DIARY FOR OCTOBER.

1. Mon ... County Court and Surrogate Court Term begins.
6. Satur... County Court and Surrogate Court Term ends.
7. SUN.... *19th Sunday after Trinity.*
8. Mon ... York and Peel Fall Assizes.
14. SUN.... *20th Sunday after Trinity.*
18. Thurs.. *St. Luke.*
21. SUN.... *21st Sunday after Trinity.*
28. SUN.... *22nd Sunday after Trinity. St. Simon and St. Jude.*
31. Wed... All Hallow Eve.

The Local Courts' AND MUNICIPAL GAZETTE.

OCTOBER, 1866.

SAW LOGS ADRIFT.

One of the commonest things in the way of accidents in this country, whereby a loss is entailed, is, next to accidents by fire, the breaking loose of rafts of timber and saw logs. The dexterity and patience used in recovering the logs or " sticks," is something to be admired, and it is often a source of wonder that more are not lost to the adventurous owner. But when a raft does breaks up, or a boom breaks, and logs are drifted hither and thither, many of them, notwithstanding the persevering exertions of those in charge, are never found; some get into stray corners and are hidden from view, others are picked up perhaps by some neighbouring unscrupulous lumberman, whilst many are cast on the beach and appropriated by persons living on the lake shore; with these latter we at present intend to have a few words, our attention having been drawn to the subject by the letter of a correspondent, which is hereafter given. We may mention here, that our sympathies are much more strongly interested towards the unfortunate lumberman, (contrary to the apparent leaning of our correspondent, or rather those for whom he asks the question,) than to the finder of the logs upon whose beach they happen to be cast. But this by-the-bye—and now, as to the legal position of the finder, and as to when he brings himself within the range of the criminal law.

It is laid down generally, in works treating of this branch of the law, that if one man lose goods and another find them, and not knowing the owner, convert them to his own use, this is said to be no larceny, even although he deny the finding of them or secrete them. But this doctrine must be taken with great limitation, and can only apply when the finder, *bonâ fide* supposes the goods to have been lost or abandoned by the owner, and not to a case where he makes that pretence a colour for a felonious taking. The law is clearly otherwise if he know the owner, for in every case where there is a mark on the goods, whereby the owner may be known, and the finder, instead of restoring the property, converts it to his own use, such conversion is larceny.

In the case submitted, the question would depend mainly on the facts, whether the owners name was on the logs, or whether they were hauled on shore with a felonious intent, and this must be gathered from the attendant circumstances. The mere fact of their being hauled on shore is in itself no evidence of such intent, for that might be the means of enabling the owner eventually to secure them; and it can scarcely be said that such an act on the part of the finder, without anything further, such for example as cutting them up, selling, or even concealing them, would be a conversion of the logs to his own use, and a conversion is a material ingredient in the crime of larceny.

There is, however, an enactment which must be referred to on this point, and that is, Con. Stat. C., cap. 46, sec. 48, which enacts that—

Whoever wilfully and unlawfully (with the intention to set adrift) unmoors, by cutting or otherwise, any timber, masts, spors, staves, oars handspikes, planks, boards, saw logs, or other description of lumber, or any boat, bateau, or scow, or wilfully and unlawfully conceals any article or thing aforesaid which, having been adrift in any river or lake in this Province, is so found adrift or cast on shore in any part of such river or lake, or any of them, and is saved, or wilfully and unlawfully defaces or adds any mark or number on any article or thing aforesaid, so saved, or makes any false or counterfeit mark thereon, or unlawfully aids or assists in doing any such act as aforesaid, or refuses to deliver up to the proper owners thereof, or person in charge of the same on behalf of such owner, any such article or thing, shall incur a penalty not exceeding four hundred dollars, nor less than twenty dollars, for each offence.

Now this enactment considerably extends the purview of the law in favour of the protection of the lumberer, and very properly so, for he has of necessity to encounter great natural and unavoidable difficulties in taking his goods to market. The latter part of the

section is principally in point in connection with the case put by our correspondent. The words used are, "refuses to deliver them up to the *proper owner* thereof," &c., but it cannot be said from this that the finder is bound to give them up to the first person that asks for them; on the contrary, he should refuse to give them up until he has reasonable grounds for supposing that it is the proper owner who is demanding them; and a *bona fide* refusal in such a case would not, we conceive, bring the finder within the meaning of the statute.

APPOINTMENT OF OFFICIAL ASSIGNEES.

An important decision has lately been given on this subject which it is advisable to make known to those interested as soon as possible. It came up in Chambers in a case of *Hingston* v. *Campbell* before the Chief Justice of Upper Canada.

Under the Act of 1864 it was necessary that the official assignee to be appointed under a voluntary assignment should be "resident within the district or county within which the insolvent has his place of business." In 1865 an Act to amend the first Act was passed, which by its second section enacts, that "a voluntary assignment may be made to any official assignee appointed under the Act without the performance of any of the formalities or the publication of any of the notices required by sections one, two, three and four of section two of said Act." Now it was thought by most persons that the words "*any official assignee*" enabled an assignment to be made to any assignee no matter in what county he might reside, and numerous assignments were made on this impression.

There are doubtless many good reasons why the Act should bear this wide interpretation, and as is usual in most cases, many against it; but the learned Chief Justice in the case referred to has decided against this view, not being, as he stated, able to satisfy himself that an assignment could be made to the official assignee of another county than that in which the insolvent resided and carried on his business.

This ruling on the part of so careful a judge will, we think, have a very decided effect in putting a stop to the practice that has been alluded to. This has gone so far, we are told, that assignments have been made by insolvents in Upper Canada to assignees in Montreal. Such a course of proceeding is objectionable in many ways, and it is well that this excess, even of the supposed authority given by the last Act should be restrained.

We shall give a full report of the case of *Hingston* v. *Campbell* in our next issue.

When disgusted with the stupidity or carelessness which we have often to complain of in this country, with reference to the trial of cases by jury, it is sometimes refreshing to turn to the pages of English law periodicals, and find that the people of this country, from which jurors are selected, are, as a rule, much more advanced in intelligence than the same class in England. Most of us have heard the story of the Suffolk jury which found a prisoner "not guilty, but he must not do it again." This was a petit jury, but grand jurors occasionally do curious things, of which the following, taken from the columns of the *Law Times*, is an amusing example:—

"A prisoner with rather a remarkable name had just been called up to receive sentence at quarter sessions for a felony to which he had pleaded 'Guilty.' Upon this a grand juryman, by mere accident standing in the court (for the grand jurymen were already discharged) exclaimed aloud, "We threw out the bill against that man, I remember his name!" Upon this the clerk of the peace referred to the bill of indictment and found it really was indorsed 'No bill;' the prisoner, therefore, to his great surprise, was forthwith discharged, instead of receiving his well-merited sentence. But the best is to follow, and here we see the admirable working of the grand jury system. The juryman, evidently gratified by his successful intervention, now added, 'I remember well the man's case, for we threw out the bill'—not because they thought there was not even *primâ facie* evidence against him, but 'because we thought he had already suffered punishment enough!'"

The trials of those who were taken prisoner in June last, as being implicated in the Fenian raid on this Province, have commenced, and so far as they have gone, have resulted in the conviction of Lynch and McMahon. The trials were conducted throughout in the most impartial and dignified manner. So much so that even Lynch himself publicly testified to the fact.

SELECTIONS.

THE BREADALBANE PEERAGE CASE.

The rival claims of Mr. Campbell, of Glenfalloch, and Mr. Campbell of Borland, to the earldom and estate of Breadalbane, have been the subject of litigation in the Scotch courts for two years or more. At last the final judgment has been obtained by the former, who has the advantage of possession, and it will probably determine for ever the succession to an inheritance not less extensive and far more enviable than many a continental principality. The decision just given, though not unanimous. is supported by a very great preponderance of judicial authority. The case had originally come before a single judge Lord Barcaple, who pronounced in favour of "Glenfalloch" as he is called, by a Scotch idiom, throughout these proceedings. Thereupon "Borland" appealed to the first division of the Court of Session, consisting of four judges, who consulted their nine brethern of the Scotch Bench. One of the nine declined on grounds of relationship, to deliver any opinion, but the other eight concurred in affirming the title of Glenfalloch. The judges of the First Division, however, were equally, the Lord President and Lord Deas agreeing with the consulted judges, while Lord Curriehill and Lord Ardmillan recorded their dissent. The result is, that Mr. Campbell, of Glenfalloch, is declared Earl of Breadalbane by a majority of ten Scotch judges against two, and can only be onsted by a solemn reversal of their sentence by the House of Lords.

