DIARY FOR APRIL.

1. Wed.. Local School Superintendent's term of office begins.
5. SUN.. *6th Sunday in Lent.*
6. Mon.. County Court and Surrog. Court Term begins.
7. Tues.. Local Trustees to return arrears of taxes due to County Treasurer.
10. Frid.. *Good Friday.*
11. Sat. .. County Court and Surrogate Court Term ends.
12. SUN.. *Easter Sunday.*
13. Mon.. *Easter Monday.*
19. SUN.. *1st Sunday after Easter.*
23. Thurs. *St. George.*
25. Sat. .. *St. Mark.*
26. SUN.. *2nd Sunday after Easter.*
29. Wed.. Appeals from Chancery Chambers.
30. Thurs. Last day for non-residents to give list of lands or app. from assessmt. Last day for Local Clerks to ret. occu. lands to Co. Treasurer.

The Local Courts'
AND
MUNICIPAL GAZETTE.

APRIL, 1868.

ACTS OF LAST SESSION.

It cannot be said to be too late to refer to the law legislation of the Session of the Legislative Assembly of Ontario which closed in the beginning of March last, when the public have not yet been placed in a position, by the publication of the statutes by the proper authorities, to judge of what was then done. The majority of those, however, who are required to obey the law are still unprovided by those who have made them, with the usual means of instructing themselves in what the law, by an amusing fiction, says we knew, marked, learned and inwardly digested on the fourth day of March last.

Every allowance, however, must be made under the circumstances; the printers, in fact nearly all those concerned in this department, are new "to the business," and the staff neither as numerous nor, as yet, from want of experience, as efficient as those who had to perform like duties under the former regime. The statutes are, we believe, now in the hands of the binder and may be expected shortly.

We have done what we could to supply our subscribers with copies of such of the acts as seemed of the most importance, but this is necessarily only a partial benefit. We trust that the issue of the first volume of the Statutes for the Province of Ontario, which we may now soon expect, will be a large one. Economy in matters of this kind is but short-sighted policy, whilst delay is a great evil.

The difficulties likely to arise from want of a prompt distribution of the Statutes, are increased by their having come into operation immediately upon receiving the assent of the Lieutenant-Governor. This remark is particularly applicable to such an act as that relating to executions against goods and lands in the Superior Courts, for, from what we have already seen, it seems highly probable that many execution creditors have not retained the priority to which they were entitled, merely because they did not know (and could not very well have ascertained in some cases) that an alteration had been made in the law by the act referred to.

A stranger to our laws might have supposed, judging from the mass of Bills introduced during the Session, that the laws of this country were in a most defective state, and that, but for the energy of the new Parliament, the population in general would have been in a bad way. But things are not so bad as that, nor is it every change in a law that is beneficial, and we were glad to notice that as a rule the members, with a few notable exceptions, did not fail to remember that there is now no check in hasty legislation in the shape of a second House.

In addition to the acts published in our last issue, we may notice the Registry act, which makes several changes rendered necessary by the great want of care displayed in the former act. It cannot be said that the present measure is now perfect, but perfection, or anything in the neighbourhood of it, is not to be expected in such a difficult branch of the law as that affecting and affected by the Registration of titles. One great source of difficulty might perhaps be remedied by degrees, by the appointment of thoroughly qualified professional men as Registrars, competent to judge of the many points of real property law that so frequently arise in the conduct of the business of a registry office, and to put a reasonable interpretation upon the act. A proper step has been taken in a different direction by preventing Registrars or their subordinates from acting as conveyancers; a wholesome provision, which we shall be glad to see extended to others outside registry offices, many of whom have been the means of unwittingly causing much expense and litigation to those who have employed them.

There is also—An act to amend the Municipal Institutions Act of 1866: an enactment which does not pretend to be anything more

than a temporary measure to remedy a few prominent defects in that act; full legislation on the subject is to abide the results of extended enquiries into the municipal system. Also an act to provide for the organization of the territorial district of Muskoka, and the appointment of a stipendiary magistrate (an office which has been filled by the appointment of Charles W. Lount, Esq., Barrister-at-law, and an act respecting the interpretation and construction of Statutes.

Of the bills which did *not* become law—and their name in the aggregate was legion—we may refer to the following:

A bill to amend the law of evidence, by allowing parties to suits to testify on their own behalf, is the most important. This proposed measure has been so freely discussed that it is not now intended to refer to it further than to express our opinion that, however proper such a law is in theory, and consonant as it is with our convictions as to what the law ought to be under other circumstances, and however well it may have worked in England, it is not a measure which, in the present state of things would be expedient here; though the time may come when the alteration of existing circumstances of the country, (which however we cannot at present discuss at sufficient length,) would change the balance in favor of the passing of such a measure as was proposed, and, after much careful consideration, rejected.

The following are also amongst the Bills that did not become law—A bill to abolish the Heir and Devisee Commission, and give the like powers to Judges in Chambers, which would facilitate business and save time to applicants—A bill to amend the Act respecting Division Courts, containing some valuable and well drawn clauses, reflecting much credit upon its introducer, Mr. Coyne, but which, as a whole, it was best not to pass—A bill to provide for the attachment of debts in Division Courts; a very useful provision, if the benefit is not swallowed up in expenses—A bill to amend the Act for the Protection of Sheep, which it seems impossible to get exactly as it ought to be—Any number of bills to amend the Municipal and Assessment Acts, which are referred to in another place—A bill to quiet the titles of persons holding lands formerly sold for taxes; about as objectionable a measure, at least so far as one could judge from the copies distributed, as could well be imagined, but which would not have been allowed to pass in its present shape, we venture to say, even if there had been time for the purpose, and irrespective of the question, whether it is desirable or not to preserve tax titles from destruction, owing to defects and irregularities in the sale or otherwise.

The legislation of this the first Parliament of Ontario will be regarded with much interest; and upon the whole, we think there is no just ground for complaint that the new Legislative Assembly, principally composed, as it is, of beginners in the science of law-making, has in the matters here alluded to fallen far short of the wisdom of its more experienced predecessors.

THE MUNICIPAL AMENDMENT ACT.

The most important measure of last session, so far as concerns the readers of this journal, was the Act to amend the Municipal Institutions Act of 1866.

As most of our readers are no doubt aware, a committee of the House was appointed to prepare and report upon amendments to the Municipal Act, and to this committee were referred the host of bills which were brought in by private members to remedy defects which had occurred to them, or been brought to their notice. It was in fact necessary that one set of men should agree upon some measure which might as far as possible remedy all obvious defects without that clashing of clauses, which would inevitably result from a number of disjointed provisions.

