite end and over other land, and into the turnpike-road at a point nearer the Stockport, so that no toll was paid.

The Stockport magistrate convicted Mellor of the offence of evading toll, and the appeal came on before the Court of Queen's Bench sitting in banco, on the 31st ult. The landlord was compelled to admit that he used to stay at his house all night in order to save the toll. "I tell my customers," he said, "that if they stay all night they can get over this land without paying toll."

The judges were unanimous in their opinion that the magistrates were right in convicting the appellant of an intention to evade toll. And if the only point in the case were that which the judges assumed to be so - namely, the intention of the appellant to evade, it is surprising that he should have had the audacity to appeal. We are not satisfied, however, that the case is within the letter of the Turnpike Acts, and, if not, every subject has a right to evade an impost if he can.

The Lord Chief Justice was probably correct in his suspicion that the landlord was the real appellant, and that relying on the uncertainty of the law, he chose rather to incur the expense of litigation with the possibility of retaining his lucrative calling, than by sub-

mitting to the decision of the magistrates to undergo the certain and positive loss of a large amount of custom.—*Solicitor's Journal.*

THE LAW & PRACTICE OF THE DIVISION COURTS.

(*Continued from page* 86.)

In some particulars the language of this section and section 71 of the act are identical, and will be noticed in examining the general provision.

The place of sittings of a court, as respects the residence of defendant, is by the clause the main point in respect to jurisdiction. By section 69 of the act, the judge may appoint, and from time to time alter, the places within each division at which the Division Courts shall be holden. This appointment, like all other acts of the county judge, is made by order, and any change must be in like manner by order. As has already been observed in another place, no alteration should be made while summonses are current for the attendance of parties at a particular place, and due notice must of course be given of any change made in the place of sittings.

The act of 27 & 28 Vic. contemplates one place of sittings of a court, and it is apprehended that an order to hold a court in two different places alternately would, at least since the passing of that act, be bad; and in view of its provisions, alterations should be sparingly made, and not without a long previous notice. It would appear that the condition of things at the time when a suit is entered, would determine the question of jurisdiction, and an alteration in the place of holding a court, made after a suit entered, would not affect the power of the court to hear and determine it. Thus: suppose a party to reside within four miles of the place of sitting of a court in a county adjoining the one in which he lives, and the place of sitting of the court for the division in which each party lives to be fifteen miles from his residence, if action brought against such party for a debt incurred in his own division, the plaintiff would have the right to sue him in the court in the adjoining county, the place of sittings being only four miles distant; but if the place of sittings of the party's own division is, after the suit entered and before the hearing thereof, brought within two miles, then would come the question, could the court determine the case? The language, "and such suit [that is, the suit properly entered] may be tried and determined irrespective of when the cause of action arose," would go to show that the suit being rightly entered, the particular court had cognizance for final adjudication, but the point is not quite free from doubt.

The court, under this section, must be the *nearest* one to the residence of the proposed defendant: the right is a special one, and if there be a court having its sittings nearer to the defendant's residence than the one in which the suit is brought, the latter court would not be authorized to deal with the case under this section. In measuring distance, it would be scarcely practicable to measure according to the actual distance by road in a new country, and where roads are constantly straightened or changed, to do so would involve great difficulty in fact; nor would it be always easy to say what was a road, or whether a "short cut" over private property or ungranted land should be regarded as a road in measurement. The distance, it seems clear, is to be measured, not by the nearest mode of access, but by a straight line in the horizontal plane, or "as the crow flies," according to the common phrase. An analagous provision in the English County Courts Act is, that certain actions may, at the option of the parties, be brought in the superior courts. "Where the plaintiff dwells more than twenty miles from the defendant," &c. These words have undergone judicial construction. In *Lake* v. *Butler* (3 E. & B. 92), it was held that the twenty miles were to be measured in a straight line on the horizontal plane, and not by the nearest public mode of access. The point was also considered in *Stokes* v. *Grissel* (14 C. B. 678). Lush, in the argument, urged that the twenty miles should be measured by the road, and not in a straight line. "The county court bailiff's fees," he urged, "are regulated by the distance they have to go. The question is, not how far one man is from another, but what distance he has to go." Jervis, C. J.—"Then a man may one day be without the twenty miles, and one day within, by altering the road." *Reg.* v. *Saffron Walden* (9 Q. B. 76) has been relied on by the other side. That was a decision on the Poor Law Act, 4 & 5 Wm. IV., cap. 76, sec. 68, by which it was enacted that no person should be deemed adjudged or taken to retain any settlement gained by virtue of any possession of any

estate or interest in any parish for any longer or further time than such person should inhabit within ten miles thereof. Lord Denman, in that case, says, "Some statutes furnish one mode of measurement, some another. In *Leigh* v. *Hind* (9 B. & C. 774), one learned judge, my brother Parke, thought that the natural mode of estimating the distance was as the crow flies; but there, with reference probably to the object of the contract, the measurement by the nearest accessible route was adopted. Here we are left very much at large, and without materials for judgment. We find no words referring to any particular object. We have therefore to lay down a fixed and absolute rule. Now, abstractedly, the most reasonable rule appears to be that approved of by my brother Parke, namely, a measurement by a direct line. By this we shall avoid the practical difficulty of a settlement being good one day and bad the next. It would be most inconvenient that one spot should one day confer a settlement, and another day not." Maule, J.—"Some houses would be about the border. In all the cases where a man lives about that distance, you will have, if the distance be measured by road, to send a surveyor to see if there has been a shortening or lengthening of the roads." And Maule, J., in giving judgment, observed, "I think the true construction as to the twenty miles is like that put upon similar words by Parke, B., in the case (*Leigh* v. *Hind*) in the Queen's Bench, that the words have not two senses, but one, subject to this, that if that sense led to a clear contradiction or inconvenience, then they would not be interpreted in that sense, because that would have been visible to those who used them; but that is not so here, because the convenience is greater in using them in their ordinary sense than in any other. I think that that judge's opinion was expressed with his usual accuracy, when he said that he should have thought that the proper mode of measuring the distance would be to take a straight line from house to house, in common parlance, as the crow flies.

In a straight line, is the natural and obvious meaning of these words. Under the same statute it has been also held, that when there are several defendants, all of them must dwell within twenty miles of the plaintiff to oust the Superior Courts of their concurrent jurisdiction: *Doyle* v. *Lawrence*, 2 L. M. & P. 368; *Parry* v. *Davis*, 19 L. J. Ex. 284.

MAGISTRATES, MUNICIPAL & COMMON SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

HIGHWAY—PROSECUTION FOR OBSTRUCTION—COSTS—25 & 26 VIC. ch. 61, sec. 20.—A person who had encroached on and obstructed a public highway in the township of W., was indicted for so doing by the highway board of the district wherein W. was situated, and convicted upon the indictment. In addition to the taxed costs, the expense of the prosecution was £60, which the highway board required the township of W. to pay.

Held, that they were liable to the payment of that sum, it being an "expense in relation to a highway" within the township, within the meaning of 25 & 26 Vic. ch. 61, sec. 20. (*Heath* v. *Highway Board of West Eddisbury*, 13 W. R. 805.)

LOCAL TURNPIKE ACT — TOLLS — LIABILITY TO TOLL ON RE-PASSING GATE ON SAME DAY—By a local Turnpike Act a certain toll was imposed on every horse drawing any coach, stage-coach, van, caravan, or other such like carriage; and a lower toll was imposed on every horse drawing any waggon, wain, or cart, or other such like carriage. Horses were exempted from toll on repassing a gate in the same day, if it had been once paid, with the exception that tolls were payable for horses drawing any stage-coach, diligence, van, caravan, or stage-waggon, or other stage-carriage, conveying passengers or goods for hire, on each time of passing or repassing along the roads.