The late Marquis of Breadalbane, who died in Nov. 1862, left no heir capable of succeeding him in the peerage of Great Britain. The Scotch earldom, however, together with estates supposed to be worth more than 50,000*l* a-year, devolved on his nearest heir general, and no one seems to have doubted during his lifetime, or until a young lieutenant in the army started up as a competitor, that Glenfalloch stood in this position. Both claimants traced their descent from the same great-grandfather, William Campbell, of Glenfalloch, who died in 1791, and as Glenfalloch's grandfather was the second son of this old genteman, Borland's grandfather being only the sixth, the fountain-head of dispute was brought within two generations. The whole question turned, in fact, on the legitimacy of Glenfalloch's father, W. J. L. Campbell, and this upon the alleged marriage of his grandfather, James Campbell, second son of William, the common ancestor. It was clearly shown that James Campbell's reputed wife and the grandmother of Glenfalloch, had cohabited with James for three years before the death of her lawful husband, Christopher Ludlow, an apothecary and grocer, of Chipping Sodbury. Their acquaintance began while James Campbell, then a young officer, was quartered in the west of England, and they eloped together in Jan. 1781. In the same year it appears that a marriage ceremony of some kind took place at Edinburgh, and the parties soon afterwards sailed for America, with James Campbell's regiment, and were received there in society as man and wife, but as Ludlow did not die until 1784. it is not denied that during this period their relation was wholly illicit. Between 1784 and 1792 or 1793 they lived for the most part in England, and their only son, W. J. L. Campbell, was born in 1788, but thenceforward. until 1806, when James Campbell died, their ordinary residence was in Scotland, where the validity of their marriage was taken for granted by every one. Upon these facts it was contended on behalf of Glenfalloch that, according to the principles of Scotch law, a matrimonial consent sufficient to constitute marriage, and to give a retrospective legitimacy to issue previously born, was established by actual cohabitation, as well as by "habit and repute," after the year 1793. It was alleged, and scarcely denied, that James Campbell and the *cidevant* Eliza Ludlow passed everywhere for married persons, not only with world, but with members of their own family, of the Breadalbane family, and even of the Borland family. A power of attorney left by James Campbell, on going to Gibralter in 1800, described Mrs. Campbell as his wife, and he shortly afterwaads issued letters of inhibition against her as his wife; their son, W. J. L. Campbell, was brought up as a legitimate child, and succeeded without challenge to the property of Glenfalloch, on his uncles's death, his cousin, the representative of Borland for he time being, acting as his agent. On the other side, great stress was laid on the circumstances that, when the reputed Mrs. Campbell claimed her pension as an officer's widow in 1807, she referred exclusively to the sham marriage at Edinburgh in 1781, a ceremony worse than invalid, for being solemnised in her real husband's lifetime, it might have rendered her liable to the penalties of bigamy.

Hence it was inferred on behalf of Borland that she was aware of no other marraige contract than one at the same time illusory and criminal, and it was further argued that no mere implication form subsequent conduct could purge this original taint, even after Ludlow's death, so as to convert her from a mistress into a wife.

The material data in this strange case being unquestioned, the court had simply to balance certain legal presumptions against each other. The two dissenting judges took their stand on the illegal and adulterous inception of the connection, and from this point of view, which comes first, so to speak, in order of time, the *onus probandi* seems to rest on those who set up a marriage by repute. Starting from the fact that Mr. and Mrs. Campbell pretended to be man and wife, and were recognized as such by friends and relations, when they were consciously living in a state of concubinage, and were incapable of exchanging that consent which in Scotch law operates as an "irregular" marriage, what date are we to assign for the first manifestations of "matrimonial intention," and why

should we go out of our way to presume such intentions? It is not very easy to meet this mode of putting the case, except by stating the opposite argument. Looking first to an unbroken cohabitation extending over a period of twenty-two years after a marriage by consent might lawfully have been contracted, recognized as marriage by all contemporary witnesses, and accepted as such ever since by parties whose interest was hostile to the Glenfalloch title, we cannot but acquiesce in the justice of the view adopted by the majority of the judges. The enjoyment of an "undisturbed and undisputed status of legitimacy" for more than half a century is certainly a safer and sounder basis of judicial inference than any position which can be taken on the other side. It is far more improbable that James Campbell and his reputed wife intended their children to be bastards, although every act of their lives points the other way, than that, on finding the legal impediment to their union removed, they should have mutually renewed their vows, without revealing to others the secret of their former adultery. Where the presumption of law against the marriage, under such circumstances and after such a lapse of time, we cannot agree with Lord Ardmillan that it would conduce to the interests of morality, and it would assuredly conflict with those of public policy. —*Times.*

UPPER CANADA REPORTS.

COURT OF ERROR AND APPEAL.

(*Reported by* ALEX. GRANT, ESQ., *Barrister at Law, Reporter to the Court.*)

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

HODGINS v. THE CORPORATION OF THE UNITED COUNTIES OF HURON AND BRUCE.

(*Continued from page* 139.)

The question then is, whether the word "person," used in chapter 126, Consolidated Statutes of Upper Canada, is to be held to include the various corporations, municipal and other, in Upper Canada; in other words, whether the protection given by chapter 126 to justices of the peace and other officers and persons fulfilling any public duty, extends to corporation.

The appellants are a municipal corporation, and are prosecuted in this suit because, as the plaintiff alleges, and the jury must be taken to have found, the defendants duly assumed a highway running between two townships in the county of Huron, which made it their duty to cause that highway to be planked, gravelled or macadamized; and that in constructing a gravel road on this highway, they, for the purpose of drainage, cut a drain and led the water through a new culvert, stopping up an old one, and thereby wrongfully caused the water collected in the drain to flow on to the plaintiff's land. This work was completed in 1858, since when, in times of freshets, the water overflowed the plaintiff's land from year to year. In 1862 this action was brought. I do not connect this injury with any illegality in the by-law, assuming the highway as a county road, none is suggested or complained of, nor does it appear that any ground existed for quashing the by-law. The 202nd and 203rd section of the Municipal Act will not therefore apply; and if the defendants are entitled to notice of action, and that the action be brought within six months after the act committed, it must be by virtue of the extension of the provisions of chapter 126 to them. It is to be remembered that the question, whether by force of the interpretation acts the word "person" includes a municipal corporation, is not limited to a case where the act done is illegal and yet was authorized by a by-law which is also illegal; but extends to all cases where the act producing injury to another party, is nevertheless within the scope of the authority given to, or duties imposed upon, municipal corporations by statute. If chapter 126 applies to this case, it must also apply to the case of an act done under an illegal by-law, and then the argument of *Burns, J.*, in *Snook* v. *The Town Council of Brantford*, 13 U. C. Q. B. 626, applies, and with increased force, since long after the Interpretation Act of 12 Victoria, and after the two superior courts of common law had given opposite judgments upon this question, the Legislature passed the Municipal Corporation Act of 1858, which contains the same provisions as the preceding act upon which that argument was founded, and which, by renewing the special protection as to acts done under illegal by-laws, tends strongly to negative the conclusion that the legislature had given or were giving a more general protection to municipal corporations under the acts for the protection of magistrates.

It is unnecessary to repeat or review the conflicting decisions in the two superior courts, which were cited on the argument. They were all decided on the application of the 14th and 15th Victoria, chapter 54. No reference was then made to any provision of the 16th Victoria, chapter 180, as affecting the point in dispute. I presume because the statute 14 and 15 Victoria was in terms repealed by the 16th Victoria only so far as related to justices of the peace, though the 16th section of the last act provided that the act should apply for the protection *all* persons for anything done *in the execution of their office.* It may possibly have been thought that these words prevented the 16th Victoria from applying to corporations, as the "context" would exclude the interpretation "corporations" being given to the words, all persons for anything done in the execution of their office. In *Reed* v. *The Corporation of Hamilton*, *Macaulay*, C. J., makes a passing reference, but without any special remark, to the statute 16th Victoria.

But as the Interpretation Acts declare that the word "persons" includes corporations, the Consolidated Statutes, chapter 126, must include them also, unless we find that the context and obvious intent of that statute, excludes them, or at least excludes municipal corporations from its purview. The language used in every section, except the first and last, would seem to point to justices of the peace only; and the first section, in defining the other officers and persons included in the protection thereby given, uses language to which forced construction must be given to make it apply to corporations; while the last

only extends the privileges and protection not conferred on the first section to the officers and p rsons mentioned therein, "so far as applicable." If this act does apply to corporations, the first section, which expressly mentions all "persons," must be held to include them; it would have done so had the last section not been part of the act, and as a consequence, every action brought against a municipal corporation for anything done in the performance of its duties and, as is urged in the present case, in the execution of its power, must be an action on the case for a tort, and the declaration must allege that the act complained of was done maliciously, and without reasonable or probable cause, and on the general issue this allegation must be proved.

To my apprehension, it is clear that the legislature never contemplated the general application of this section to municipal corporations; and I am equally convinced, that no part of this act ought to be construed as applying to other than natural persons and individuals holding station or office, to which certain public duties are attached; the execution of which, in their official capacity, might expose them to actions.