Although this was thought to be the best thing to do under the circumstances it was not contemplated that the bill that was brought in the committee should be the final result of their labours, but it is intended that mature reflection shall be bestowed and as much light as possible thrown upon the subject, so as hereafter to prepare a more complete measure. When or how this will be done remains to be seen.

We had intended giving a sketch of the alterations and additions introduced by this Act, but find, after commencing it, that it would take more of our space than we can give to it. The Act will, we believe, shortly be in the hands of all those who are interested.

The sections, that of the Acts of 1866, have been repealed, amended, and added to, are the following:—

Sub-section 1 of section 26; sub-section 3 of section 66; sections 73, 75, 76. 80, 81 and 88; sub-section 8 of section 100; sub-sections 1, 2, 4 and 6 of section 101; sections 124 and 165; sub-sections 7 and 8 of section 196; sub-section 7 of section 246; and sub-section 2 of section 282.

RIGHTS OF INNKEEPERS.

An interesting case with reference to the right of innkeepers to select apartments for guests, and to change them as occasion may require, was decided lately in the Court of Queen's Bench.

It appeared in the case referred to, that the plaintiff occupied two rooms in the hotel kept by the defendant. The plaintiff's family consisted of himself, his wife, two female servants, and three young children. He became indebted to defendant, and bills were rendered from time to time and payment demanded, and he was told he must leave unless he paid up. On the 18th of September the plaintiff owed $83.25, and he was told that he must quit. He said he was going, that he was anxious to leave if his wife's state of health would allow of it. The Provincial Fair or Exhibition being near at hand, the plaintiff was asked to let defendant have one of the rooms (occupied by plaintiff and his wife), as he wanted the use of it during the exhibition; and a clerk of defendant's swore that the plaintiff consented. On the 21st of September the plaintiff owed $109.15. He said he was going to leave, and asked for the bill, which was rendered by 2 P.M. that day. But on that morning defendant had gone into the room, no person being in it at the time, and put up some additional beds and removed the plaintiff's trunks and property out of it. The plaintiff was not in the hotel at the time, but was at his office in town, where defendant's clerk had gone to him and demanded payment, when plaintiff said he was going to leave. The bill was not paid until that evening. Plaintiff kept the other room, and continued to board at the hotel with his family till the 29th of September, but he slept elsewhere.

The action was brought for the alleged trespass on the part of the defendant in going into the plaintiff's room and putting up more beds in it and removing his property out of it. The jury found a verdict for the plaintiff and $100 damages.

On an application for a new trial the plaintiff contended, that having been let into possession of the rooms he acquired such an exclusive right of possession as against his landlord, so long as he continued to occupy it, that the latter was liable as a trespasser for entering and removing his trunks out of it.

The court in giving judgment did not agree in this view of the law, which it considered inconsistent with the well settled duties, liabilities, and rights of innkeepers, Chief Justice Draper, who gave judgment, saying:

"Whatever may be the traveller's rights to be received as a guest, and to be reasonably entertained and accommodated, the landlord has, in our opinion, the sole right to select the apartment for the guest, and, if he finds it expedient, to change the apartment and assign the guest another, without becoming a trespasser in making the change. If, having the necessary convenience, he refuses to afford reasonable accommodation, he is liable to an action, but not of trespass. There is no implied contract that a guest to whom a particular apartment has been assigned shall retain that particular apartment so long as he chooses to pay for it. We think the contention on the plaintiff's part involves a confusion between the character and position of an innkeeper and a lodging housekeeper.

"It appears to us further, that although the innkeeper is bound to receive, the guest must not only be ready and willing, and before he can insist as of right to be received, that he must offer to pay whatever is the reasonable charge; and that a guest who has been received loses the right to be entertained if he neglects or refuses to pay upon reasonable demand. The plaintiff's bill accrued due *de die in diem*, and had been in arrear though frequently demanded.

"On both points we think upon the evidence the plaintiff failed, and that there should be a new trial without costs."

SELECTION.

JUSTICES OF THE PEACE.

A case which came before the Court of Exchequer last week, affords a curious illustration of the working of the present jurisdiction of justices of the peace. The action was by a gentleman of property, the owner of a house at Aldborough, against two justices of the peace for the county of Suffolk, for false imprisonment. An information had been preferred against the plaintiff by certain inhabitants, for driving his carriage along a certain path. The case coming on to be heard last July, before the defendants, as magistrates for the county, they, acting upon the advice of

heir clerk, fined the plaintiff forty shillings and costs, in spite of an objection. Subsequently the plaintiff was arrested upon a warrant issued by the defendants to enforce the conviction, and conveyed to the police station, where he paid the amount under protest. The conviction was afterwards quashed by the Court of Queen's Bench, on the ground that as the path in question did not run by the side of a public carriage way, the magistrates had no jurisdiction in the case. (*Vide* 5 *&* 6 *Vict*, *c*, 50, *s*. 72). The plaintiff then brought the present action for the amount of his attorney's bill and costs, The defendants had expressed their regret at having voluntarily exceeded their jurisdiction, and tendered £73, which, however, the plaintiff declined to accept. The Lord Chief Baron, before whom the case was tried, directed the jury that the only question was as to the amount of damages, and the jury awarded £247. We are not concerned with the merits of the case, otherwise than as they bear upon the efficiency of ordinary justices of the peace. As regards the defendants, they appear to have acted *bonâ fide*, and without any bias beyond the desire to arrive at a correct decision in the case before them; but the best possible intentions are utterly futile if there be no power for them to set in motion; and, emphatically in the case of a judge, knowledge is power—knowledge of a special description, legal knowledge. How much knowledge of magistrate's law these two Suffolk justices possessed may be gathered from their evidence in this case, as given in the *Times*.

Captain —— stated that he was one of the convicting magistrates in the case. He had been guided in the matter solely by the advice of the clerk to the justices. He had not the slightest ill-feeling towards the plaintiff, and so on . . . He had been so short a time on the bench that he did not know whether it was customary to give notice before issuing a warrant of this kind. He had looked once or twice into a book upon the duty of justices of the peace. He always took the advice of the justice's clerk in matters of pure law.

Mr.—— the second defendant, and also one of the convicting magistrates, had been one of the justices of the county since last September twelvemonth. He had also acted in this matter under the advice of the justices' clerk. He had no ill-feeling towards the plaintiff. . . He had never looked through the Highway Acts, and had he done so he should not have understood them.