The appellant was a common carrier, and on certain days he conveyed goods, and occasionally passengers, for hire, in a caravan or waggon, from Cirencester to Cheltenham and back. He was not licensed under the Stage-carriage Act, but paid duties under the assessed Duties Act for a carriage used by a common carrier principally for conveying goods and occasionally passengers. He was charged both on his way to and from Cheltenham on the same day toll at the lower rate, which was admitted to be the proper one; his vehicle, on each occasion, conveyed goods and one passenger.

Held, that he was liable to toll on each time of passing or repassing along the roads. (*Comley* v. *Carpenter*, 13 W. R. 812.)

POOR—RATABILITY — MILL RATED AS WAREHOUSE.—A mill not worked by the proprietor, and which he does not intend to resume the

working of, but in which he retains machinery and other articles necessary for its use as a mill, with the view of selling or letting it in that condition, is ratable as a warehouse. (*Harter* v. *The Salford Overseers*, 13 W. R. 861.)

MUNICIPAL ELECTION — DISQUALIFICATION — CONTRACTOR — PROCEEDINGS.—A dispute arose between a township treasurer and the council of the township as to the duty of the treasurer, who was paid by salary in lieu of perquisites of office, to fund certain per centages for seven years, during which he held office. He paid the per centages for two years under protest, and refusing to pay more was dismissed, and afterwards became a candidate for the office of councillor, to which office he was elected, and subsequently became Reeve. Having, while in office, given a bond to the corporation, as treasurer of the township, conditional for the due performance of the duties of his office.

Held, 1. That the dispute was a matter of contract in the legal sense of the term, viz., the remuneration for services performed, the retention by one party of money claimed by the other, the due performance of the office of treasurer by the defendant, &c.—2.: That although the defendant did not hold the office of treasurer at the time of the election, there then being a dispute in good faith between him and the council of the township, arising out of matters connected with his administration of the duties of that office, he was disqualified as a person having an interest in a contract with the corporation.

Where the affidavit of the relator, though not intitled in any court, followed and referred to the statement of the relator, which was properly intitled, held sufficient, an objection that the recognizance was not intitled in any court, was disallowed upon similar grounds. *And semble*, such mere formal objections cannot be urged by defendant after appearance. His proper course in order to raise them would be to move. (*Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. 44.)

MUNICIPAL ELECTION—INNKEEPER—DISQUALIFICATION—COSTS.—The defendant being an innkeeper on the eve of a municipal election, leased the inn to a person who was formerly his barkeeper, and notwithstanding the lease, himself and family continued to live in the inn, occasionally attending bar as before the lease.

Held, 1st. That if the transfer of the business was in good faith, it was no valid objection, that the object of it was to enable the defendant to be legally elected to the office of township councillor. 2nd. That the parties to the transaction, having expressly negatived collusion or want of good faith, the boarders in the house, and those who had dealings with the defendant before the transfer, and those who were in the habit of visiting the house frequently, and had opportunities of knowing if there had been any change in the business, having expressed their belief under oath, that the defendant had nothing to do with business of the inn, that the transaction must be taken to have been *bona fide*, and defendant, therefore, entitled to his seat. 3rd. That the relator having acted in good faith in bringing forward the matter, should not be amerced in costs. (*Reg ex. rel. Crozier* v. *Taylor*, 6 U. C. L. J. 60.)

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

MEASURE OF DAMAGES—CARRIER.—In an action against a carrier for loss of goods by negligence, the measure of the damages is the market price of the goods lost at the place of delivery; and this includes three elements—(1) cost price of the goods at the place from which a person residing at the place of delivery would reasonably order them, (2) cost of carriage, (3) ordinary importers' profits.

Therefore, where there is, at the place of delivery, a market for goods of the same kind with those lost, the measure of damages is the actual current market price; but where there is no such market, the three elements above mentioned must be taken into consideration.

It is not necessary to give any evidence as to the average of importer's profits, but if the jury gave extravagant damages, the court would correct it. (*O'Hanlan* v. *Great Western Railway Company*, 13 W. R. 741.)

RAILWAY COMPANY—CARRIER—CONTRACT BY COMPANY TO CARRY BEYOND ITS OWN LINE.—The defendants were carriers of goods from Worcester to Chester. They forwarded goods by two different routes, first, by their own line the whole way, and secondly, by their own line to Stafford, and thence by the London and North-Western line to Chester. Goods were delivered to the defendants at Worcester, consigned to Chester, "*via* London and North-Western, Stafford."

Held, that there was evidence of an entire contract by the defendants to carry the whole distance. (*Webber* v. *Great Western Railway Company*, 13 W. R. 755.)

NEGLECT TO KEEP UP FENCE—HORSE STRAYING KICKING PLAINTIFF'S HORSE — REMOTENESS OF DAMAGE.—The owner of a horse is liable in trespass or case, if, through his neglect to maintain proper fences, it strays into the field of a neighbour, and there kicks his horse; and damages for the injuries so inflicted are not too remote to be recovered in such action. (*Lee* v. *Reily*, 13 W. R. 751.)

LIBEL — PRIVILEGED COMMUNICATION — WHAT WORDS THE OCCASION WILL JUSTIFY—EXCESS OF PRIVILEGE—MALICE —The plaintiff was trustee of a local charity. It being in contemplation to remove him from his office, he requested C., whose servant he was, to obtain signatures to a protest against his being turned out of the trust. C. called on the defendant amongst others, and asked him to sign the protest. The defendant declined on the ground that he would not keep a "big rogue" like the plaintiff in the trust. At the same time he also expressed surprise that C. should keep such a man as the plaintiff near his own son. C., in consequence of the conversation with the defendant, dismissed the plaintiff from his service. In an action of slander, brought by the plaintiff against the defendant, it was held that the words complained of were spoken on a privileged occasion.

Held, also, that the intemperance of expression and unnecessary force of language of the defendant were evidence of malice for the jury, but (the jury having negatived malice) they did not take away the privilege otherwise belonging to the occasion, inasmuch as they were relevant to the question whether the plaintiff was fit to be trusted or not. *Cook* v. *Wildes*, 5 E. & B. 328, 3 W. R. 458, followed. (*Cowles* v. *Potts*, 13 W. R. 858.)

COMPUTATION OF INTEREST WHEN PAYMENTS MADE GENERALLY.—*Held*, that the proper mode of computing interest, in the absence of payments made specially on account of principal, is to compute it on the amount due to the time of each payment, making rests, deducting the payments, and charging interest on the balance. (*Bettes* v. *Farewell*, 5 U. C. C. P. 450.)

PARTNERS—EXECUTION OF DEED.—*Held*, that where one of two partners signed in the name of both in the presence of the other and for him with his assent, though there was but one seal, it was the deed of both. (*Moore* v. *Boyd et al.*, 15 U. C. C. P. 513.)

UPPER CANADA REPORTS.

COMMON PLEAS.

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

THE CHIEF SUPERINTENDENT OF EDUCATION IN RE HOGG V. ROGERS.

School Trustees—Power to levy school rate at any time.

Under the acts relating to common schools, school trustees may *at any time* impose and levy a rate for school purposes: they are not bound to wait until a copy of the revised assessment roll for the particular year has been transmitted to the clerk of the municipality, but may and can only use the existing revised assessment roll.

[C. P., E. T., 1865.]

This was an appeal from a judgment of the Judge of the Fourth Division Court of the county of Grey. The action was trespass against the defendant, a collector of school rates for Union school section number one, in the township of St. Vincent, for unlawfully seizing and detaining a horse, the property of the plaintiff. The warrant under which the seizure took place was under the seal of the corporation of the school trustees of Union school section number one, in the said township of St. Vincent. It was dated February 22, 1864. Annexed to the warrant was a rate bill or list taken from the assessment roll of St. Vincent for the year 1863, dated February 20, 1864, but endorsed, Rate bill 1863. Plaintiff refused to pay the rate, whereupon defendant seized the horse upon the premises assessed. About four or five days afterwards, plaintiff paid the amount for which he had been assessed, and the horse was restored to him. The learned judge held that the trustees ought to have waited for the making and completion of the assessment roll for 1864, before issuing their warrant to the collector to levy the rate, and that the collector receiving in February a warrant for the collection of such a rate based upon the assessment roll for 1863, the year preceding, was not legally authorized to excute such warrant; that the only roll which a township collector is authorized to receive and act upon is the roll made up, finally revised and certified, and delivered to him on or before the 1st October in the year in and for which the taxes mentioned in the roll are to be collected, and the collector's power under his roll ceases on the 14th December following, unless prolonged by express by-law or resolution of the county council; and that a school collector has no greater power than a township collector, and must proceed under the same restrictions as to time and authority in the exercise of his duties. He therefore directed a verdict for plaintiff.