I agree in the reasons given in the judgments of the Court of Queen's Bench for their construction of the word "persons" in cases like the present, and I cannot but feel, that no small part of the reasoning of the then learned Chief Justice of the Common Pleas in contesting the argument of *Burns*, J., above referred to, is weakened, if not wholly displaced, by the subsequent action of the legislature.

I am of opinion this appeal should be dismissed with costs.

RICHARDS, C. J., said he was unable to concur in the views just expressed by the learned Chief Justice. The point involved had been frequently discussed by him with the late Sir James Macaulay, and nothing that had since occurred had created any doubt in his mind as to the soundness of the opinions expressed by the judges in the Court of Common Pleas. It was unnecessary for him to say more than that he concurred in the views which were enunciated by Mr. Justice Adam Wilson in the judgment which he had prepared on the present occasion.

A. WILSON, J.—The statutes to be considered are the following: Chapter 126, section 1—Every action brought against any justice of the peace, for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, or against any other officer or person fulfilling any public duty, for anything by him done in the performance of such public duty, whether any of such duties arise out of the common law or be imposed by act of parliament, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged, that such act was done maliciously and without reasonable and probable cause; and if at the trial of any such action upon the general issue pleaded, the plaintiff fails to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant.

Section 9—No action shall be brought against any justice of the peace [see section 20, extending this and the other sections to every officer and person mentioned in the first section,] for anything done in the execution of his office, unless the same be commenced within six months next after the act complained of was committed.

Section 10—No such action shall be commenced against any justice of the peace until one month at least after a notice in writing of the intended action has been delivered to him, or left for him at his usual place of abode by the party intending to commence the action, &c.

Section 11—Provides for the venue and pleading the general issue.

Section 12—Provides that the action shall not be brought in any county or division court against a justice of the peace, for anything done by him in the execution of his office, if he object thereto and give a written notice of his objection.

Section 13—Provides, that after notice given, and before an action has been commenced, the justice may tender amends for the injury complained of, or after action he may pay the same into court.

Section 14—Provides, that if the jury think the plaintiff is not entitled to greater damages than have been tendered or paid, they shall find a verdict for the defendant.

Section 15—Provides, that the plaintiff, if he accept of the money paid into court in full, shall be entitled to his costs.

Section 16—Provides, that if at the trial the plaintiff do not prove:—1. That the action was brought within the time limited. 2. That the notice was given one month before the action was commenced. 3. The cause of action stated in the notice. 4. That the cause of action arose where the venue is laid. 5. When the suit is brought in a county or division court, that the cause of action arose within the county for which the court is holden, then the plaintiff shall be nonsuit, or the jury shall find for the defendant.

Section 19—If in any such case it be stated in the declaration that the act complained of was done maliciously, and without reasonable and probable cause, the plaintiff, if he recover a verdict for any damages, or if the defendant allow judgment to pass against him by default, shall be entitled to his full costs of suit.

Section 20—So far as applicable, the whole of this act shall apply for the protection of every officer and person mentioned in the first section hereof, for anything done in the execution of his office as therein expressed.

The Upper Canada Consolidated Statutes, chapter 2, section 12, provides the word "person" shall include any body corporate or politic.

Chapter 22, section 17, provides, that every writ issued against a corporation aggregate, and in the absence of its appearance by attorney, all papers and proceedings in the action before final judgment may be served on the mayor, warden, reeve, president, * * * or agent of such corporation, or of any branch or agency thereof in Upper Canada; and every person who within Upper Canada transacts or carries on any of the business of, or any business for, any corporation whose chief place of business is without the limits of Upper Canada, shall, for the purpose of being served with a writ of summons issued against such corporation, be deemed the agent thereof.

The Municipal Act, section 202, provides, in case a by-law, order or resolution be illegal in

whole or in part, * * * no action shall be brought until one month has elapsed after the by-law, &c., has been quashed or repealed, nor until one month's notice in writing of the intention to bring such action has been given to the corporation; and every such action shall be brought against the corporation alone, and not against any person acting under the by-law, order, or resolution; and, section 337 provides, that proceedings taken against corporations for non-repair of roads, or for damages sustained by reason of their non-repair, shall be commenced within three months after the damages have been sustained.

The reasons which have been assigned by the Queen's Bench why a municipal corporation is not entitled to notice of action are:

1. Because it would be inconsistent with the intent and object of the legislature, as expressed in the preamble [of the act 14 & 15 Victoria, chapter 54, now chapter 126 of the Consolidated Statutes of Upper Canada,] which was to alter, amend, and reduce into one act the various acts, whereby certain protections and privileges were afforded to magistrates and others which were not of a uniform character. *Brown* v. *Sarnia*, 11 U. C. Q. B. 218.

2. The context of the act shews that the Statute only applies to individual persons; 11 U. C. Q. B 219.

(*a.*) The two modes of serving the notice, *personally* or by leaving it *at the usual place of abode*, are altogether inapplicable to municipal corporations; *Ibid.* 219.

(*b.*) The service of a notice of action is not within the meaning of the act, which provides for serving the head of the corporation with "writs and process, and other papers and proceedings before final judgment;" *Ibid.*

(*c*) Personal service upon a corporation cannot be interpreted to mean upon the head of the the corporation, this would be service only upon a part of the corporation.

3. The 14 & 15 Victoria, chapter 54, did not apply to any of the then municipal acts, 12 Victoria, chapter 81, 13 & 14 Victoria, chapter 64, 14 & 15 Victoria, chapter 109, or 16 Victoria, chapter 181, because it had reference only to "so much of any act now in force as confers any privilege," as to notice or limitation of action, or amount of costs, or pleading the general issue, and giving the special matter in evidence, or venue, or tender of amends, or payment of money into court, while none of these municipal acts gave the municipality any privilege as to notice or limitation of action, or as to amount of costs, &c.; *Snook* v. *Brantford*, 13 U. C. Q. B. 623.

4. Because none of these municipal acts fall within the description contained in the preamble to the 14th & 15th Victoria, chapter 54, viz, "acts of Parliament in force in Canada, both public, local and personal, whereby certain protections and privileges are afforded to magistrates and others; 13 U. C. Q. B. 624.

5. Because none of these acts "are altered or amended" by this statute.

6. Because, apart from the Interpretation Act, the language of the 14 & 15 Victoria, chapter 54, shewed the Legislature had not municipal corporations in view when they passed it; all the language was applicable strictly to the personal acts of an individual, and cannot be applied to a corporate body without a strained and unnatural construction; 13 U. C. Q. B. 624.

7. Because the word "person" in the Interpretation Act is not to be extended to corporations, if it be inconsistent with the intent and object of the act, or with the context; and the object and intent of the act and the context shew it was not intended to apply the word "person" to municipal corporations; *Ibid.* 625.

8. Because if the 14 & 15 Victoria, chapter 54, be extended to municipal corporations, it might happen that a party would have little more than a week within which he could bring his suit, for by 12 Victoria, chapter 81, section 155, no action for anything done under a by-law can be brought until the expiration of one month after the by-law has been quashed; one month's notice of action has then to be given, and the action must be brought within six months by the 14 & 15 Victoria. chapter 54; *Ibid.* 626.

9. Because the 13 & 14 Victoria, chapter 15, limiting the time of bringing this action to three months, would have the effect of depriving a party of all remedy if he had to wait until the by-law was quashed before bringing his action, or the time mentioned in the act must be assumed to have been altered by the 14th & 15th Victoria, chapter 54, "a conclusion which [the learned judge said] I am not prepared to adopt;" *Ibid.* 626.

10. Because the three months' limitation in the 13 & 14 Victoria, chapter 15, would be reduced to two months if the 14 & 15 Victoria, chapter 54, be held to apply to corporations, *Ibid* 627, or the time therein mentioned must be held to be extended to six months; *Ibid.* 628.

11. Because after the passing of the Interpretation Act, and the act of 14 & 15 Victoria, chapter 54, the Legislature "has used the same language as to corporations being entitled to plead the general issue and give the special matter in evidence, as had been used previously without any provision for notice of action to be served," as in the Bytown and Prescott Railway Act, 13 & 14 Victoria, chapter 132, section 50, and in the 16 Victoria, chapter 190, section 53, as to road companies.

The reasons which have been assigned by the Common Pleas why a municipal corporation is entitled to notice of action are:

1. That municipal corporations are fully within the spirit of the 14 & 15 Victoria chapter 54; *Reid* v. *Hamilton*, 5 U. C. C. P. 290.

2. Individual members of the corporation are entitled to notice, and on the same principle the corporation, when the members act collectively, are entitled to notices; 5 U. C. C. P. 290.

3. The corporation is entitled to notice, notwithstanding the argument that if the party had to wait until the by-law [if one were in question] had been quashed, his right of action might be outlawed.—*Barclay* v. *Darlington*, 5 U. C. C. P 290.

4. By-laws bear analogy to convictions, and both afford protection until quashed, and it is clear that justices are entitled to notice of action, and that the action must be brought in a limited time.—*Barclay* v. *Darlington*, 5 U. C. C. P. 290, 439.