These gentlemen state, candidly enough, that their decisions are the decisions of the clerk to the justices, and so far their case is eminently a representative one; but is this advisable? If the clerk be the real judge so far as concerns matters of law, let him sit as a judge to direct the magistrates as to the law, and let his ruling be binding upon them, as that of a judge of the superior court upon a jury. In this case a decision upon the operation of the Highway Acts was nominally given by two gentlemen, one of whom "had looked once or twice into a book upon the duty of justices of the peace," the other, "had never looked through the Highway Acts, and had he done so should not have understood them." We repeat that we have no antagonism against either of these particular justices, or their clerk. Everything appears to have been done *bonâ fide*. It is the system under which these things are done with which we find fault. In the present case the effect of the wrongful decision has been redressed by an appeal to Westminster, but if the party convicted had been a labouring man, there probably would and could have been no appeal. A justice of the peace is a judge, though an humble one, and as such, we really think he should possess *some* knowledge of the law which he is sworn to administer.—*Solicitors' Journal*.

ONTARIO REPORTS.

ELECTION CASES.

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

REGINA EX REL. WM. ADAMSON v. JOHN BOYD.

Municipal election—Payment of taxes by voters and candidate—When election commences—Notice to voters of candidates disqualification—Surrender of tenancy.

B. and A. were partners occupying premises as co-tenants under a yearly tenancy on the terms of an expired lease. Before the nomination day for a municipal election they dissolved partnership, B. leaving the business and premises, of which A. remained in possession. A. shortly afterwards went into partnership with S., and the new firm then took a fresh lease of the premises from same landlord.

Held, 1. That B. was not at the time of the election the co-tenant of A., the tenancy having been surrendered by operation of law.

2. That the non-payment of taxes by a candidate before the election disqualifies him.

3. That municipal elections commence with the nomination day, and the disqualification of a candidate has reference to that day.

4. If a candidate claims to be elected by reason of the disqualification of his opponent he must so distinctly claim it at the nomination, and also notify the electors that they are throwing away their votes.

[Common Law Chambers, March, 1868.]

This was a writ of summons in the nature of a *quo warranto*, calling upon John Boyd to show by what authority he exercised and enjoyed the office of Alderman for the Ward of St. David, in the City of Toronto, and why he should not be removed therefrom, and William Adamson be declared duly elected and be admitted thereto, on grounds disclosed in the statement of said William Adamson, and the affidavits and papers filed in support of the same.

The statement and relation of William Adamson of the City of Toronto, wharfinger, complained that John Boyd, of the said city, merchant, had not been duly elected and had unjustly usurped and still usurped the office of Alderman in said City of Toronto, under the pretence of an election held on Monday, the 6th day of January, 1868, at Toronto, for the Ward of St. David, in said City of Toronto, and that he, the said Adamson, was duly elected thereto and ought to have been returned at such election as Alderman for said Ward, and declared that he, the said Adamson, had an interest in said election as

an elector and as a candidate for said office of Alderman, and stated the following causes why the election of the said John Boyd to said office should be declared invalid and void, and he, the said Adamson, be duly elected thereto.

1st. That said John Boyd was not possessed of the qualification required by law to enable him to be a candidate for or to be elected to the said office, inasmuch as he, the said John Boyd, had not, at the time of the election, in his own right, or the right of his wife, as proprietor or tenant, a legal or equitable freehold or leasehold, rated in his own name on the last revised assessment roll of the said City of Toronto, of the value required by law, the said John Boyd having parted with his interest in the leasehold property in which he is apparently assessed as a partner of the firm of "Boyd & Arthurs," long before the time of the said election, and not being rated for any other real property for a sufficient amount to qualify him as such Alderman.

2nd. That the said John Boyd was further disqualified in this, that he had not on the 23rd day of December last, being the day appointed for the nomination of candidates to fil said office of Alderman, paid all municipal taxes due by him in the Ward of St. Lawrence, in the City of Toronto, in compliance with the requirements of the statute in that behalf, and that there was on that day due from and unpaid by him the sum of $518 40 for municipal taxes on the real and personal property for which he was rated in the Ward of St. Lawrence, and that such taxes were not paid until the 4th day of January, 1868.

3rd. That said John Boyd had not a majority of legal votes at said election, inasmuch as the following persons who voted for said John Boyd were not qualified to vote, not having paid all municipal taxes due by them for the year 1867, in the City of Toronto, on or before the 16th day of December, 1867, as required by statute in that behalf (mentioning fifty-seven names); and that by the striking off from the poll at said election the names of said persons who illegally voted for said John Boyd, the relator had a majority of the legal votes on said poll.

4th. That the relator protested at the time of said election against the votes of the electors being received and recorded for said John Boyd, and publicly notified both the returning officers and the electors that the votes of the electors would be thrown away if recorded for said John Boyd, in consequence of said John Boyd not being legally qualified according to the provisions of the act of parliament in that behalf.

The relator made affidavit that he was a duly qualified municipal elector for the Ward of St. David, in said City of Toronto, and at the last municipal election, held on 6th January, 1868, was a candidate for the office of Alderman for said Ward of St. David, and that he believed the several grounds of complaint, as set forth in the above statement, were well founded.

It appeared from the last revised assessment roll for the Ward of St. David for 1867, that the residence of the defendant was assessed to him as tenant, and to John Smith as owner, for $8,000; and by the last revised assessment roll for the Ward of St. Lawrence, for 1867, the warehouses on Wellington Street were assessed to Boyd & Arthurs as tenants, and to Mr Todd as owner, for $14,5 i0; and Boyd & Arthurs were further assessed for the sum of $20.000 for personal property, making in all $34,560; upon which the taxes for 1867 amounted to $518 40.

The taxes in the Ward of St. David were admitted to have been paid in time, but the taxes in St. Lawrence Ward were not paid until the 4th January, 1868, after the day of nomination, but before the polling day.

The property in St. David's Ward was in itself a sufficient qualification.