From this judgment the Chief Superintendent for Education in Upper Canada appealed. The case was first set down in the paper in Michaelmas term last, when *Hodgins* appeared for the appellant, and cited Con. Stats. U. C., ch. 64, sec. 27, sub-secs. 2, 11, 20; secs. 83, 109, 125; *Craig* v. *Rankin*, 18 U. C. C. P. 186; *Vance* v. *King*, 21 U. C. Q. B. 187; *McMillan* v. *Rankin*, 19 U. C. Q. B. 356, *Gillies* v. *Wood*, 13 U. C. Q. B. 357; *Chief Superintendent of Schools re McLean* v. *Farrell*, 21 U. C. Q. B. 441; *Doe* v. *McRae*, 12 U. C. Q. B. 525; *Doe re McGill & Jackson*, 14 U. C. Q. B. 113; *Spry* v. *Mumby*, 11 U. C. C. P. 285.

On a subsequent day during the same term, *D. A. Sampson* appeared for the respondent, and the case was on his application allowed to stand over till the following (Hilary) term, when he again appeared, and cited *Timon* v. *Stubbs*, 1 U. C. Q B 347; Rob. & H's. Dig. "Notice of Action;" *Haight* v. *Ballard*, 2 U. C. Q. B. 29; *Donaldson* v. *Haley*, 13 U. C. C. P. 81; *Bross* v. *Huber*, 18 U. C. Q B 282; *Dunwich* v. *McBeth*, 4 U. C. C. P. 228; *Wilson* v. *Thompson*, 9 U. C. C.P. 364; Con. Stats. U. C., ch. 64, secs. 10, 16, sub-secs. 4, 34; ch. 49, sec. 13.

Hodgins, contra, cited *Newbury* v. *Stevens*, 16 U. C. Q. B. 65.

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

The sole question in this case is, whether school trustees have authority in any year, before a copy of the revised assessment roll of that year has been transmitted to the clerk of the municipality, to impose and levy a rate for school purposes, upon the assessment roll of the preceding year.

The learned judge in the court below has taken great pains to review the common school acts in his judgment, but with great deference to his opinion, we have been unable to adopt his conclusions.

We think the error into which he fell arose from making the analogy between municipalities and trustees, and township collectors and collectors under warrants of trustees identical, thus restricting the common school acts by acts not necessarily affecting them.

It is clear that school trustees may themselves, or through the intervention of the municipality, provide for the salaries of teachers and all other expenses of the school, in such a manner as may be desired by a majority of the freeholders and householders of the section at their annual meeting, and shall levy by assessment upon taxable property in the section such sums as may be required; and should the sums thus provided be insufficient they may assess and collect any additional rate for the purpose; and that any school rate imposed by trustees may be made payable monthly, quarterly, half-yearly, or yearly, as they may think expedient.

Many of the requirements of a school admit of no delay. The peculiar provisions respecting teachers demand great promptness in the payment of their salaries: repairs to school houses must be made when required. These may be sudden and unexpected. To oblige trustees, or those entitled to payment, to wait till the rolls of the year were made up, would be productive of great inconvenience, and if the law had been less clear than it is, we should not have felt justified in putting a stop to a practice which has, we learn, hitherto obtained, unless on grounds admitting of no doubt.

The general principle is, that levies for municipal purposes shall be made upon the revised assessment of the year in which they are made. It is true that one rate for the year is only struck by the municipal authorities; but suppose a sheriff got an execution either at the suit of the Crown or of a municipality in the month of January, would he be justified in delaying to levy until the revised assessment roll of that year was completed and a certified copy given to the municipality?

So if the requirements of a school section created a necessity for levying a rate, would the trustees be excused from performing their duty by saying we must wait till the assessment roll of the year is completed before we can act? The obvious answer would be, there is the last revised assessment roll, it is available for all purposes until the new one is made.

On reading the 36th section we find that no township council shall levy and collect in any section during one year more than one school section rate, except for the purchase of a school site or the erection of a school house, and no council shall give effect to any application of trustees for the levying or collecting of rates for school purposes unless they make the application to such council at or before its meeting in August of the year in which such application is made.

But the 12th sub-sec. of sec. 27 authorises the school trustees to employ their own lawful authority as they may judge expedient for the levying and collecting by rate all sums for the support of their school, for the purchase of school sites, and the erection of school houses, and for all other purposes authorised by the act to be collected.

It is to be noted, that the legislature did not confer on the trustees the power to apply to the township council at any time they chose to levy rates; but at or before its meeting in August, and then only for one rate, except *for the purchase of a site*, or the *erection of a school house*. Suppose a second rate for a site or a school house were applied for in a part of the year from January to August, would not the council be bound to levy it? During this period there would be but the existing roll to use for the assessing of this rate.

The restriction to one rate, and the exceptions in regard to the rates authorised to be levied by the municipality for school purposes, lead us to infer that when the trustees chose to exercise their own authority to levy, they were not restricted, and might levy oftener than once for the payment of teachers and for the other purposes mentioned in the 27th section.

In the case of an arbitration between the trustees and a teacher, the arbitrators may levy, but the trustees are bound to do so; for by the 23 Vic. cap. 49, in case they wilfully refuse or neglect, for one month after publication of award, to comply with, or give effect to the award, they shall be held personally responsible for the amount awarded, which may be enforced against them individually by the warrant of the arbitrators. But if they are thus bound at any time to exercise their power to levy, it must necessarily be done upon the existing assessment roll. None of the authorities cited touch this question as raised; but looking at the scope of the acts relating to common schools, the duties imposed upon trustees, the exigencies of schools, and the powers conferred upon trustees to levy rates, we are of opinion that trustees are not restricted to making one levy, but may levy at any time as need requires it; and may use, and can only use, the last existing revised assesment roll for imposing the required rate. The appeal will therefore be allowed.

Appeal allowed.

The Corporation of North Gwillimbury v. Moore et al.

Promissory note—Evidence of payment—Right of beneficial holder to sue in name of representatives of payee—Municipal corporations may take any rate of interest.

Defendants made the note sued on, payable to D. *or bearer* for $348 40, with interest at 15 per cent. The note was made to D., and delivered to him as Reeve of the township, for money loaned by the latter, and was left with S., the treasurer, for plaintiffs. Subsequently the defendant Moore gave his own note for $278 payable to S. (but not to order), S., without authority from plaintiffs, giving up to him the former, the difference between the two notes being a loan to S. himself, though included in defendants' note. S having died, his accounts with plaintiffs were adjusted by the latter with his surety, who was charged with the note sued on, which he arranged by giving the note for $278 and his own note for $70; and a balance of $1 83 was, as agreed to by plaintiffs, paid by, and a receipt therefor given to him in full of plaintiffs' claim against S. *After this* settlement plaintiffs by a resolution in council recognized this note for $278 as amongst their existing securities, thus shewing that they were aware of its having been received in substitution of the note sued on.

Held, that taking the whole transaction together there was such a ratification of the acts of S. by plaintiffs in the subsequent adjusting of his accounts with his surety that, coupled with the receipt of the note for $278 with other notes and money in full satisfaction of all claims on the note sued upon, it was evidence to go the jury of the payment of this note under under a plea of payment.

Held, also, that the plaintiffs could enforce payment of the note for $278 in the names of the representatives of S

Held, also, that municipal corporations are not restricted any more than individuals, as to the rate of interest to be received upon monies loaned by them, but that they may take any rate of interest agreed upon.

[C. P., T. T., 1865.]