5. If a by-law be quashed the corporation has notice by statute that no action can be brought, for a month, within which time they may tender

amends, but where there is no by-law, and they have acted, as for instance under the 13 & 14 Victoria, chapter 15, they should, when performing a public duty imposed upon them by act of parliament, have notice before they are sued, as well as individual officers, *Ibid* 290.

The only point of difference and difficulty is whether the 14 & 15 Victoria, chapter 54, now consolidated by the act of Upper Canada, chapter 126, applies only to individual persons, or whether it does not apply also to municipal corporations.

The reasons that are given for confining it only to individual persons, which require special consideration, are:—The second reason above stated in support of the view of the Queen's Bench which covers also the sixth and seventh reasons. The eighth reason of the Queen's Bench applying also to the ninth reason. The Common Pleas, by their first and second reasons, profess to answer the second reason of the Queen's Bench; and by their third, fourth, and fifth reasons, to answer the eighth reason of the Queen's Bench.

The other ground stated why the statute does not apply to municipal corporations would not, in my opinion, prevent the application of the statute to such corporations if the reasons lastly referred to do not alone prevent its application; they are relied upon rather as strengthing the other and principal reasons, and are not I think, stated as sufficient reasons in themselves for excluding the applications of the statute to corporations.

The following authorities will explain the grounds upon which I have formed my opinion. And, firstly, as to the meaning and application of our statute 14 & 15 Victoria, chapter 54, which is now represented by chapter 126 of the Consolidated Statutes for Upper Canada; it applies also clearly to public acts, local acts, and personal acts, not only to public, *local* and *personal* acts.

In *Richards* v. *East*, 15 M. & W. 244, the Building Act 14 George III., chapter 78, was held to be an act of a local and personal nature; local as being confined to local limits, personal as affecting particular descriptions of persons only as distinguished from all the Queen's subjects, and therefore the right of the general issue, and giving the special matter in evidence, provided for by that act, was held to be taken away by the 5 & 6 Victoria, chapter 97, section 5.

There are many cases in which companies are entitled to notice of action before suit is brought.

In *Garton* v. *The Great Western Railway Co.*, El, Bl, & El, 837, the defendants were held to be entitled to notice of action under the words in the act "that no action shall be brought against any *person* for anything done or authorized to be done, &c."—*Boyd* v. *The London and Croydon Railway Co.*, 6 Sc, 461; 2 Jur. 327.

The notice of action required to be given by chapter 126, section 10, is to be "delivered to him, or left for him at his usual place of abode;" and this, it is contended, means a delivery to the party *personally*, which cannot be made in the case of a corporation aggregate, and means also a leaving at a personal residence or abode, while a corporation aggregate can have no place of abode. *Delivering* to him can mean no more than *giving* to the intended defendant, which was the expression in *Ellis Blackburn & Ellis*, 840, and in 2 Jurist, 327, and in both of these cases the corporations were held to be entitled to notice, although the word *person* only was used. I see no difficulty therefore arising from the requirement that the notice is to be *delivered* to the party.

Then as to *the place of abode*. In *Attenborough* v. *Thompson*, 2 H. & N. 559, the *residence* of a party was held to be sufficiently stated by giving his office or place of business, although it usually means *home*, or where the party dwells, or where he eats, drinks, and sleeps.

So *abode* is satisfied in some cases by stating the party's place of business. In *Blackwell* v. *England*, E. & Bl. 547, *Erle* J., said, "*residence* is a word capable of bearing several meanings. The object of the enactment was to enable the party who suspected a fraud to trace the witness; for this purpose, his residence is to be given; Which meaning given to that word will best effectuate that object. I hold it impossible for any one, whose mind is not perverted by too much technical knowledge, to doubt that the purpose is better effectuated by giving the place where the witness passes all his active hours, the place of business; than by giving the place of pernoctation; where the object is different, the meaning of the word may be different."

Id *Adams* v. *The Great Western Railway Co.*, 6 H. & N. 404, in which a great many cases are commented on, it was determined that a corporation can *dwell* at the place its business is carried on.

I find therefore no difficulty in holding the reference to the place of abode as any insuperable bar to the statute in this respect being held to be applicable to corporations.

The 8th reason, before mentioned, is the principal one, why the statute should not be considered as having been extended to municipal corporations, and it is the one which the late Sir James Macaulay said raised "the strongest objection" he had felt to the construction being given to the statute which he had placed upon it.

When a by-law is illegal, and any act is done under it, which, by reason of such illegality, gives a right of action, the 202nd section of the present Municipal Act now requires, in addition to what the former acts required, that not only must the by-law be quashed, and the party wait for one month after it has been quashed before he shall bring his action, but he must also give one month's notice in writing of his intention to bring such action.

This was the principal argument relied upon against the 14 & 15 Victoria, chapter 54, being extended to such cases, because it is said, that if the month's notice in writing were superadded to the time which it would take to quash the by-law, and to the month which must afterwards supervene between the quashing of the by-law and the commencement of the action, the period of six months allowed for bringing the action would almost if not altogether have expired. The present statute has certainly altered the law in this respect, and notice in writing must now be given, not by virtue of chapter 126, but by the special provision of the Municipal Act itself which was probably made to meet the difference of opinion. I do not see, however, that the rights of parties who may have a ground of action are thereby injured, for there is no reason why the month which must have elapsed under the

former law after the by-law was quashed, before the suit could be begun, should not be used by the party as a part of the time within which his written notice of action is also to be served; or why this could not have been done under tne former law, if the act 14 and 15 Victoria, chapter 54, could have been extended to corporations in other respects. Requiring a party to wait one month before he shall bring his action, and to give a month's notice in writing of his intention to bring it, does not necessarily involve the loss of two months' time, but really means no more than that after the by-law is quashed the party injured shall not bring his action until he he has given one month's notice in writing of his intention to bring it. The difficulty which has been stated to have been in the way in applying the 14 & 15 Victoria, chapter 54, to municipal corporations, does not in this respect appear to me to have really existed.

In those cases in which the by-law is not illegal, but in which the corporation have acted so as to subject them to an action while fulfilling a public duty, either under the common law or imposed upon them by act of Parliament, there can be no special reason why the protection of the act, chapter 126, should not be equally extended to the body corporate, which it is admitted is applicable, and does extend to their officers and agents in the self-same cases.

The great purpose of the statute was, and is, to give protection to all those who are fulfilling a *public duty*, that is, who are performing acts which they are *bound* or *required* to perform, by reason of their public functions or character. They are permitted, in such cases, to tender amends for their wrongful conduct before they are sued for it. And why should this right, if granted at all, not be extended to corporations, as well as to their officers and servants? If there be any reason for making any distinction in such a case, probably it might be thought the corporation was entitled to greater protection than their subordinates, because it is frequently, though perhaps not universally, that it is the officer who is alone to blame—the corporation being held responsible merely as the principal, according to the maxim, "*respondeat superior*;" and because corporations are commonly more severely amerced by juries than individuals are.

This act of parliament, however, only applies to any act or any thing done, and not to such omissions as are referred to in section 337 of the Municipal Act, or what was formerly the 13 & 14 Victoria, chapter 15, section 1 (*Carr v. The Royal Exchange Company*, 1 B. & S. 956;) and this perhaps is an answer to the argument, that in order to extend the 14 & 15 Victoria, chapter 54, to municipal corporations, the three months' period of limitation in the act of 1850 must be held to have been repealed, and the period extended to six months by the act of 1851 in every case.

The result of my consideration is, that by the express terms of section 202 of the Municipal Statute, where any act which gives a cause of action, has been done under an illegal by-law, order, or resolution, no action can be brought against the corporation "until one month has elapsed after the by-law, order, or resolution has been quashed, nor until one month's notice in writing of the intention to bring such action has been given to the corporation." And for the reason before given, I think the limitation of six months next after the act complained of was committed, mentioned in chapter 126, does apply to municipal corporations. That by the express terms of section 337 the limitation of proceedings against the corporation for not keeping roads and highways in repair, is three months, which section, being restricted to cases of non-feasance is not within the provisions of statute 126. And that in all other cases of acts done not under an illegal by-law, but done in the performance of their public duty, municipal corporations are entitled to notice of action under chapter 126, before they can be rightly sued in like manner and to the same extent that their officers and servants are; and therefore that this later statute extends to and includes municipal corporations.

In this particular case the declaration shews the defendants had assumed this road; and that they afterwards made, formed, graded, and gravelled it. In the performance of which work this cause of action is alleged to have arisen. This is the power which they have under sections 339 and 340 of the present act. The declaration does not say this road was assumed by by-law, but this may be presumed as against the plaintiff. The evidence shews that the defendants, "in the exercise of their powers and duties under the Municipal Acts, built a gravel road," &c., and did the act from which the plaintiff contends he acquired his right of action. These acts were done in the year 1858, and the action was not brought until the year 1862.