The defendant and Arthurs were tenants of the warehouses in St. Lawrence Ward, under a lease from Mr. Todd, for three years, from the 1st day of May, 1863. After the expiration of this lease, on the 1st day of May, 1866, they held over as tenants from year to year, as the defendant alleges, and paid one year and one quarter's rent. During the three months between the 1st of May and the 1st of August, the partnership between them was dissolved, the defendant retiring, leaving Arthurs in possession of the business and of the warehouses in which it was carried on. On the 1st day of August last, a new lease of the warehouses was made by Todd to John Smith and G. A. Arthurs, who, after the dissolution of the firm of Boyd & Arthurs, had formed a new copartnership, and have ever since carried on business there

In the affidavit of Mr. Todd, attached to the new lease, he said that Mr. Boyd had not then, nor had he since the date of the said lease, any interest either legal or equitable in the said lands and premises, or any part thereof.

In answer to this, Mr. Boyd said that he was neither party nor privy to the lease in any manner to John Smith and George A. Arthurs, nor did he know of the execution thereof, till after the day of the election: that he never surrendered to Mr. Todd the old lease, nor the term thereby granted, nor the term he might in law have in the same and the premises therein mentioned, as co-tenant with the said G. A. Arthurs from year to year.

In a subsequent affidavit, Mr. Todd attached the old lease to it, and said that the said lease having expired on the 1st day of May, 1866, the said John Boyd and George A. Arthurs became and were his tenants from year to year of the said property: that they had not, nor had either of them, given any notice to quit, nor had he given them such notice, whereby the said tenancy would be determined, other than a lease of said property made by him to said George A. Arthurs and John Smith referred to in his former affidavit.

Mr. Boyd, in referring to this in his affidavit, said that it was true, and that after the expiration of the said lease, on the 1st of May, he Mr. Boyd and the said George A. Arthurs became and were tenants thereof to Mr. Todd from year to year, and that he has not given any notice to quit the premises in said lease, nor received any such notice from the said Todd. Now it is on a tenancy still subsisting, as the defendant alleges, he claims now to be qualified.

Boyd and the relator were the only two candidates, and the former obtained the majority of the votes polled.

Votes were polled on both sides by electors who had not paid their taxes, and the defendant filed affidavits to shew that there had been

some agreement between the candidates that the roll should be taken as it stood, to save any trouble on this head.

The following protest was handed by the relator to the returning officer, and was by him read to the electors present at the opening of the poll and before any vote was recorded for either candidate.

"Take notice that I protest against any votes being taken or recorded at this election for Mr. John Boyd, on the ground that he is not legally qualified according to the provisions of the Acts of Parliament in that behalf. He having no interest in the property assessed on Wellington Street in the names of John Boyd and George A. Arthurs, and the taxes on said property not having been paid.

And I hereby publicly notify the electors that they will be throwing away their votes if they are recorded for Mr. Boyd, and I request that you will inform the electors of this my protest.

"WM. ADAMSON.

"Toronto, 6th January, 1868."

"The above protest was read by me at commencement of election.

"JOHN BURNS,
"*Returning Officer 1st Division.*"

A similar protest was addressed, to and stated in the same terms to have been read by Robert H. Trotter, Returning Officer, 2nd Division.

Copies of this protest were also shown to have been affixed in and about the polling booths in conspicuous places, but no notice appeared to have been given at the time of nomination, nor did the relator at that time contend that the defendant was disqualified, and that he was the only qualified candidate.

Harman for the relator.

1. The defendant was not qualified. He could only attempt to qualify on the property in St. David's Ward, which was clearly insufficient, and he had not "*at the time of the election*" the necessary freehold or leasehold required by sec. 70 of 29 & 30 Vic. cap. 51, having parted with all interest in the property on Wellington Street, and the former tenancy having been surrendered by operation of law.

2. The defendant was disqualified by not having paid *all* taxes due by him, pursuant to 29 & 30 Vic. cap. 52, sec. 73. These taxes should have been paid *at the time of the election*: *Reg. ex rel. Rollo* v. *Beard*, 1 U. C. L. J. N.S. 126; 1 L. C. G. 72.

And the election commences with the day of nomination, as is clear from the expressions used in the Act. Sec. 101 of 29 & 30 Vic. cap. 51, defines "the proceedings *at* such elections" (not *prior* to the election) to be, First, a day for nomination of candidates; Second, a declaration at such nomination, if no more candidates than offices are proposed, that such candidates have been "duly elected," and, Third, an adjournment, not another meeting, if there are more, and a poll is required. The case may be argued thus.—In one ward a candidate is elected on the first or nomination day by acclamation; in another ward a candidate is elected on the second or adjourned day by vote, both must have paid their taxes at the time of election, that is to say, at the time not only that they were, but could have been elected, and to decide otherwise would be to give two interpretations to the law, one to meet the case of the candidate elected by acclamation on the nomination day, and another to meet the case of the candidate who having opposition has to wait and stand a poll at the adjourned meeting when the same can be opened.*

3. The defendant had not a majority of qualified voters, inasmuch as the number already specified had not paid their taxes before 16th December preceding the election.

4. It is doubtful whether the relator can under all the circumstances claim the seat; but he is entitled to the costs of these proceedings.—*Reg. ex rel. Tinning* v. *Edgar*, 4 Prac. R. 36; 3 U. C. L. J. N.S. 39; *Reg. ex rel. Dexter* v. *Gowan*, 1 Prac. R. 104; *Reg. ex rel. Rollo* v. *Beard*, 1 U. C. L. J. N.S. 126; *Reg. ex rel. Blakely* v. *Canavan*, 1 U. C. L. J. N.S. 188; *Reg. ex rel. Hartrey* v. *Dickey*, 1 U. C. L. J. N.S. 190; *Reg. ex rel. Carroll* v. *Beckwith*, 1 Prac. R. 278.

Duggan, Q. C., and *Harrison*, Q. C., shewed cause.

1. The defendant claims to be qualified on a tenancy still subsisting as between him and the landlord. The dissolution between Boyd & Arthurs, as affecting their business transactions, would not divest Boyd of his rights as Todd's tenant. Whatever surrender there may have been of Arthur's moiety, there was none of Boyd's. There is no act of his from which an inference of a surrender by him could be shewn, except his leaving the occupation of the premises, and that really proves nothing; and no act of his former partner could bind him.—Woodfall L. & T. 272, *et seq*; *Agard* v. *King*, Cro. Elis. 775; *Mackay* v. *Macreth*, 4 Dougl. 213; *Doe* v. *Ridout*, 5 Taunt. 519; *Mollett* v. *Brayne*, 2 Camp. 103; *Thomson* v. *Wilson*, 2 Starkie, 379; Shep. Touch 272; Arch. L. & T. 83; *Carpenter* v. *Hall*, 15 C.P. 90.