This was an appeal from the county court of the United Counties of York and Peel.

The action was on a promissory note as hereinafter set out.

The pleas were: 1st. *Non fecit;* 2nd. Payment; 3rd. That after plaintiffs became the bearers and holders of the said note they transferred and delivered the same to one Richard Shepherd who then became the bearer and holder thereof, and the defendants afterwards and while the said Richard Shepherd was the bearer and holder thereof, to wit, on the 1st day of January, 1864, paid to said Richard Sheppard a large sum of money, amounting to all the moneys in the said note mentioned, in satisfaction and and discharge of the said note, and of all the causes and rights of action therein, and the said Richard Shepherd then received the same in such satisfaction and discharge; 4th. The note void, as reserving a usurious rate of interest.

The plaintiffs joined issue on all the pleas, and also demurred to the fourth and last plea.

The following facts, material to notice, appeared in evidence: On the 1st of January, 1863, defendants made their promissory note, payable to Henry Draper or bearer, one year after date, for $348 40, with interest at 15 per cent. per annum.

This note was given to Draper, as the reeve of the township of North Gwillimbury, and was, in fact, at the time the property of the township, having been given for money loaned by them to the defendant Moore. The payee had no interest in the note. It was left with the treasurer of the township, Richard Shepherd, for safe keeping for the plaintiffs.

On the 10th of April, 1863, the defendant Moore gave his own note for $278, with interest at 15 per cent., payable to Richard Shepherd, and Shepherd gave up to Moore the note sued on, which was made up of the notes for $278 and $70. These *seventy* dollars, part of the money in the note of $348 40, were, in fact, money borrowed by Shepherd himself, though included in the note. It is not pretended that Shepherd was authorised by the corporation to give up the note. After the note was given up, Shepherd died, and the corporation claimed from his sureties the full amount of all the moneys, notes, and demands which he had in his hands belonging to the corporation; and amongst other notes, for which his sureties were called upon to account and answer, was the note in question. The council appointed persons to go over the whole of the treasurer's accounts, charging him with what he was liable for, and crediting him with what was paid and what was due him for salary, &c., and found due the corporation $183 40, which was agreed to be accepted as balance due to the corporation in full from the estate of the late Richard Shepherd and his sureties.

In a resolution passed by the council on the 17th of June, 1864, referring to certain promissory notes being the Clergy Reserve Fund, that were directed to be placed in the hands of the reeve for safe keeping, was mentioned the note of Hiram Moore, for the sum of $278, due 1st of January, 1864, shewing that at that time the corporation were aware of the note of Moore for $278 having been received instead of the prior one in issue in this cause. In fact, this resolution was passed after the settlement with Shepherd's sureties and his estate: that settlement appeared to have been made on the 13th of June. The surety said he went into the accounts with the persons appointed by the corporation: the corporation charged him $348 40, amongst other amounts of Clergy Reserve moneys. He paid all the amounts in notes except $70, for which he gave his own note with the $278 (note) to make up the $348 40 note. He paid his own note by giving a receipt for school moneys for that amount, he being school treasurer. He also paid a balance of $183, found to be due from Shepherd's estate to the corporation. The persons appointed by the corporation gave him receipts on the settlement. He subsequently offered to take the note and give cash for it, but the corporation refused.

The reeve of the township said the note, dated 10th of April, 1863, was given to him by Henry & Fairbarn (persons appointed by the municipality to settle with Shepherd's estate): it was considered as accepted by the corporation as payment of the note sued on, supposing it was negotiable.

In charging the jury, the learned judge said that the corporation had no remedy on the note for $278, in the name of the representatives of Shepherd, because the parties were not the same; but he left it as a question of fact to the jury whether the note had not been given and received as a payment of the other note.

The jury found in favour of the plaintiffs.

In the following County court term, *R. G. Dalton* obtained a rule *nisi* to shew cause why the verdict obtained in this cause should not be set aside, or be reduced; or why a verdict should not be entered for the defendants upon the fourth plea of the defendants, pursuant to the leave reserved at the trial, on the ground that the said promissory note was void in whole or in part for usury; or why a new trial should not be had between the parties for misdirection

in this, that the learned judge directed the jury upon the second issue that the promissory note mentioned in the evidence for $278, was not available in the hands of the plaintiffs, and was not a payment, to the extent of the amount of that note, of the plaintiffs claim, because the plaintiff had not a remedy upon it in the name of the personal representative of Shepherd, the payee thereof, deceased; whereas, the learned judge should have directed the jury that the said promissory note was available in the hands of the plaintiffs, and was, under the evidence, a payment to the plaintiffs to the extent of the amount thereof; and that the plaintiffs had a remedy upon the said note in the name of the personal representative of said Shepherd, the payee thereof, deceased, and because the verdict on the second issue was against law and evidence.

The rule was subsequently discharged.

On the demurrer to the fourth plea, judgment was also given in favour of the plaintiffs.

These judgments form the subject of the present appeal.

R. G. Dalton, with him *R. Moore*, for the appellants, cited *Cannan* v. *Wood*, 2 M. & W. 465; *Smart* v. *Nokes*, 6 M. & G. 911; *James* v. *Williams*, 13 M. & W. 828; *Cole* v. *Sackett*, 1 Hill (U.S.), 516; *Strong* v. *Hart*, 6 B. & C. 160; *Smith* v. *Kendall*, 6 T. R. 123; *Edinburgh Ass. Co.* v. *Graham*, 19 U. C. Q. B. 581; *Bradley* v. *Clark*, 5 T. R. 201, 202, per Buller, J.; *Abley* v. *Dale*, 11 C. B. 378; *Rex* v. *Box*, 6 Taun. 325; Saunders on Pl. & Ev. 635, and cases there collected; 16 Vic. ch. 80; Con. Stats. C. ch. 58, secs. 3, 5, 6, 9; ch. 25, sec. 11; ch. 83, secs. 4, 9, 57, 60, 71, 72; 23 Vic. ch. 34; 27 Vic. ch. 17, sec. 4.

Robert A. Harrison, contra, cited *The Corp. Township of Westminster* v. *Fox*, 19 U. C. Q. B. 203; *Manning* v. *Ashall*, 23 U. C. Q. B. 302; *Gardiner* v. *Ford*, 13 U.C. C.P. 446; *Bottomley* v. *Nuthall*, 5 C. B. N. S. 122; *Brown* v. *Jones*, 17 U. C. Q. B. 50; *Lavery* v. *Turley*, 6 H. & N. 239; *Norbury* v. *Kitchin*, 7 L. T. N. S. 685; 57 Geo. III. ch. 9, sec. 6; 16 Vic. ch. 80, secs. 1, 2, 3, 4; 22 Vic. ch. 85, secs. 1, 2, 3, 6; Con. Stats. C. ch. 58; U. C. ch. 43, sec. 4.

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

We are of opinion that, taking the whole transaction together, there was such a ratification of the acts of Shepherd by the corporation in the subsequent adjusting of the accounts of Shepherd with his surety and the receiving of this note, with other notes and money, in full satisfaction of the claims on this note amongst other things, that it was evidence to go to the jury of payment of the former note under the plea of payment.

The observations of the learned judge, that the corporation had no remedy for the recovery of the $278 note in the name of the representatives of Shepherd, may, we think, have influenced the jury in deciding whether the taking of the last note and the adjustment of the matter was in payment of the note sued on, and in that way, if erroneous, becomes important.

We think the views thus expressed by the learned judge erroneous, and that there must, therefore, be a new trial, without costs.

As to the question whether the contract is void on account of usury, we are of opinion that the legislature, in the different enactments on the subject, did not intend to restrict corporations not incorporated for the business of lending money, but only allowed by law to lend money, which they might have to invest, from charging more than six or seven per cent. for money. In fact, as to these latter corporations, we are of opinion that the legislature did not intend to impose any greater restrictions on them than on any other persons. The reasons which would make it necessary to limit the amount of interest to be charged by corporations which were engaged in the business of lending money, do not, in our judgment, apply to municipal corporations; and on that point, though the language of the legislature is somewhat confused, we think the decision of the learned judge of the county court is correct.