The defendants moved for a nonsuit, because no notice of action had been given, and because the action had not been commenced within six months from the act committed. The motion for nonsuit was over-ruled, and the plaintiff recovered a verdict and $100 damages. The defendants afterwards moved the Court of Queen's Bench for a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered pursuant to leave reserved, which the court refused to grant, in consequence of the series of decisions of that court which were adverse to the defendants' application.

For the reasons before given, I think the nonsuit should have been ordered to be entered; and that there should be now a direction that the Court of Queen's Bench do order such nonsuit to be entered, upon the grounds which were taken at the trial.

I am not satisfied that the plaintiff can maintain an action for the cause stated in his declaration, that is, for the defendants "making a ditch for about two chains on the land of the plaintiff, through which the defendants caused water to flow from the road on to the plaintiff's land," because section 323 of the Municipal Act provides that "every council shall make to the owner of real property *entered upon, taken, or used* by the corporation in the exercise of its powers, in respect to roads, &c., due compensation for any damages necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration."

The cases of *The London and North Western Railway Company* v. *Bradley*, 15 Jur. 639; *Clothier* v. *Webster*, 12 C. B. N. S. 790; and many others of the same nature might be added, shew that where the statute confers the power to do the act complained of, and directs that compensation shall be awarded in a particular manner, the special mode of procuring that compensation must be pursued, which is in this case by arbitration, and not by suit.

If, however, the defendants have done their work so negligently and unskilfully, that by reason *thereof* the plaintiff has sustained special damage, he may, notwithstanding the statute, still maintain an action for redress in respect of the special damage accruing from the negligence. *Lawrence* v. *The Great Northern Railway Company*, 16 Q. B. 643; *Imperial Gas and Coke Company* v. *Broadbent*, 5 Jur. N. S. 1319; and many other cases including those in 15 Jur. 639, and 12 C. B. N. S. 790, before cited. And it may be that the plaintiff does complain of negligence and unskilfulness on the part of the defendants in carrying out their authorized works; for he states that the defendants left the water on his land so conveyed there, "instead of causing the same to flow northerly in a ditch along the west side of the road to a natural water course situated within twenty chains northward of the culvert before mentioned, as it was the duty of the defendants to have done in the *proper* and lawful construction of the said road."

It is not necessary, however, to consider this further, as it was not raised either in the court below or in this court, and is not material in my view of the case on the other points; but I feel it right to call attention to the matter, as it may yet be necessary to consider it in some other case if it should arise for adjudication.

In my opinion the appeal should be allowed, and a nonsuit be directed to be entered in the court below.

MOWAT, V. C., concurred in the conclusion at which the Chief Justice of the Common Pleas and Mr. Justice *Adam Wilson* had arrived.

Per Cur. — Appeal dismissed with costs. [*Richards*, C. J., *A. Wilson*, J., and *Mowat*, V. C., dissenting.]

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, Esq., Q. C., *Reporter to the Court.*)

IN RE DOHERTY AND THE CORPORATION OF THE TOWNSHIP OF TORONTO.

Common Schools—Loan by township to school section—C. S. U. C., ch. 64, sec. 35.

A township corporation passed a by-law, reciting that by section 35 of the Upper Canada Common School Act, authority is given to township councils to collect by special rate in school sections that had become indebted to them by loan, and that a certain section had borrowed of the municipality $400, due at different days; and enacting that there should be levied in the section by the collector of the municipality the sum of $262, to meet a certain portion of said loan.

The by-law was quashed, for, (among other objections,) the statute referred to gives no such authority; and if it did, it requires provision to be made for levying the whole sum borrowed.

The money was said to have been lent out of the Clergy Reserve funds of the township, and 27 Vic., ch. 19, was referred to as authorizing it, but that statute was passed after the loan.

[Q. B., E. T., 1866.]

Robert A. Harrison, during last Michaelmas Term obtained a rule *nisi*, calling upon the corporation of the township of Toronto to show cause why by-law No. 185, of that municipality should not be quashed for illegality, with costs.

The by-law was in the following words:—

By-law No. 185.

To levy a certain sum on school-section No. 11, in Toronto township, for the purpose of meeting a certain loan made to that corporation on the 27th December, 1862.

Whereas by the 35th clause of the Consolidated Statutes of Upper Canada, chapter 64, authority is given to township Councils to raise, levy and collect by special rate on school sections that have become indebted to them by loan. And whereas school section No. 11 did on the 27th of December, 1862, by resolution bearing date the 27th of December, 1862, borrow of this municipality the sum of $400, on the above condition, bearing interest at the rate of six per cent. per annum. And whereas the same was granted in two sums of $200 each, one due on the first day of January, 1865, and one on the first day of January, 1866. Wherefore the corporation of the township of Toronto enacts, that there be raised, levied, and collected from the ratable property of school section No. 11, in this township, in addition to all other rates and assessments for the current year, the sum of $262, which said sum shall be collected by the collector of this municipality, and paid over to the treasurer, to meet a certain portion of said loan made to the school-section No. 11, on the 27th December, 1862, amounting to the sum of $400 and interest, due on the first day of January, 1865. Passed August 19th, 1865.

(Signed)

JAMES E. RUTLEGE, *Town Clerk.*
SAMUEL PRICE, *Town Reeve.*

On the application affidavits were filed for the purpose of shewing the illegality of the proceedings of the trustees and the municipality antecedent to the passing of the by-law, but as the judgment is rested upon defects in the by-law itself, it is unnecessary to notice such objections.

The objections made to the by-law were—1st. That the corporation had no authority to lend the moneys of the township to the shool-trustees. 2 That section 35 of the U. C. Common School Act conferred no such authority as that recited in the by-law; and 3, If it did, the by-law should have provided for levying a sum sufficient to pay off the whole of the principal and interest, and not merely a sum to cover a portion of the principal and interest.

During this term *M. C. Cameron*, Q. C., shewed cause.

Robert A. Harrison supported the rule.

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

The by-law professes on its face to have been passed under the authority of 35th section of the Common School Act, ch. 64 Consol. Statutes U. C. On referring to that section it enacts, that a township council may grant to the trustees of any school section, on their application, authority to borrow any sums of money necessary for the purposes above mentioned (in sec. 34), in respect to school sites, &c., and in that event shall cause to be levied in each year upon

the taxable property in the section, a sufficient sum for the payment of the interest on the sum so borrowed, and a sum sufficient to pay off the principal within ten years.

The by-law recites this clause as giving the councils authority to levy and collect by special rate in school-sections that have become indebted to them by loan. The clause contains no such authority, and one can hardly understand how any one having the statute before him could put such a construction on the section.

The by-law further recites, that school-section No. 11 did, on the 26th of December, 1862, borrow of the municipality the sum of $400 *on the above condition*. What is meant or intended by the above condition we cannot make out; and after stating in what manner the $400 are to be repaid, the by-law enacts that there be raised, &c., from the rateable property of shool-section No. 11 the sum of $262, to meet a certain portion of the loan made on the 27th of December, 1862, amounting to $400 and interest, due on the first of January, 1865. What certain portion this refers to does not appear, or for what amount of principal or interest.

On the face of the by-law no authority appears for the loan made by the municipality in 1862 to the school-section, nor was any authority by statute or otherwise cited or referred to in the argument authorizing any such loan. It does not even appear by the by-law that it was a loan for any school purpose, or for what purpose it was made, or upon whose application.

The only affidavit filed on the part of the municipality is that of Mr. Parker, the now deputy reeve of the township, who states that he was reeve of the township at the time the loan of $400, in 1862, to the trustees was made, and that as far as he was aware he had no knowledge that there was any difficulty between the ratepayers of the section and the school trustees, although subsequent circumstances indicated that one of the council might have known that there was. How or under what circumstances the loan was made he does not state, although his attention must have been drawn to the affidavits filed on the application, shewing the loan was asked for on the personal responsibility of two of the then trustees, and granted on giving notes of hand, signed by them, for the amount.

Mr. Parker further states, that the loan was made to the trustees out of the Clergy Reserve funds of the township. With reference to this latter statement, it was mentioned during the argument by the counsel for the municipality, that the corporation had authority to apply the Clergy Reserve funds for educational purposes, and to lend such funds to school-sections, and it was argued that the loan in question being made by the township council out of their own Clergy Reserve funds to the trustees, such a proceeding was in effect giving to the trustees authority to borrow the amount loaned to them under the provisions of the 35th section of the School Act; but on referring to the statute 27 Vic., ch. 17, which gives the authority to township councils to loan surplus moneys derived from the Clergy Reserve fund to school-sections, and also authorizes trustees to borrow such moneys for purchasing school sites, &c., we find that statute was not passed until the 15th of October, 1863, while the loan in this case was made on the 27th of December, 1862, near a year before the passing of the act, and consequently not under the authority of that act.