The roll is however conclusive as to property qualification (the language being even stronger in this respect with reference to candidates than voters, see secs. 70 and 75), and the Courts will as far as they can uphold the qualification in favor of the sitting member.—*Reg. ex rel. Blakely* v. *Canavan*, 1 U. C. L. J. N. S. 188; *Reg. ex rel. Chambers* v. *Allison*, *Ib.* 244; *Reg. ex rel. Ford* v. *Cottingham*, *Ib.* 214; *Reg. ex rel. Tilt* v. *Cheen*, 7 U. C. L. J. 99; *Reg. ex rel. Laughton* v. *Baby*, 2 U.C. Cham. R. 130.

2. There is no affirmative declaration that the candidate must have paid all his taxes before the election, only that non-payment disqualifies him from being a member, and he does not become a member of the Council until he takes the oath of office.

The defendant paid his taxes before the election, which commences not with the nomination but with the recording of the votes and the choice by the electors between two or more candidates.

It is sufficient in any case that he has paid his taxes in the ward in which he lived, otherwise it would follow that he must have paid his taxes in a different municipality, which the statute could not contemplate.

3. The names of the voters must be received as they appear on the lists, and there is no machinery to carry out the provision disqualifying voters who have not paid their taxes, and if

* See *The Queen* v. *Cowan*, 24 U. C. C. B. 606.—EDS. L. J.

a new election is ordered the same lists must be used.

The persons whose names appeared on the roll were accepted by both candidates as qualified voters so far as payment of taxes was concerned, and though an elector might not perhaps be bound by such an agreement, the candidate would: *Reg. ex rel. Charles* v. *Lewis*, 2 Cham. R. 171.

The roll is conclusive.—Sec. 101, ss. 5; *Dundas* v. *Niles*, 1 Cham. R. 198; *Reg. ex rel. Chambers* v. *Allison*, 1 U. C. L. J. N.S. 244.

More votes are however attacked by the defendant than by the relator on this ground, and a scrutiny must be had as to that.

4. The defendant should not be visited with costs if the election is simply set aside and a new election ordered, as the relator would then only succeed as to part. — *Reg. ex rel. Clark* v. *McMullen*, 9 U. C. Q. B. 467; *Essex Election Case*, 9 U. C. L. J. 247; *Reg. ex rel. Swan* v. *Rowat*, 13 U. C. Q. B. 340; *Reg. ex rel. Gordanier* v. *Perry*, 3 U. C. L. J. 90; *Queen* v. *Hiorns*, 7 Ad. & El., 960.

J. H. Cameron, Q. C., *Harman* with him, *contra*.

1. As to the question of the surrender, the same was completed in law, from the absolute abandonment of the premises by Boyd, and his removal to new premises with his new partner, any question of liability between Todd, the landlord, and himself as to a yearly or any other tenancy being absolutely concluded when Todd granted a new lease to Smith & Arthurs as the successors of Boyd & Arthurs. One test was, could Todd maintain an action for rent against Boyd after the granting such new lease, and could not Boyd set up such new lease as a conclusive answer and defence? Undoubtedly he could. *Nickels* v. *Atherstone*, 10 A. & E., N. S. 944, is a direct case on the point. Lord Denman, C. J., in this case says, "If the expression 'surrender by operation of law,' be properly 'applied to cases where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing and which would not be valid if his particular estate had continued,' it appears to us to be properly applied to the present. As far as the plaintiff the landlord is concerned, he has created an estate in the new tenant which he is estopped from disputing with him and which is inconsistent with the continuance of the defendant's (the former lessees) term. As far as the new tenant is concerned the same is true. As far as the defendant, the owner of the partnership estate in question, is concerned, he has been an active party in the transaction, not merely by consenting to the creation of the said relation between the landlord and the new tenant, but by giving up possession, and so enabling the new tenant to enter."

2. *Reg. ex rel. Rollo* v. *Beard*, *ante*, is conclusive that the candidate must be qualified as a member at the time of the election, which it is clear commences with the nomination.

3. As to costs, *Reg. ex rel. Tinning* v. *Edgar*, *ante*, is almost exactly parrallel with this case as entitling the relator to costs.

The other grounds taken in moving the writ were also enlarged on.

John Wilson, J.—Assuming that there was a tenancy from year to year, was it not surrendered before the election, and on the 1st of August last, by operation of law and the acts of the defendant, on his own showing.

Boyd & Arthurs dissolved their partnership, when does not appear, but certainly before the 1st day of August last. Arthurs is left with the business and business premises. Boyd retires, pays no further rent, retains no further possession, and is so much a stranger that he swears he was no party to the lease to Smith & Arthurs, or ever heard of it till after the election. Is he, after all that has taken place, co-tenant with Arthurs in these premises? Can he now go to Arthurs and claim possession as his joint tenant? If he cannot, he is not *bona fide* possessed as tenant. so as to qualify him as Alderman under this Municipal Act.

On the reasoning in the case of *Nickells* v. *Atherstone*, 10 Q. B. N.S. 944, is the defendant not precluded from saying he is still co-tenant with Arthurs? Have not all parties estopped themselves from setting up the yearly tenancy now contended for? Todd cannot be allowed to say this yearly tenancy between Boyd & Arthurs exists, for he has made a lease under seal to Smith & Arthurs. Arthurs cannot say it subsists, for he is a party with Smith to the new lease. By operation of law as to these parties the tenancy from year to year has merged. Can Mr. Boyd claim that it is still existing? Can he go to his late partner and say I am joint-tenant with you? I think not; for on his own showing he left his partner Arthurs, and formed a co-partnership with Mr. Munroe in another place, as wholesale grocers. He left his partner to do as he pleased with the business and the warehouses in which it was carried on, and without doubt knew at least that Arthurs was carrying on the same business which he had left, with his new partner Smith. Has Boyd any more right to assert an interest in the warehouses than he has in the goods, which before his retirement had been the goods of Boyd & Arthurs?—See *Matthews* v. *Sawell*, 8 Taunt. 270; *Thomas* v. *Cook*, 2 B. & Al. 119; *Walker* v. *Richardson*, 2 M. & W. 882.

I think therefore the defendant was not at the time of the election the co-tenant of Arthurs, and without this he had not the property qualification to be chosen Alderman.

As to the second ground, that the defendant had not paid all his taxes before the election, it is admitted the defendant paid his taxes after the nomination and before the polling day; and the question is, when is the election?