The appeal is allowed, and the rule for a new trial in the county court is directed to be made absolute, without costs.

SQUIRE QUI TAM v. WILSON.

Property qualification of Justices of the Peace.

(Continued from p. 89.)

This is the first time that any question has arisen as to the valuation of property in view of this "Act respecting the qualification of Justices of the Peace"; and it would be desirable if some principle of valuation could be laid down for the guidance of those who act, and those who may have reasons of complaint under it. It is for the most part a consolidation of the 6th Vic., cap. 3, which in the preamble recites that "as well by the criminal laws of England in force in this province as by divers provincial acts, Justices of the Peace are invested with great powers and authority, therefore it has become of the utmost consequence to all classes of Her Majesty's subjects that none but persons well qualified should be permitted to act as Justices of the Peace, and that the laws now in force in this province are insufficient for this purpose." It enacted, as the act before us does, that all Justices of the Peace shall be of the most efficient persons dwelling in the districts and counties respectively; and further, that no person shall be a Justice of the Peace, or act as such, who has not real estate, of the description mentioned in the act, of or beyond the value of $1,200 over and above what will discharge all incumbrances affecting the same, &c. The object of the act was two-fold; first, that the Justices should be of the most sufficient persons; and secondly, that they should be worth unencumbered real estate to the value of $1,200 at least, to satisfy any one who should be wronged by their proceedings. Then, that Justices might be deterred from acting, the right is given to any person to sue *qui tam* and recover a penalty of $100 for each offence against him who acts as a Justice without qualification, or without having taken and subscribed the oath of qualification set forth in the act. The present action is for ten such offences, and the point raised by this rule is, what is sufficient proof of this qualification, and in case the evidence of value be doubtful, which party is to have the benefit of the doubt. That the price paid for land and the money expended upon it, do not constitute its value, is a matter of every day's experience. We incline to

think its value depends much upon the number of persons who at the moment are willing to purchase, coupled with the unwillingness of the owner to sell, and in a less degree by the amount of capital held for investment in land at the time. The anxiety of the owner to sell, when few are willing to buy, frequently reduces it to a value more nominal than real. Strictly speaking, the value of land, like any other commodity, is the price it will bring in the market at the time it is offered for sale; but to apply this rule to land in this country would be manifestly unjust, for there would be found times when no one would be willing to buy at any price, and for the simple reason that capital is not, and land always is, abundant in the market.

The defendant's oath of qualification was put in, and if evidence at all, it was evidence of value in his estimation; but in judging of the value a man sets upon his own property, especially if it be his home, we cannot weigh his opinion of it in "scales too nicely balanced." It may have acquired value in his estimation from its associations, or, it may be, from the pains he has bestowed upon it to make it conformable to his ideas of elegance, or fitness, or comfort; or he may value it from the very preciou-ness which ownership and possession give to the house and home of most men.

Nor can we weigh the estimates of stangers as to the value of a man's house and land in scales more nicely balanced; for, allowing all credence to the honesty of those who give their opinions, they must be more or less speculative, according the stand-point of view from which they are taken. The evidence for the plaintiff here affords an illustration. He calls the assessor for the years 1859, '60 and '61. In this last year the oath of qualification had been made. This witness, we have just seen, assessed its yearly value at $36, thus representing its actual value at $600. At present he says it may be worth $300 more, but he had never been inside the house at all; and yet the yearly value of a house, as well as its absolute value, must in a considerable degree depend upon its internal appearance and finish. Nor does he say how it is that it is worth more now than in 1861; but in this country property out of business situations will seldom rent to pay six per cent. of its value.

Another witness values it at $700 to $800; but he had never been up stairs and never had looked at it with a view to its value. Another says it was, he thinks, worth $600 before it was repaired but he has not seen it since; he should not, however, like to give over $900 now for it, although some might give more. If these estimates of value by the witnesses for the plaintiff were weighed in scales nicely balanced, there could be but indefinite justice. No proper valuation can be made of a house without seeing it inside; for some men disregard the exterior, who are lavish of internal finish, and *vice versa;* and what one or another would give as speculative amounts cannot be a safe rule of value, unless they have examined the property, or are intending purchasers. The defendant's witnesses represent the value of it to be $1,200 or more on given data, and on a reasonable knowledge of what the property was. If the plaintiff had met this by data more definite, by a comparison of the value of land in the immediate neighborhood, or by a detailed estimate of the value of the buildings and their state of repair, external and internal, there might have been ground for finding fault with the direction; but when the evidence is vague, where it might have been more definite, we think the learned judge laid down the only rule which was safe, at least under the circumstances of the case.

In the affidavits before us on this motion, for and against it, the same differences of opinion exist. One witness for the plaintiff who had sworn he would build now just such a house for $450, in an affidavit for the defendant corrects this and says, he could not do it for less than $600. We infer he had omitted to take into consideration the value of the verandah. On the one side they represent it as worth $1,200, on the other as of less value.

Then as to the express misdirection, "that any reasonable doubt as to value should be in favor of the defendant." When the defendant had made a *primâ facie* case, sustaining his oath, his conduct, and his obedience to an act of the legislature, by evidence based upon tangible data, and when the plaintiff threw a doubt upon it, by evidence of speculative opinion, without given data, and without the knowledge of the thing valued, and without laying down any rule of general application, we can safely say that, under all the circumstances of this case, the learned judge was right in his direction. The plaintiff undertook to make out that the defendant had been guilty of dereliction of duty, if not of positive crime; but the presumption is always in favor of right acting, rather than of wrong doing.

The grounds for a new trial, on the score of surprise, we need hardly discuss: the plaintiff supposed the defendant's estate was a leasehold, which the latter answers by producing under oath his conveyance in fee. On the whole we think the plaintiff's rule should be discharged.

A. Wilson, J.—It is reported that the learned judge at the trial directed the jury that "they ought to be fully satisfied as to the value of the defendant's property before they found a verdict for the plaintiff; that they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favor of the defendant."

The first part of the charge I understand to mean, that the jury should be fully satisfied that the value of the property *was not* what the defendant represented it to be, before they should find a verdict against him.

The statute provides, "that no person (except when otherwise provided for by law,) shall be a Justice of the Peace, or act as such, who has not in his actual possession, to and for his own proper use and benefit, a real estate, &c., of or about the value of $1,200 over and above what will satisfy and discharge all incumbrances;" and the act further provides, that in any action, suit, or information brought against a person for acting as a Justice of the Peace, not being so properly qualified, "the proof of his qualification shall be upon the person against whom the writ is brought."

The evidence in this case was contradictory. The evidence given by the plaintiff's witnesses was, that the property was worth $700 or $800, and that given by defendant's witnesses was, that it was worth $1,200.

I think the effect of the charge was, that the plaintiff had failed to sustain his case, because the jury might assume he had not successfully impeached the correctness of the defendant's valuation; instead of directing the jury that if the defendant had not satisfactorily made out that he did possess the necessary qualification they should find against him, because the law had cast upon him the burden of exonerating himself by proving affirmatively, as he was the proper person to do it and the one who could best do so, his own qualification.

As I think there was a misdirection, I think there should be a new trial, and this may be ordered for such a cause in a penal action. Whether it would be attended with a different result on any other charge which might be given, it is for the plaintiff to consider.

RICHARDS, C. J., concurred with J. Wilson, J.

Rule discharged.

IN THE MATTER OF O'NIEL AND THE CORPORATION OF THE UNITED COUNTIES OF YORK AND PEEL.

Purchase of road by Council—By-law.

(Continued from p. 90.)

I am of opinion this rule must be discharged. Under the Municipal Institutions Act, as it was first passed in 1849, the corporations thereby established had but limited powers of contracting debts, and under section 177 it was provided that no by-law for the creation of any debt or negotiation of any loan *should be binding*, unless a special rate should be settled, and other provisions made. This section and the provisions thereof were from time to time amended, under certain circumstances making publication necessary, and under 18 Vic. cap. 133, requiring a by-law for the creating of a debt to be submitted to the electors.