As to the third objection, the legislature wisely enacted, and made it compulsory, by the 35th section of the School Act, upon township councils, in the event of their granting authority to school-sections to borrow money for any of the purposes referred to, that the township council should also provide the means for securing repayment of the amount borrowed, by the levying in each year through their own collector, by a special rate on the taxable property in the school-section, sums sufficient to pay off the interest and principal within ten years. In the present case the by-law only provides for the levying of a sum to pay off a portion of the principal and interest, and no provision is made for payment of the balance.

Upon these several grounds we are of opinion the by-law should be quashed with costs.

Rule absolute.

In re Scott and the Corporation of the County of Peterborough.

Survey—C. S. U. C., ch. 93, secs. 6-9—C. S. C. ch. 77, secs. 58-59.

The county council passed a by-law directing a township municipality to levy and collect from *the patented and leased lands* of the township, a certain sum required to reimburse the expenses incurred in a re-survey of the township. *Held*, that the by-law illegal, for the statute directs that such expense shall be defrayed by the "*proprietors*" of the lands issued.

Semble, that the jurisdiction to pass such a by-law should appear on the face of it, by shewing a survey such as the statute contemplates.

Quære, whether the act authorizes the re-survey of a whole township.

[Q. B., E. T., 1866.[

Robt. A. Harrison obtained a rule during last Hilary term, calling on the defendants to shew cause why so much of a by-law, No. 262, of the corporation of the County of Peterborough, which enacts that the municipality of Smith and Harvey be required to levy and collect from the patented and leased lands of the township of Harvey such a rate as will produce $2541·5, to reimburse the expenses of the re-survey of the township of Harvey, should not be quashed without costs, for illegality, on several grounds: among others—1. That the jurisdiction or power of the corporation to levy or direct the levy of the $2541·5, is not shewn on the face of the by-law, in this, that it is not shewn that such a survey as the statute contemplated had been previously made as the statute directs; and that the survey was not in fact one such as the statute contemplated. 2. That a direction to levy the same from the patented and leased lands of the township of Harvey, and not from the resident landholders, as mentioned in sec. 6, ch. 69, Consol. Stat. U. C., and sec. 68, ch. 77, Consol. Stat. C., or the proprietors, as mentioned in sec. 9 of the first mentioned statute, and sec. 61, of the last mentioned statute, is bad.

During this term *C. S. Patterson* shewed cause, citing *Hodgson* v. *The Municipal Council of York and Peel*, 13 U. C. Q. B. 268; *Tylee* v. *The Municipal Council of Waterloo*, 9 U. C. Q. B. 572.

Robert A. Harrison, in support of the rule, cited *Cooper* v. *Wellbanks*, 14 U. C. C. P. 364; *Grierson* v. *The Municipality of Ontario*, 9 U. C. Q. B. 630; *Tanner* v. *Bissell*, 21 U. C. Q. B. 553.

From the affidavits filed in support of the application and the copies of extracts of the minutes of the council of the County of Peterborough referred to, it appeared that on the 25th of March, 1863, a committee of the council recommended that the townships of Burleigh and Harvey be resurveyed in all places where the old lines could not be found, and that stone monuments be placed on the government lines, and that a memorial be sent to the government to appoint John Reid and Theodore Clementi to make such re-survey: that on the 27th of March, 1863, the county council memorialized the government, representing that the settlement of the townships of Harvey and Burleigh had been greatly prevented owing to the uncertainty which existed regarding the lot and concession lines, the landmarks of the old surveys having in a great measure been obliterated. And they prayed His Excellency the Governor-General to cause a re-survey of those townships to be made, stating that towards the expenses of the survey they were prepared to contribute in the proportion of the lands patented in those townships; and they recommended for such survey the appointment of Messrs. Reid and Clementi, provincial surveyors.

It also appeared that the government, through the honourable the Commissioner of Crown Lands, caused the township of Harvey to be wholly re-surveyed by the surveyors, or one of them, above-named, the amount of remuneration being first settled at five cents an acre being the lowest government price, and which was agreed to by the county council on the 15th of May, 1863; and on the 22nd of January, 1864, a resolution was adopted by the council, authorizing the warden to enter into an agreement with Mr. Clementi for the re-survey of the township of Harvey, and to pay him at the rate of five cents per acre for the whole area of land and water—all lakes and waters to be properly laid out on the plan, with their contents in acres; and it further appeared that, upon the certificate and order of the Commissioner of Crown Lands, the treasurer of the county paid $2541.5 as their proportion of the expenses incurred in performing such re-survey.

An affidavit of the treasurer was filed on shewing cause, who swore that in order that the sum of $2541.5 might be levied by the corporation of the united townships of Smith and Harvey, as well as to inform them of the amount necessary to be raised and levied to defray and pay the expenses of the re-survey, that part of the by-law sought to be quashed was passed; and that the corporation of the united townships did thereupon pass a by-law for the purpose of levying the said sum of money, and that they proceeded to act under such by-law, and that before this application they levied and collected a large portion of the money, but had not yet paid the same to the county of Peterborough.

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

As our judgment proceeds upon the ground of the second objection taken, it is unnecessary to decide whether the first objection is sustainable, although it is probable, upon an examination of the 6th, 7th, 8th, and 9th sections of ch. 93, Consol. Stat. U. C., and corresponding sections 58, 59, 60, and sec. 61 of ch 77, Consol. Stats. C., which are word for word the same, that the by-law, upon the ground of the first objection, would be found to be illegal.

As to the second objection, assuming the county council had authority to pass the by-law as to a re-survey of the whole township, it was contended that that part of the by-law requiring the amount to be levied and collected from the patented and leased lands of the township of Harvey is illegal and defective, and we are of opinion that the objection is well taken.

The term *leased lands* is very ambiguous. No doubt the council intended it to apply to lands leased by the Crown. The sixth section referred to enacts, that the survey shall be at the cost of the proprietors of the lands interested, and the ninth section refers to the same being levied on the said proprietors. The term *proprietor* we take to apply to and include a larger class of persons than owners of patented and leased lands. The by-law should have followed the words of the statute. Thus restricting the levying of the expenses to a smaller class of persons or lands than those mentioned in the statute, may exempt many persons and lands from paying or being liable to a share of the expenses, and thereby cast a heavier burden upon the other inhabitants and owners, contrary to the provisions of the statutes.

Upon this ground, in our judgment, that portion of the by-law moved against is defective and illegal, and ought to be quashed.

During the argument it appeared to me that the portion of the by-law objected to only amounted to a mere expression of opinion of the county council, and that it was unnecessary that this court should interfere; but, on consideration, permitting the by-law to remain as it is, might hereafter give rise to some difficulty, or in some way effect or create a liability on the part of the municipality of Harvey; and the better course, in order to avoid future question, is to set it aside.

Rule absolute to quash so much of the by-law objected to, with costs.

Rule absolute.

CORRESPONDENCE.

Insolvent Act of 1864.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—"A Barrister," in your last issue raises some questions under the Insolvent Act of 1864, and amongst others whether or not it is necessary to mail a notice to each creditor on an application by an insolvent for his discharge, and refers to a recent decision on the question—doubtless *In re Waddell*, as you suggest.

The same question arose in my practice. I argued that it was not necessary to mail the notice, and the learned county judge sustained me. I am still firmly of the opinion that the statute does not require it. My reasons are as follows.

The statute is divided into 13 sections or chapters, each one (except the first and the last) divided into several sub-sections, and having a descriptive title, as "Of voluntary assignment," "Of dividends," &c., section or chapter 11 being "Of procedure generally."

Under this clause, sub-sec. 1, it is contended by some that in applications under section or chapter 9, treating "Of composition and discharge," it is necessary to address notices to all creditors and representatives of foreign creditors within the province. I contend that it being for procedure generally, does not affect cases which are particularly provided for elsewhere in the statute. Confining this argument to notices under sub-sec. 1 of sec. 11, and referring to the notices mentioned in the act, we find that there are four places in the statute where provisions are made as to how notices shall be given: the first is sub-sec. 13, sec. 4—the assignee may sell the real estate after advertisement for the same time, and *in the same manner*, as required for sales of land by the sheriff. Mark *en passant* that this is a notice "required to be given by advertisement."

The second is sec. 3, sec. 7—notice of appeal. This notice is to be *served* on the opposite party.

The third is sub-secs. 6 and 10, sec. 9—another notice required to be given by advertisement; and the fourth is sub-sec. 7, sec. 11, generally.

Now the statute is positive in its provisions in each one of these sub-sections. The first one reads "but only after advertisement thereof," &c. Can it be contended that under sub-sec- 1, sec. 11, it is necessary, before an assignee can make a legal sale and conveyance of the insolvent estate, he must not only advertise the lands as directed in sub-sec. 13, sec. 4, but also address and mail notices, &c., post paid, as in sec. 11, notwithstanding that this sub-sec. 13 says notice shall be given "*in the same manner*" as sheriffs give notice of sales of land? Clearly not. And yet if the position contended for by Judge Logie is correct, it must go that far, because this is a notice "herein required to be given by advertisement."