The relator contends that it is the day of nomination; the defendant says it is the polling day.

That the day of nomination is the day of election seems clear. The polling day is but an adjournment of the election. The words of the act seem to put it beyond a doubt, for it declares that the proceedings at elections shall be—a nomination on the last Monday but one in December, when, if only one candidate, or one candidate for each office, be nominated, after an hour, he shall be declared elected; but if more, and a poll be demanded, then the Returning Officer shall adjourn the proceedings until the first Monday in January; but, by sec. 73, a candidate is disqualified who has not paid all taxes due by him.

To hold that the day of polling is the day of election would enable a candidate to offer himself who was disqualified, and who, if the only one, might be declared elected, contrary to the letter and spirit of the Act.

I think therefore that the day appointed for the nominaton is the day of election, and the disqualification of a candidate has reference to that day, in analogy to the holding of the learned judge in *Reg. ex rel. Rollo* v. *Beard*, and I think to hold otherwise would be at variance with the spirit of the Act.

The relator, in the first instance, claimed to be entitled to his seat; but this is not seriously urged, for he gave no notice on the day of nomination that the defendant was not qualified, or that he claimed to be elected as the sole candidate by reason of the non-qualification of Boyd. In *Reg. ex rel. Forward* v. *Detlor* (ante p.), I lately held that a candidate who claims to be elected by reason of the disqualification of his opponent must distinctly so claim it at the nomination, and at the poll give notice that the electors are throwing away their votes; and he cannot be declared entitled to the seat if his conduct be equivocal, so as to mislead the electors. He cannot go to the polls, taking his chance of election, after deterring voters, and then fall back and claim his seat on grounds which by his going to the polls he has waived.

I therefore adjudge the election of John Boyd, as one of the Aldermen of St. David's Ward, in the City of Toronto, to be invalid; and I direct a writ to be issued according to the statute, to remove the said John Boyd from such office; and I further direct that a writ be issued for the purpose of a new election being held for the election of an Alderman for St. David's Ward, in the room of the said John Boyd.

I also direct that Mr. Boyd shall pay the costs of these proceedings, so far as they relate to the invalidity of his election for want of a property qualification.

Reg. ex rel. Bugg and Moulds v. Bell.

Contested Election—Election by acclamation—29 & 30 *Vic. cap.* 51, *sec.* 130.

Where a candidate is declared elected on the nomination day, as being the only candidate proposed, his election cannot be questioned on a *quo warranto* summons under above act, there being no other "candidate at the election or any elector who gave or tendered his vote thereat" who could by law be a relator.

[Common Law Chambers, March 14, 1868.]

This was a writ of summons in the nature of a *quo warranto* to set aside the election of the defendant, who was elected as one of the aldermen for St. Andrew's Ward, in the city of Toronto, at the municipal election on 23rd December, 1867.

The defendant was the only candidate proposed and seconded at the nomination; and was declared duly elected, pursuant to sec. 101, ss. 3, of the Municipal Act.

The statement of the relator complained of the usurpation of the office by defendant, and stated, in effect:—That the said Robert Bell was not duly elected, and usurped the office of Alderman of St. Andrew's Ward on pretence of an election held on Monday, 23rd December, 1867; that relators had an interest in said election, as electors of said ward and of other wards, the relator, John Bugg, being an elector who gave his vote at the last annual election for aldermen in said city; when the said Robert Bell was declared elected as such alderman, and the relator, W. Moulds, being a duly qualified elector, present at and who in so far as his vote could be tendered or taken, voted or tendered his vote at the nomination or election of said Robert Bell; and they shewed the following causes why the election should be declared invalid:

1. That the election was not conducted according to law, in this, that at the annual meeting for nomination, &c., held in Ward of St. Andrew, at noon (or thereabouts) on Monday, the 23rd December last, the Returning Officer having called upon the electors there present to nominate a fit and proper person, &c., the said Robert Bell was proposed and seconded; but that the Returning Officer, without waiting the time required by law to allow other nominations to be made, closed the said meeting of electors before the expiration of one hour from the opening, &c., and declared said Bell duly elected.

2. That said Bell, neither when he was so elected or when he accepted office, had the necessary property qualification as a freeholder or leaseholder.

3. That said Bell had not at the time of election and acceptance of office, in his own right or right of his wife, &c., a legal or equitable freehold or leasehold, rated in his own name on the last revised assessment roll, to the amount of at least $4,000 freehold or $8,000 leasehold, as required, &c.

4. That said Bell had mortgaged his interest in the property on which he qualified for the sum of $3,179, to the Canada Permanent Building Society, as appeared in the registry office, and that said mortgage was not discharged.

5. That said Bell qualified on property partly freehold and partly leasehold, rated as follows: leasehold $7,466, freehold $800, while the incumbrances amounted to $3,179.

J. H. Cameron, Q. C. (*Harman* with him) showed cause.

1. The election cannot be inquired into under the 130th section of the Municipal Act. The act requires that the relator should be a person who was either a candidate, or an elector who voted or tendered his vote at the election of the alderman complained against; and as the party here sought to be unseated had been elected by acclamation and without a contest, the relators could not be, and in fact were not, entitled to the writ, they being neither candidates nor electors who voted or tendered their votes. This point has, however, been already settled in favor of this contention by *Reg. ex rel. Smith* v. *Roach*, 18 U. C. Q. B. 226, and *In re Kelly* v. *Macarow*, 14 U. C. C. P. 457.

2. The statement that the poll was not kept open for the hour, required by the act, was based upon the affidavit of the relator Moulds, uncorroborated by other evidence. But this was met by positive affidavits by the Returning Officers, contradicting his assertion, who swore that the proceedings commenced at noon precisely, and were not closed until after one o'clock, and by other persons in corroboration.

3. The relators are not in any event qualified as such to be heard, not having paid the taxes due by them on the 16th day of December, as required by section 73, in support of which sun-

dry affidavits were filed by the collectors of the several wards in which they were in such default.

4. As to the property qualification of the defendant, affidavits were filed from the city clerk, and the Secretary of the Building Society, as to the property on which the defendant qualified and the mortgage thereon, shewing that the former was under and the latter overstated, and on which it was argued that the defendant was amply qualified; and further, that there was nothing in the act which required the property on which a civic qualification is based to be unincumbered, all that was required was that he should be assessed for and pay taxes for property worth $4,000 freehold or $8,000 leasehold.

Hodgins for the relators.