The statute 12 Vic. cap. 5, sec. 12, authorised the Governor-in-council to contract with any municipal council or other local corporation, for the transfer to them of any of the public roads, harbours, bridges, &c., which it might be more convenient to place under the management of such local authorities. By 14 & 15 Vic. c. 124, any municipal corporation in Upper Canada might *contract a debt* to her Majesty in the purchase of any public roads, &c.; and such municipality might enter into, make and execute all or any bonds, deeds, covenants, or other securities to her Majesty, which such municipality might deem fit, for the payment of the amount of the purchase money of any such work, and for securing the performance of any conditions of sale, and might also pass all by-laws for any of the purposes, and such by-laws, debts, bonds, deeds, covenants or other securities, were to be valid and binding on such municipality to all intents and purposes, though no special or other rate per annum should be settled or imposed to be levied as provided under the 177th section of the Municipal Corporations Act of 1849. But by section 2 the corporation was nevertheless authorised, in any by-law for the creation of such debt, or for making or executing any such bonds, deeds or other securities as aforesaid to her Majesty, or in any other by-law by the corporation, to impose a special rate per annum of such amount as the municipality might deem expedient for the payment and discharge of such debts, bonds, covenants or other securities, or some part thereof, and every such by-law should be valid and binding on the corporation, although the rate settled or imposed should be less than was required by the 177th section of the Municipal Corporations Act, and all provisions of that act (except in so far as they were inconsistent with the act then being passed) were to apply and extend to every such by-law, and the moneys to be raised thereby, as fully as they would extend to any by-law enacted by any such municipality for the creation of any debt or raising any loan, as provided in said 177th section, and to the moneys raised thereby.

By 16 Vic. cap. 181, sec. 39, it was enacted, that none of the provisions of the 4th or 16th sections of the Municipal Corporations Amendment Act of 1851, should affect or apply to any by-law passed or to be passed by any municipality in Upper Canada for any of the purposes mentioned in 14 & 15 Vic. cap. 124, or to any debts, bonds, deeds, covenants or other securities, contracted, made or executed to her Majesty under the provisions of that act, or for any of the purposes therein mentioned. Under Provincial statute 18 Vic. cap. 133, it was enacted in effect, that no by-law to be passed for raising money upon the credit of any city, town, township or village corporation should have force or effect, until the approval of the municipal electors should have been obtained.

All these provisions were repealed by the Municipal Institutions Act of 1858, and the present enactments in effect substituted for them, the provisions in the act of 1858 and in the Con. Stats. of U. C. ch. 54, in this respect being the same. By sec. 223, headed "BY-LAWS TO CREATE DEBTS, &c.," it is enacted that "every council may, under the formalities required by law, pass by-laws *for contracting debts*, by borrowing money or otherwise, and for levying rates for payment of such debts on the ratable property of the municipality for any purpose within the jurisdiction of the council; but no such by-law shall be *valid* which is not in accordance with the following provisions:

1. *The by-law, if not for creating a debt for the purchase of public works*, shall name a day when the by-law shall take effect;

2. If not contracted for gas or water works, or for the purchase of public works, according to statutes relating thereto, the whole debt, &c., to be payable in twenty years at furthest, and, if debt contracted for gas or water works, in thirty years from day on which by-law takes effect."

3. Provides a yearly rate,

4. Of sufficient amount to discharge debt and interest, when payable;

5. Amount of ratable property irrespective of future increase;

6. By-law to recite: (1) amount of debt created and its object; (2) total amount required to be raised annually by special rate to pay debt and interest; (3) the amount of the whole rateable property of municipality according to last revised assessment roll; and (4) the annual special rate in the dollar for paying interest and creating sinking fund for paying principal of new debt.

Sec. 224 enacts, "every by-law for raising upon the credit of the municipality *any money* not required for its ordinary expenditure, and

not payable within the same municipal year, shall before the final passing thereof receive the assent of the electors of the municipality in the manner provided by the 193rd section of this act; except that in counties (other than cities) the council of such county may raise by by-law (without submitting the same for the assent of the electors) for contracting debts or loans any sum over its ordinary expenditure, not exceeding in one year $20,000."

Sec. 225—"Provided that no *such* by-law for contracting the debt up to $20,000 shall be valid, unless the same is passed at a meeting of the council especially called for the purpose of considering the same, and held not less than three months after a copy of such by-law at length as the same is ultimately passed, together with a notice of the day appointed for considering the same, has been published in some newspaper issued weekly or oftener within the county, which notice may be to the effect" of the form given.

Sec. 226—Under the title of "PURCHASE OF PUBLIC WORKS."—"1. Any council *may contract a debt* to her Majesty in the purchase of any of the public roads, harbours, bridges, &c., or other public works in Upper Canada, and may execute such bonds, deeds, covenants, and other securities to her Majesty, as the council may deem fit for the payment of the price of any such public work sold or agreed to be sold or transferred to such municipal corporation, and for securing the performance and observance of all or any of the conditions of sale or transfer; and also may pass all necessary by-laws for any of the purposes aforesaid; and all such by-laws, debts, bonds, covenants, and other securities shall be valid although no special or other rate per annum has been settled or imposed to be levied in each year, as provided *by the three last preceding sections of this act;*"

"2. But any council may, in any by-law to be passed for the creation of any such debt, or for the executing any such bonds, deeds, covenants or other securities, or in any other by-law to be passed by the council, settle and impose a special rate per annum of *such amount* as the council may deem expedient, in addition to all other rates to be levied in each year upon the assessed rateable property within the municipality, for the payment and discharge of such debt, &c., or some part thereof; and the by-law shall be valid, although the rate settled or imposed thereby be less than is required by the said sections last mentioned; and the said sections shall, so far as applicable, apply and extend to every such by-law, and the moneys raised or to be raised, thereby, as fully in every respect as such provisions would extend or apply to any by-law enacted by any council for the creation of any debt, as provided in the said sections, or to the moneys raised or to be raised thereby."

"3. The council of any municipal corporation purchasing any claim under the act respecting the sale and purchase of claims due to government for monies advanced to public works, may raise by assessment the sum necessary to pay the consideration agreed upon."

Consolidated Statutes of Canada, cap. 28, sec. 76, contain similar provisions with 12 Vic. cap. 5, sec. 12, for the Governor in council entering into arrangements with any municipal council for the transfer to them of any of the public roads, harbours, &c., (whether within or without the limits of the local jurisdiction of such council,) which it is found convenient to place under the management of such local authorities. And the municipal councils may enter into such arrangements, and may take and hold any such works so transferred, and all moneys payable to the province under the conditions of any such grant (transfer) shall be carried to the credit of the (provincial) sinking fund.

Looking at these enactments as applying to the question before us, I think we may assume that under the Municipal Institutions Act, passed in 1849, and amended from time to time since, in relation to contracting debts beyond $20,000 in one year, and not to be paid within the year (except for the purchase of public works, to which I shall presently advert), such debts can only be created by by-laws of the municipality, and such by-laws will not be valid or binding on the municipality unless passed according to the requirements of the 177th section of the statute of 1849 and its subsequent amendments. One of the primary features of all such by-laws was that the debt should be paid in twenty years, and there should be a special rate levied annually for raising the interest and sinking fund necessary to pay such debts within that period; and the municipality of course could not raise money or contract a debt for any purpose for which they were not authorised by law so to do. On the passing of 12 Vic. cap. 5, under sec. 12 of that act, municipal councils were authorised to acquire from the government any of the public works therein mentioned, and they could for that purpose have passed by-laws creating debts to pay for them. Such by-laws to be legal must have fixed the period within twenty years when the debt would be paid, and also the special rate per annum to pay the debt and interest, for that was the only way they could have made a legal by-law for contracting the debt, and a by-law was the only mode by which they could legally contract a debt. After the passing of 14 & 15 Vic. cap. 124, any council might *contract a debt* to her Majesty in the purchase of any of the public roads, &c., in Upper Canada, and might execute bonds, deeds, &c., as the council might deem fit, for the payment of the price of such works. Now, if the enactment as to the power of the council had stopped at this point, there would be no dispute as to their being authorised to contract the debt, and to execute such bonds, deeds, covenants, &c., as to them might seem meet, for the purchase of a road from the government. The further power seems rather cumulative than restrictive, "and may also pass all necessary by-laws for any of the purposes aforesaid, and all such by-laws shall be valid, though no special rate or premium had been settled."