The second is not a notice of meeting of creditors, nor is it a notice required to be given by advertisement. The statute in that section says it shall be served upon the opposite party and upon the assignee—positive and clear enough, but not more so than the other provisions.

The third says, "and notice shall be given by advertisement in," &c., " for two months, and for the same period in," &c. This is also positive and clear enough. Notice of the application is to be advertised for two months as directed. And upon such application, *i.e.*, the application of which notice, as directed, has been given, any creditor may appear, &c. If no other general provision were made as is made in the fourth sub-sec. quoted, there could be no contention that it was necessary to mail notices.

The fourth is also positive and clear: "shall be so given by publication thereof, &c., and in any case, &c., giving such notice shall also, &c. To what, then, does sub-sec. 1 of sec. 11 refer? what notices does it provide for. Before answering this I will give my construction of the sub-section, and what I understand by the words "without special designation of the nature of such notice" (these words seem to be the knot). I take it there are two kinds of classes of notices referred to in this sub-sec. 1st. Notices of meeting of creditors. 2nd. "All other notices required to be given by advertisement, without special designation of the nature of such notice," *i.e.*, this sub-sec. in the first place does specially designate the nature of the notice, viz., meetings of creditors. In the second place, it, the sub-sec., does *not* specially designate the nature of the notice, but provides for all other. Other than what? That *meetings of creditors*, herein required to be given by *advertisement*, without in this sub-sec. designating their nature, as in the other kind or class, the nature of which is meetings of creditors. A reference to the statute will I think answer my question and sustain my construction.

The first place in this statute where a notice is spoken of as being required is sub-sec. 1, sec. 2. This is for a meeting of creditors, and comes under the first class, and the next sub-sec. says each notice of such meeting sent by post as *hereinafter* provided. The only provision hereinafter made that could touch this case is in sub-sec. 1, sec. 11.

The next notice is sub-sec. 8 of sec. 3. This is a notice to be given by advertisement, and falls under the second class. There is certainly no other place in the statute providing for the manner in which the notice shall be given, and yet it is clear that the whole of sec.

11, sub-sec. 1 is not applicable, for the writ is issued and placed in the hands of the sheriff, who himself knows nothing about the estate or its creditors, by one who only knows that he is a creditor, and it is simply impossible for the sheriff to mail a notice of this meeting post paid to each creditor.

The third place is sub-sec. 13 of sec. 3, and comes under the first class, being a meeting of creditors. Here again the only provision is in sub-sec. 1, sec. 11, and Mr. Abbott, the author of the act, in his book edition of it, p. 25, says in reference to this section "That provision would, however, seem inapplicable to this clause, as no list of creditors is attainable at this stage of the proceedings, and there is 'no assignee or person' calling the meeting."

The fourth is in sub-sec. 17 of same section, is a meeting of creditors; and again sub-sec. 1 of sec. 11 is the only directing clause as to how notice of such meeting is to be given.

The fifth sub-sec. 3, sec. 4, a meeting of creditors.

The sixth is sub-sec. 13, sec. 4, commented upon above.

The seventh, sub-sec. 18 of same section, a meeting of creditors.

The eighth, sub-sec. 11, sec. 5, a notice to "be given by advertisement."

The ninth, sub-sec. 2, sec. 9, another notice "required to be given by advertisement."

The tenth, sub-sec. 6 and 10 of same section, also referred to above.

The eleventh, sub-sec. 1, sec. 10, a "meeting of creditors," notice of which is to "be given by advertisement."

And the twelfth and last is sub-sec. 1 of sec. 11.

These are all designated or described where they are spoken of in the act, either as notices of meetings of creditors or as notices required to be given by advertisement, and I have pointed out several cases in which it is impossible to perform all of the conditions of sub-sec. 1 of sec. 11, and in no other place is provision made for the MANNER in which such notice shall be given. If then the clause is inapplicable to some of the cases which can only come under "procedure generally," *a fortiori* it is inapplicable where positive and specific provisions are elsewhere made for a particular notice.

Now as to sec. 11, sub-sec. 1 itself. Notice of the two kinds of classes shall be given by publication thereof FOR TWO WEEKS in," &c. "And in any case the assignee or person giving such notice shall ALSO address notices thereupon," &c. What does the word "also" mean? Clearly that in addition to *two weeks'* publication there must be a mailing of notices post paid; but not in addition to a TWO MONTHS' publication specifically and completely provided for elsewhere. The language of the statute evidently contemplates a two months' publication without notices mailed, equivalent, in this particular case, to two weeks' publication *with notice mailed*, in general cases.

Again, (Chief Justice Draper's argument, and a conclusive one too), sub-sec. 1 of sec 11 provides that the publication in the local newspaper shall be in one "published at or near the place where the proceedings are carried on." Sub-sec. 6 of sec. 9 selects as the local newspaper the one published "in or nearest the place of residence of the insolvent." Now every one who knows anything about the practice under the act knows that it is very often the case that the insolvent lives in one county and the proceedings are carried on in another. Sometimes he lives in Lower Canada, and the proceedings are carried on in the western part of Upper Canada. The only possible argument that can be advanced to sustain the proposition that, on an application for a discharge of an insolvent it is necessary to mail a notice post paid to each creditor is, that notice of the application may be validly given in two ways, as pointed out in sub-sec. 6 of sec. 9, or as in sub-sec. 1 of sec. 11. But you cannot add the last clause of sub-sec. 1 of sec. 11 to sub-sec. 6 of sec. 9 without adding the two prior clauses (with which it is connected by a copulative conjunction), the first of which is that publication shall be for two weeks, and the second is that such publication must be in the local newspaper published at or nearest to the place where the proceedings are being carried on. You must take all or none.

Another question likely to arise under the Act is this: can a creditor sue and recover judgment on a debt contracted and due before the assignment in voluntary, or appointment of the official assignee in compulsory liquidation; or to put it thus, in an action on a promissory note described in the insolvents schedule of creditors attached to his deed of assignment, would it be a good plea before discharge to plead the assignment or appointment under

the Act? I contend it would, and form my opinion from the statute itself. The effect of an assignment, or the appointment of an official assignee, is declared to be, "to convey and vest in the assignee the books of account of the insolvent, all vouchers, accounts, letters, and other papers and documents relating to his business, &c.. which he has or may become entitled to at *any time before his discharge under the Act, excepting*," &c; sub-sec. 7 of sec. 2, and sub-sec. 22 of sec. 3; and all creditors can come in and share *pro rata* in the insolvent's estate. The assignee represents the creditors, and has an absolute right of property in, as well as a right of possession of all the insolvents estate, real and personal, wheresoever situated, excepting only such as could not be seized under execution. This is much more than the writ of execution could do for the creditor in the case of a *fi. fa.*, that would only give the sheriff a right of possession of, with a lien upon certain kinds of personal or real estate situate in his bailiwick, to be sold within a limited period, and always at a sacrifice. If the creditor is not entitled to his discharge he will always remain in this way, and whenever he gets a cents worth beyond what the law exempts from seizure under execution it instantly ceases to be his and vests in his assignee—in trust for the body of creditors. The assignee has got to apply for his discharge after notice, and it would not be granted until after all the assets were converted and distributed, and until the insolvent gets his discharge. The practical effect then of the assignment and appointment is, that of *a judgment recovered*, not of an action pending, as in *Baldwin* v. *Peterman*, 16 U. C. C. P. 310. The assignee in his own name as such sues for the recovery of debts due to the insolvent, and may "intervene and represent the insolvent in all suits or proceedings by or against him which are PENDING at the time of his appointment. In suits or proceedings commenced against the insolvent after the insolvency proceedings, the assignee cannot intervene, the insolvent has no means to employ a professional man to defend him; and no matter how unjust the claim may be his hands are tied, he must submit, and when he gets his discharge from the insolvent court (the expenses of which are defrayed by the estate) he finds a judgment against him—a judgment debt contracted *after* the date of his assignment staring him in the face—a judgment founded on a most unjust and illegal claim, but "*interest reipublicæ ut sit finis litium*," and the illegal claim is merged in the legal judgment obtained *after* his assignment in bankruptcy.

By sub-sec. 9 of sec. 5, costs incurred in proceedings against an insolvent before due notice of an assignment or writ can rank upon the estate, such costs forming a debt contracted *before* insolvency proceedings. Costs incurred after due notice do not so rank. With what constitutes due notice I have nothing to do here, the statute elsewhere points that out. Now the Statute of Gloucester, 6 Edw. 1, c. 1, says, that the plaintiff in all actions in which he recovers damages shall also recover against the defendant his costs of suit. If then a creditor can sue and obtain judgment AFTER these proceedings in insolvency the Stat. Gloucester gives him full costs of suit.

Again, the insolvent is only discharged from such debts as are proveable against his estate and existing against him at the time of his assignment, not from debts contracted afterwards. If, then, a creditor be allowed to put his claim into a judgment with costs, the original cause, *transit in rem judicatam*, is merged and gone forever. If one creditor can do this, all can, and the insolvent would find that his debts, instead of being erased by the insolvency proceedings, have, like the prophet's gourd, during the long night of his commercial death, most wonderfully increased in size, and that he owes twice as much as he did before.