The words "elector who voted or tendered his vote at the election," should be interpreted as meaning at the annual election of aldermen within the municipality.

The interpretation contended for by the defendant would leave no redress in cases where a candidate is elected by acclamation; and that part of the statute which requires a property qualification might in such case be evaded.

HAGARTY, J.—This case seems to me to be governed by *In re Kelly* v. *Macarow*, and I shall decide it against the relators upon the authority of that case. If the electors do not think it worth while to contest an election in the ordinary way, it may properly be considered that the Legislature did not mean to give them a right to contest it by an application of this kind. As to the point raised, that the proceedings at the nomination were not kept open for a full hour, the objection is most loosely made and is amply contradicted.

Summons discharged with costs.

REG. EX REL. BOYES v. DETLOR.

29, 30 *Vic. cap.* 51, *sec.* 73—*Disqualification of candidate.*

Held, that a County Clerk is disqualified under sec. 73 of 29 & 30 Vic. ch. 51, from sitting as mayor of the same or any other municipality.

[Chambers, January 23, 1868.]

This was a *quo warranto* summons to set aside the election of the defendant, who claimed to have been duly elected mayor of the Town of Napanee.

The defendant was clerk of the municipality of the United Counties of Lennox and Addington at the time of his alleged election as mayor, and it was contended that being such clerk he could not legally take a seat as mayor of that or any other municipality, being disqualified under sec. 73 of 29 & 30 Vic. cap. 51.

C. W. Paterson shewed cause. The disqualification only applies where the same person attempts to fill both offices in the same municipality; and the former act (22 Vic. ch. 57, sec. 73), still in force in this particular by virtue of sec. 428 of 29 & 30 Vic. cap. 51, and the defendant would not have been disqualified under the former act.

Moss contra. The disqualification is general, and the statute is clear on the point, and differs from the former act, for here all the officers who are disqualified for election are particularised. The reason of the statute is obvious, for there might be disputes between the different municipalities which would render the holding of these offices by the same person incompatible. There was a mischief under the former act which this is intended to remedy.

JOHN WILSON, J.—The question is, whether by the 73rd section of 29 & 30 Vic. cap. 51, the defendant is disqualified as a member of the municipal corporation of Napanee. The words of that section, as regards this defendant, are, "no clerk of any municipality shall be qualified to be a member of the council of any municipal corporation."

The words of the old statute, Con. Stat. U. C. cap. 54, sec. 73, are, "no officer of any municipality shall be qualified to be a member of the council of the corporation." The defendant contends that he was not disqualified under the former act, and the new act is to be construed as the old one.

If this case had occurred under the old act I should have held this defendant disqualified, for the language seemed very clear, that no officer of any municipality shall be qualified to be a member of the council of the particular corporation.

But under the last act no clerk of any municipality shall be qualfied to be a member of the council of *any* municipal corporation. The evident intention of the legislature was, among other things, to exclude persons who might be placed in a false position, by reason of holding two offices; and no man should, if it can be avoided, be placed in a false position.

It requires no great foresight to see that a man, being a subordinate in the municipal corporation of a county, and the head of the corporation of a town or city in that county, would have conflicting duties to perform, and would represent conflicting interests if he held these offices. To allow the defendant to be mayor while he held the office of clerk of the municipality of the county, would be contrary to the express words of the statute, and at variance with its spirit.

The office is adjudged vacant, and there will be a new election with costs to the relator.

REG. EX REL. FORWARD v. DETLOR.

Municipal election—Notice to electors of disqualification of a candidate.

Held, 1. When voters perversely throw away their votes the minority candidate has a right to the seat.

2. When a candidate claims the right to be elected at the nomination owing to his opponent's disqualification, his going to the polls waives such right.

3. A candidate should, under such circumstances, beside claiming the seat at the nomination, also notify the electors at the polls that they are throwing away their votes by voting for the disqualified candidate.

[Chambers, January 25, 1868.]

This was a *quo warranto* summons similar to the last, but it was further contended by the relator, who had been an opposing candidate, that he was entitled to the seat instead of the defendant. The question of his disqualification was admitted to have been established by the decision in the case above reported; and the arguments of counsel were directed to the question whether the relator was entitled to the seat.

Holmested for the relator. The objection was clear on the face of the statute, and as there was therefore no other qualified candidate than the relator before the electors, it was unnecessary for

him to give any notice to electors at the polls,—electors could not then nominate another candidate.

There was collusion on the part of Boyes, the former relator, and the defendant, and therefore the judgment in his case was no bar to this application, and Boyes was not qualified as a relator in that case, having voted at the election for one Williams, who was not in fact a candidate and had not gone to the polls.

He cited *Reg. ex rel. Metcalfe* v. *Smart*, 10 U. C. Q. B. 89; *Reg. ex rel. Tinning* v. *Edgar*, 3 U. C. L. J., N. S., 39; *Reg. ex rel. Richmond* v. *Teggart*, 7 U. C. L. J. 128; *Reg. ex rel. Dexter* v. *Gowan*, 1 Prac. Rep. 104.

McKenzie, Q. C., *contra*.

J. WILSON, J.—I think Boyes was qualified as a relator under the statute.

If voters perversely throw away votes the minority candidate has a right to his seat, but the facts here do not shew that they did, as the electors might reasonably have thought that all the candidates were qualified. The relator should have gone further and told the electors at the polls that defendant was not qualified, and warned them not to vote for him.

The candidate with the largest number of votes should of course be elected, if possible, and, under all the circumstances, I do not think the relator should have the seat, for he waived his first protest by going to the polls. If a candidate claims to stand on his rights he must do so, and not waive them by afterwards going to the polls. He must elect his position and stand by it.

It was not suggested in the first case that there was another case pending on precisely the same grounds, or they would have been both disposed of at the same time, but the judgment in both will be the same.

As to costs, I do not think the first application was, so far as Detlor was concerned, collusive, and if not he should not be visited with costs of both applications. In this case each party must pay his own costs.

INSOLVENCY CASE.

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

BRAND v. BICKELL.

Insolvent Acts of 1864 *and* 1865—*Sale of goods—Interpleader.*

When a sale has been had under an execution against a judgment debtor, who after the sale makes an assignment in insolvency, the proceeds of the sale are not vested in the official assignee, but go to the judgment creditors. A Sheriff has a right to an interpleader in such a case, where proceeds claimed by the official assignee.

[Chambers, January 15, 1868.]