Until the passing of 18 Vic. cap. 133, any municipality could without doubt have contracted a debt and passed a by-law for any purpose connected with the purchase of a public work from the government, without the special requirements of the Municipal Act as to by-laws for contracting other debts being carried out. On the passing of that act, every municipality, except a county municipality, was required to submit by-laws for raising money or contracting

debts to the vote of the electors. Now, did this act compel a municipality before contracting a debt with the government for the purchase of a government work, to pass a by-law authorising that to be done? I do not think by the passing of that statute the former power of buying from, and contracting a debt to, the government was entirely taken away; at all events, that provision did not extend to county councils with whom we now have to deal, and the enactment applying that prohibition to county councils was first introduced in the Municipal Institutions Act of 22 Vic cap. 99, sec. 223, from which it is consolidated as sec 224 of cap. 54 of Con. Stat. of U. C. Though thus introduced for the first time so as to apply to by-laws of county councils contracting debts in any one year exceeding $20,000, in the same statute as well as the consolidated act, the provision that the councils may contract debts to her Majesty for the purchase of roads, harbours, &c., is likewise contained. These provisions being now all contained in the same statute must have force, one cannot properly over-ride or displace the other. The right to contract the debt to her Majesty in the purchase of the roads, exists independent of any by-law under the provision of the statute. The right to execute bonds, deeds, covenants, and other securities, for the payment of the price of such works, also exists in the same way. So far, therefore, it appears to me the right of the municipality to enter into an agreement with the government to pay $72,500 for these roads, and to execute bonds (debentures) or other securities for the payment thereof, is sustained by the very words of the 226th section of the Municipal Institutions Act; and the resolution which the county council has adopted does not, as far as I can see, contravene any of the stipulations of that clause of the statute, but is rather in accordance with it. If the provincial government think proper to accept bonds or debentures without the passing of any by-law authorising their issue, or providing any rate or sinking fund for paying them off, they may do so; but the government would probably feel that it would be more satisfactory to have some special rate fixed by a by-law, to be levied annually, to pay the amount within a given period, which by-law could not afterwards be repealed until the debentures were paid.

Whether such a by-law could be passed without the assent of the ratepayers it is not necessary now to determine. The fact, however, that at the close of the first paragraph of the 226th section of the Municipal Act, it is stated that the by-laws to be passed under that section shall be valid, although no special or other rate per annum shall be settled or imposed to be levied in each year, as provided by the three *last preceding sections* of the act, would seem to imply that section 224 did not extend to these by-laws. Only one of those sections, the 23rd, provides for the fixing of the annual or special rate: the 224th being the one which requires the submitting the by-law to the assent of the electors, when the debt to be contracted exceeds $20,000, does not refer in any way to such rate, nor does the 225th section. If it was intended that the 23rd section should still apply to a by-law to be passed under the 226th, why is reference made to it at all as one of the *three* preceding sections? There is much room to argue that none of the three sections relating to by-laws for *creating debts* extend to by-laws made for the purchase of public works, except in the manner and to the extent pointed out in the second paragraph of the 226th section.

As to the Kingston road purchased by the municipality, extending into the county of Ontario about three quarters of a mile, the statute (Con. Stat. Canada, cap 28, sec 76) authorising the sale of these works, specially provides that they may be sold to a municipal council, whether they be within the limits of the municipality or not.

Rule discharged.

CORRESPONDENCE.

County Courts—Original Judgment Rolls as Evidence.

To the Editors of the Law Journal.

Gentlemen,—With reference to the judgment reported in this present July number of the *Law Journal*, in *Patterson* v. *Todd*, is a *subpœna duces tecum* from a Superior Court, requiring the production by the clerk of an Inferior Court of a record of his Court, to be regarded as "*higher authority.*" If not, why should the clerk of an Inferior Court be be placed in the position of refusing obedience to a writ running in the Queen's name, which charges a penalty for disobedience to Her commands. See rule 31 (Reg. Gen. T. T. 1856) H. C. & P. Act, 611.

Yours, &c.,

County Court.

[Rule 31 reads as follows: "No subpœna for the production of an original record, or of an original memorial from any registry office, shall be issued, unless a rule of court, or the order of a judge, shall be produced to the officer issuing the same, and filed with him and unless the writ shall be made conformable to the description of the document mentioned in such rule or order." The "higher authority" intended by the Court of Queen's Bench, is evidently the judge of the County Court. Why, in the absence of such a decision as *Patterson* v. *Clark*, a clerk who in good faith obeyed the writ of a Superior Court, commanding him to produce the rolls of his Court at a Court being held in the same building, and in good faith obeyed the writ, "acted improperly and deserved censure" we are at a loss to understand. He was we think, under the circumstances, in the absence of authority to the contrary, warranted in looking upon the

subpœna as "higher authority," and free from censure. He is not bound to enquire whether or not the order referred to in the rule was produced to the officer issuing the subpœna. He had to presume that the subpœna was issued in accordance with the rule, and was, we think, in the absence of any law to the contrary, bound to obey the subpœna, or be in contempt.—EDS. L. J.]

Streets in a township—Who bound to repair—Overseer of highways.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—You would confer a favor upon many of your readers connected with the management of municipal affairs, by giving in your next number an opinion upon the following case:

The village of P., not a corporation or police village, is situated within the municipality of the township of B., and contains, say fifty dwellings and two hundred and fifty inhabitants. A public thoroughfare passes through the centre of the village, from which, on either side, streets are laid off at right angles; one of which leads to a railway station and a grist mill, another to the town hall, a third to a church, and the rest to the residences of the villagers. These streets are not otherwise public roads or highways, than as they are shown and named in the surveys made by the original proprietors, and deposited in the registry office, in pursuance of Con. Stat. cap. 93, sec. 39, and by use; that is, the Municipal Council has not declared them to be public highways, or assumed them as such. The ground on which the village is built is wet and swampy, and the streets, with a little use, become nearly impassable in the wet seasons. The inhabitants request the Township Council to order a *part* of their statute labour to be applied on these streets. The Council, while they admit the abstract justice of the claim, doubt their power by law so to expend any money or labour.

The question, therefore, is, 1st, Has the Council power, without formally assuming the streets as township roads, to order any work to be done thereon? Or, 2nd, Can the pathmasters for the division, without such order, do anything towards repairing them?

I remain, gentlemen, yours truly,

RUSTIC.

[1. We think the Township Council has power, without formally assuming the public travelled streets as public roads, to order work to be done upon them; but, until established and assumed by by-law of the corporation, it would seem to us that the corporation is not bound to keep them in repair.

2. The powers of the pathmaster or overseer of highways are not defined by law, and in the absence of express authority from the Council we should doubt his power to repair such roads.—EDS. L. C. G.]

Co. Victoria, July 24, 1865.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN, — In the last number of the *Gazette*, I see you have been asked a question by a bailiff—"Does a Division Court execution bind the defendant's property from the time it is placed in the bailiff's hands?"—and I was rather astonished to see your opinion, "that it did not, until after actual seizure."

As the *Law Journal* has been chiefly my guide since first published, I have turned to the number for January, 1857, page 23, and there you quote from the Bailiff's Manual, which of course you give as sound authority, that a bailiff is justified in seizing goods sold by a defendant *after* the execution has been placed in the officer's hands.

In the number of the *Law Journal* for July, 1857, you quote C. L. P. Act, 1857, sec. 24, and in your opinion on it you say, "The goods of defendant *are held* from the time the execution is delivered to the officer."