The words used in sub-sec. 9, sec. 4, *supra*, giving the assignee power to intervene in all proceedings by or against the insolvent which are *pending* at the time of his appointment, of themselves shew by direct inference that he cannot be sued after assignment or appointment.

The argument used against me is, that the insolvent may never get his discharge. True, an execution debtor may never get his pay. If he never gets his discharge his assignee will not, and whenever he gets anything his assignee owns it and takes for the creditors. Could an execution do more than or as much as this?

There are no authorities against this view. *Baldwin* v. *Peterman* is not, as I have shewn. *Spencer et al.* v. *Hewitt*, Law Rep. 1 Ex. 123, is under the English Bankruptcy Act. I have not the English Act, but from the reported cases on it it seems entirely different from

ours, and from the fact of there being provisions in it for a *superseadeas* of the commission, makes me think the authority is not applicable.

Yours, &c., SUBSCRIBER.

October, 1866.

[*Audi alteram partem.* The profession doubtless desire to see as much light thrown upon this Act as possible. We gladly therefore open our columns to a free discussion of its provisions. The latter question which our correspondent refers to is, he tells us, now before the County Court of his County for adjudication. We shall be glad to hear from him again when it is decided. As to the argument based upon the fact that proceedings are often carried on in another county than that in which the insolvent resides, see Editorial remarks on p. 146—EDS. L. J.]

Larceny — Drift timber — Felonious conversion by finder.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—Your answer to the following would much oblige and doubtless settle a very vexed question:—

We live on the lake shore; our deeds bound the front of our lots "to the water's edge, giving access to the beach to all vessels, boats, and persons." A raft of saw logs breaks up on the American side, and the logs are scattered all along the beach here. Some of the people hauled up a few on chance of the owner not looking after them—a pine log is a prize here, as we have no pineries near us. The owner, however, sold his claim to other parties, who demanded the logs without shewing any authority. One or two refused to give them up without seeing it. They were summoned before a magistrate, but the case was settled out of court by the parties holding the logs buying them. The magistrate informed the parties there, that no one had any right to take possession of anything, even on their own beach, or if they did, they were liable to be imprisoned for doing so.

Will you have the kindness, in your next issue, to inform us if such is the law.

SAW LOGS.

[See Editorial remarks, at page 145.—EDS. L. C. G.]

Bailiffs Fees.

TO THE EDITORS OF THE L. C. GAZETTE.

GENTLEMEN,—I noticed an article in your September Number, headed "Bailiffs' and their fees;" and also that in your closing remarks you invited those who chose to do so to give their views on the matter. You speak of the large number of suits heretofore in the Division Courts, and the great remuneration formerly received by the officers for their services. I beg to differ with you as regards this assertion, they received the same fees on each suit then as they do now, but there were more suits and consequently more to do; the officers made more money but they had to earn it; you will remember in 1857, when the business of Division Courts greatly exceeded anything before or since, an attempt was made to get the tariff altered, the fees then being regarded as insufficient for the services rendered. It is not the falling off of business in these courts that makes the officers ask for a revision of the tariff, but the desire for a just and fair remuneration for the services performed, in proportion to that received by other officers of like responsibility.

In this country Bailiffs have to give sureties for from $8,000 to $10,000 before they can hold the situation. I would ask any intelligent person if he would want his friends to become his surety for so large an amount unless a fair remuneration was to be received from the office?

To perform aright the duties of a bailiff, that officer should have a pretty fair knowledge of law, otherwise he might be ruined, even through what he might conceive to be a prompt discharge of duty.

I can assure you that unless some alteration is made in the tariff such men as now fill the situation (and the majority of these I believe do their work creditably), will not continue to hold the office, and the position will be occupied by an inferior class of men. True it is, persons may be obtained that will accept of the present tariff or any other that may be adopted, as we can find hungry and unscrupulous office-seekers always ready for a situation; but from my knowledge of the duties of a bailiff, it is not every person seeking the office, or even those who could give the necessary sureties, that should fill the situation. There are some services that certainly bailiffs should be remunerated for,—

First, you object to the fee of ten cents for each case called in open court, which was intended as a remuneration for court days. Certainly you will admit they should be paid for those services, and if so, how? unless by a fee on each suit; the manner proposed is in accordance with the practice of the Superior Courts, and I believe has the merit of being just to all concerned. If you take the average number of Division Court suits throughout the country for the last two years, you will find that it gives about ten cases to each court, this would allow the bailiff $1 for his day's services, which no reasonable person would object to.

Again, as regards the fee on executions returned *nulla bona;* in many cases plaintiffs order executions to be issued to find out the true position of the defendant, as they are aware that under the present tariff it costs them nothing, and the bailiff must do so at his own expense and trouble, before he can make his return; therefore, I think you will agree with me, that every officer should be paid for his services, and if so, it is not too much. And generally we ask for a revision of the tariff, as it is not in proportion to sheriffs', or other officers, of like responsibility and capacities.

If Division Court officers employ their spare hours to advantage, should that prevent them being paid for their services as officers of the court? and, if so, the tariff adopted at the meeting of bailiffs in June last would be quite reasonable, in proportion to all other tariffs of fees where there is any amount of responsibility.

I agree with your remarks regarding the necessary disbursements bailiffs are required to make, and for which they are allowed nothing by the tariff; which prove the necessity of some alteration, and at the same time how unexpectedly a bailiff may get into trouble. You will see in the proposed tariff when a fee is asked a service has been rendered for it.

Hoping to hear from others more capable of writing on such an important subject,

I am yours respectfully,

A Subscriber.

Galt, Oct., 1866.

"None so Deaf as those who Won't Hear."—In the Crown Court, at the Leeds Assizes, on Monday, a man applied to be excused from serving on the jury. The learned Judge (Mr. Justice Montague Smith) asked him: What is your reason?—Applicant: Well, I am rather deafish.—The Judge in a low voice: Oh, deaf. How old are you?—Applicant: Sixty-two.—The Judge in the same low voice: And you are very deaf?—Applicant: Well, I can't hear half that goes on.—The Judge: Why you hear better than I do. But if you are sixty-two that will do. You should apply to the overseer to have your name taken off the list.—Applicant: I did not know that.—The old man was then sworn, and he stated that he should be sixty-three next birthday.—The Judge: How do you know that you are sixty-two?—Applicant: Why, my lord—why—why, my lord, from being—from being born, my lord (laughter).—The Judge: Oh, you remember that, do you? (renewed laughter). His lordship then told the applicant he was excused.—*Law Times.*

Mistaken Identity.—A curious question of identity came last week before Mr. Cooke at the Worship-street police-office. Charlotte Amey, aged thirty-one, a seamstress, was charged with stealing Edward Corderoy, a boy of four years of age. Corderoy had been placed in charge of his aunt, a Mrs. Leader, a toy-maker, his mother being in service, and had been abducted by Mrs. Amey, as he was out walking with one of Mrs. Leader's workmen. After a good deal of trouble Mrs. Amey's residence was discovered, and there little Corderoy was found. The prisoner protested to the magistrate that the boy was hers, saying that she was separated from her husband, who had taken her child away from her, and that she had recognized him the moment she saw him. But the next day Samuel Amey, the prisoner's husband, appeared in court, leading in his hand a boy so exactly like Edward Corderoy that no person present could see any difference between the two children. He told the magistrate that his wife's story was true, that he had quarrelled with her, left her, and taken her child away with him. Mr. Cooke at once discharged Charlotte Amey, saying that the extraordinary likeness between the two children fully accounted for the mistake she had made.—*Law Times.*

APPOINTMENTS TO OFFICE.

CORONERS.

WILLIAM NOBLE RUTLEDGE, of Coldwater, Esquire, M.D., to be an Associate Coroner for the County of Simcoe. (Gazetted September 1, 1866.)

ADDISON WORTHINGTON, Esquire, M.D., to be an Associate Coroner for the United Counties of Huron and Bruce. (Gazetted September 1, 1866.)

ROBERT M. ROY, of Belleville, Esquire, M.D., to be an Associate Coroner for the County of Hastings. (Gazetted September 1, 1866.)

ALFRED LANDER, of Frankville, Esquire, M.D., to be an Associate Coroner for the United Counties of Leeds and Grenville. (Gazetted September 1, 1866.)

NOTARIES PUBLIC.

PETER CAMERON, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted September 1, 1866.)

WILLIAM PENN BROWN, of the Village of Kincardine, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted September 1, 1866.)

FREDERICK JASPER CHADWICK, of the Town of Guelph, Esquire, to be a Notary Public for Upper Canada. (Gazetted September 1, 1866.)

JAMES YOUNG, of Carrying Place, Esquire, to be a Notary Public for Upper Canada. (Gazetted Sept. 15, 1866.)