You will add another to the many obligations already incurred by the bailiffs of Upper Canada, by explaining which of these opinions we are to act under.

I am, Gentlemen, your obt. servant,

A BAILIFF.

["A Bailiff" must not attribute to writers in the *Law Journal* an infallibility of opinion which they do not claim. The judges on the bench not unfrequently change their views as to questions of law after argument before them, or are set right on appeal.

The writer of the Bailiff's Manual, which appeared some years ago in the *Law Journal*, is a lawyer of great experience, and whose opinion is entitled to much weight, and as a general rule we have little hesitation in adopting his view of what the law is; but it is quite possible that he and the conductors of this

journal may be in error, and a particular question cannot be accepted as finally settled till there is an adjudication on the point. As yet, it has not been directly decided, but the language used by Robinson, C. J., in *Culloden* v. *McDowell* (17 U. C. Q. B. 359), would throw some doubt as to whether the Division Court execution binds goods generally from the time of delivery to the bailiff; though as between an execution from the Superior Courts and the Division Courts, priority in time of receipt settles the right, under sec. 266 of the C. L. P. Act.

But if our correspondent will look closely at what the writer in the Manual says, he will see that the position is by no means positively laid down as law. The language is as follows: "The rule *has always been considered*, as applying to executions from the Division Courts," &c. And again, in another place: "A Division Court bailiff *would seem* to be justified in seizing any goods sold by defendant in the ordinary way *after* execution delivered to bailiff," &c. And in a subsequent paragraph it is plainly implied that the power is questionable; and in speaking of the subject in the July number of the *Law Journal*, in 1857, we only dealt with the question as regards priority between executions from Division Courts and Superior Courts.

The point which troubles our correspondent is not yet settled; that is the most that can be said; and the note in *Culloden* v. *McDowell* goes beyond the actual decision. It is founded on the following remark by the judge in reference to a Division Court execution: "It could not bind the property before it came to the bailiff's hands, if indeed it could before an actual seizure made under it; for it is not to be assumed that an execution from an inferior court binds from the time of its delivery to the bailiff." Now, the clause in the C. L. P. Act to which reference has been made, was not brought under the notice of the court in *Culloden* v. *McDowell*, and it has an important bearing in respect to the question.

The note to a Kingston bailiff's letter in the last number was designed to direct special attention to the subject, and not intended to convey any deliberate and positive opinion from the conductors of the *Local Courts' Gazette.*]

REVIEW.

THE MAGISTRATE'S MANUAL; by John McNab, Barrister-at-Law. Toronto: W C. Chewett & Co., 1865.

The scope of this work is explained on the title page as being "a compilation of the law relating to the duties of Justices of the Peace in Upper Canada, with a complete set of Forms, and a copious Index,"—a most acceptable addition to the sources of information open to the magistrates of the country.

The book commences with a short sketch of the office of a Justice of the Peace, which is partly composed of an extract from an article in the December number of the *Law Journal* for 1863. The author complains that the remarks there made, though worthy of attentive consideration, are written in too condemnatory a spirit, and hints that the remedies proposed, with the exception of the first, would be of doubtful advantage. The first suggestion alluded to was, to amend the law by establishing an uniform mode of procedure in all cases of summary conviction, and giving a full set of forms, &c. The second was to transfer the jurisdiction in certain cases to Division Courts, leaving to magistrates the ministerial duties of the office, including the arrest of offenders. The third, taken from a suggestion by an English law periodical, was, the appointment of a clerk, a barrister of five years standing, in each petty sessional division.

The great difficulty in a new country like this, and there is no use in trying to disguise the fact, much as our author may condemn plain talking, is this, that there are so few men, comparatively, in country places, who have the education necessary, not, to understand and judge fairly and impartially of the matter brought before them, but to be conversant with and apply the general rules and statutes laid down for their guidance, and to draw the papers required in the conduct of the complaint they have to adjudicate upon. How can it be otherwise in a country like this? Why, even in England, where there is almost a limitless choice amongst men of first-rate education, with nothing else to do, and with much greater experience, the same difficulty is felt.

The second suggestion is, we still think, a valuable one, the one great difficulty being that it would throw much more work upon our already over-tasked county judges. The effect of it, however, would be, we think, to

lessen the number of cases in which petty assaults and other trifling complaints, often much better allowed to die a natural death than be fomented and increased by a resort to the common expedient of "having the law of him." This course would to a great extent do away with the *fee* system; and we do not think that many of our readers, not even excepting our magisterial friends, would consider that any very great loss. Ugly stories have been told about this same system, which the large and respectable majority of the magistracy deplore as much as we do, and probably more, as any such irregularities are a direct reflection upon them as a body.

Enough, however, of the introduction. We are next given a practical sketch of the procedure of a magistrate's court, followed by a form of commission of the peace.

The statutes relating to the duties of magistrates with reference to indictable offences and to summary convictions (Con. Stat. U. C. caps. 102 & 103), are given in full, with explanatory notes on doubtful points.

The principal part of the "Manual," both with reference to the space it occupies and to the amount of information it contains, is the digest of the criminal law of Upper Canada. It is arranged on the principle of Burns' Justice, the matter being placed under the various heads in alphabetical order. A great mass of useful information is given in this way, which will make the work of great value to all desirous of ascertaining the law with reference to the whole criminal law of Upper Canada, as well as to magistrates. As an example of the style, we may notice the heading, "Cheating." It commences by giving, under the sub-head "False Pretences," the various sections of the statute, stating generally what those words signify, and the punishment awarded. Then, under the head, "Persons indicted for larceny may be found guilty of obtaining under false pretences," is given the section referring to that point, and then similarly the converse proposition. Then some general remarks on the subject of false pretences, and what is the legal meaning of the expression, "false pretences," with a reference to a case where the subject was elaborately discussed. Then, under the heads, "Offences within the statute," and "Offences not within the statute," short notes of decided cases as to what were and what were not considered as offences against the statute. It is not pretended, of course, in this part of the work, to give a distinct heading for every point that a person might wish to refer to; for instance, there is no heading, "False pretences," as one might expect; but any difficulty of that kind is obviated by reference to the very full, complete and well arranged Index, which is given at the end of the book. We should have thought, as a matter of convenience, that it would have been better to have placed at the head of each page the name of the subject treated of in the page beneath, but the Index makes this a matter of no great consequence.

The Addenda contains further matter of information, on points not directly connected with the criminal law of the country, besides a chapter on evidence, which, though of necessity short, embraces all the principal points that a magistrate should be acquainted with in conducting an investigation.

Upon the whole we must congratulate Mr. McNab upon having produced a very useful book, and one, we doubt not, that will find a ready sale among magistrates and others concerned in the administration of justice. The experience of the author, in his office of County Attorney, must have been a great assistance in the preparation of the book, and would enable him to point out many things that might escape the attention of a merely professional man, however competent otherwise for the task.

The "Magistrate's Manual" is got up in Messrs. Chewett & Co.'s best style, the paper and binding being good and substantial, and the type evidently new. The price is $4.

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

ALEXANDER BRUCE, Esquire, of Hamilton, Attorney-at-Law, to be a Notary Public in Upper Canada.

ALEXANDER RICHARD WARDELL, of Hamilton, Esq., Attorney at Law, to be a Notary Public in Upper Canada. (Gazetted July 22, 1865.)

CORONERS.

ROBERT TRACEY, Esquire, Associate Coroner, County of Peterborough.

HENRY PULTZ, Esquire, Associate Coroner, United Counties of Lennox and Addington. (Gazetted July 8, 1865.)

EDMOND ANDERSON BURNS, Esquire, M. D. Associate Coroner, United Counties of Huron and Bruce. (Gazetted July 15 1865.)

JAMES PATTERSON, Esquire, M. D., Associate Coroner, United Counties of Lanark and Renfrew (Gazetted July 22, 1865.)

TO CORRESPONDENTS.

"County Court" — "Rustic" — "A Bailiff" — under "Correspondence."

"Lector Legum" too late for insertion in this number.