On the 30th December last, the Sheriff of the United Counties of Northumberland and Durham obtained from the Chief Justice of the Common Pleas an interpleader summons, calling upon the plaintiff (the execution creditor) and one Robert Elias Sculthorp, the claimant of the proceeds of the sale had under a writ of *fi. fa.* issued herein, to appear and show cause why they should not maintain or relinquish their respective claims.

The summons was returnable on 3rd January, when it was enlarged till the 8th January, on which day the Sheriff filed an additional affidavit showing that, since the service of the summons, the defendant (the execution debtor) had made a voluntary assignment to one E. A. McNaughton, an official assignee, at Cobourg under the Insolvent Act of 1864; and that he (the sheriff) had been served with a notice of claim by or on behalf of the official assignee, who also claimed the proceeds of the sale; upon which Mr. Justice Morrison, then presiding in Chambers, enlarged the summons for a week, at the same time ordering notice of the enlargement to be served on the official assignee, to enable him to appear and sustain or relinquish his claim, which was accordingly done.

On the 15th January, the summons again came up for argument before Mr. Justice Adam Wilson, when it was agreed between the parties that his Lordship should dispose of the claims summarily, and not order an issue. It appeared, from the affidavits filed by the Sheriff, in addition to the above facts, that the sale under the writ of *fi. fa.* herein had taken place on the day of December last; and that he realized thereon the sum of $230. That on the day of December, the day before the sale, a writ of *fi. fa.* (goods) against the same defendant, at the suit of the said Sculthorp, the claimant herein, had been placed in his hands; and that the said Sculthorp had, since the sale, served him with a notice that he claimed the proceeds of the said sale under his execution, on the ground that the judgment on which plaintiff's execution was issued had been released.

——— appeared for the claimant Sculthorp, and filed a verified copy of a release executed in 1865, by the plaintiff and others, releasing the defendant from all claims whatsoever that they or any of them had against him (the defendant), and contended that if the judgment was a good and valid release, the plaintiff was not entitled to issue execution upon it, or to take any steps whatever to enforce it, and that therefore the claimant was as against the plaintiff entitled to have the proceeds of the sale applied in his execution, which was not in any way impeached.

Then as to the claim of the official assignee, he referred to the Insolvent Act of 1864, sub-sec. 7 of sec. 2, and sub-sec. 22 of sec. 3, and to the sections 12 & 13 of the Act of 1865, amending the same; and contended that under sec. 12, as a sale of the goods had actually taken place under an execution, the proceeds thereof were not vested in the official assignee by virtue of the assignment, as it had been made subsequent thereto, and that therefore the official assignee was not entitled to the proceeds; and in support of this contention cited, in addition to the above mentioned acts, *Converse* v. *Michie*, 16 U.C. C.P. 167, and *White* v. *Treadwell*, 17 U. C. C. P. 487.

A. H. Meyers for execution creditor. The proceeds of the sale are claimed by the official assignee, under the Insolvent Act of 1864, and the Sheriff has no right to make this application. The act of 1865 respecting interpleading does not apply to such a case as this. The release had never been acted upon or considered as releasing the judgment by the plaintiff.

Donald Bethune, for the official assignee. The Sheriff is not properly in court, and the official assignee is entitled to receive the proceeds of the

sale; all the assets of the insolvent, of every kind and description, are vested in the assignee, and section 12 of the Act of 1865 does not exempt the money in dispute herein, even although the sale had taken place before the assignment; and at all events the claimant is not entitled to it, as it had not been made under his execution; and if the plaintiff is not entitled to it under his execution, it must go to the assignee.

ADAM WILSON, J.—I must overrule the objection taken that the Sheriff is not properly before me, or entitled to make this application. This is one of the cases to which the Act of 1865, amending the Interpleading Act, was intended to apply.

In the face of the release filed by the claimant, I cannot see what right the plaintiff has to claim the money at all. He has released his judgment, and there is therefore nothing due upon it. The claimant's execution was in the Sheriff's hands before the sale took place, and I think he is entitled to have the proceeds of the sale applied on it.

I also think that he is entitled to it as against the official assignee; for section 12 of the Act of 1865 says that "the operation of the 7th sub-section of section 2, and of the 22nd sub-section of section 3, of the Act of 1864, shall extend to all the assets of the insolvent of every kind and description, although they are actually under seizure, under any ordinary writ of attachment, or under any writ of execution, so long as they are *not actually sold* by the sheriff or sheriff's officer, under such writ." In this case the goods were *actually sold*, and therefore I think the official assignee is not entitled to the proceeds. I will therefore order that the plaintiff and the official assignee be barred from all claim thereto, that the sheriff do pay over the proceeds to the claimant Sculthorp, and that the plaintiff do pay to the sheriff, claimant and official assignee, their costs of this application.

Order accordingly.

CHANCERY.

(*Reported by* ALEX. GRANT, Esq., *Reporter to the Court.*)

PATTERSON v. THE ROYAL INSURANCE COMPANY.

Insurance—Provisional receipt.

A. applied to an agent of the Royal Insurance Company to effect an insurance, and paid the premium. The agent gave the usual receipt, following a form supplied by the Company, and which declared that a policy would be issued by the Company in sixty days if approved of by the Manager at Toronto: that otherwise the receipt would be cancelled and the amount of unearned premium refunded, and that the receipt would be void should camphene oil be used on the premises.

The agent did not report the transaction to the Company, and after the expiration of sixty days a fire occurred.

Held, 1. That this receipt contained a vaid contract for interim insurance.

Held, 2dly. That the Company, and not the insured, should sustain any damage occasioned by the agent's neglect, and that the Company was liable for the loss by the fire.

[14 Grant, 169.]

Examination and hearing at Cobourg.

Blake, Q. C., and *J. D. Armour* for the plaintiff.

Crooks, Q. C., for the defendants.

VANKOUGHNET, C.—The receipt issued in this case is headed "Agent's Provisional Receipt." It is in the form furnished in blank to the agents of the Company for use. It is filled up by the agent, and acknowledges the receipt of $40, "being the premium of insurance on property for twelve months, and for which a policy will be issued by the Royal Insurance Company within sixty days if approved by the manager in Toronto, otherwise, this receipt will be cancelled, and the amount of unearned premium refunded," and at the bottom appears: "N B. This receipt will be void should camphene oil be used on the premises." I take this receipt to contain a contract for an interim insurance—that is, till the transaction evidenced by it is rejected by the manager. The provision for the return of unearned premium shows that the insurance was to take effect at once, and the condition for making the receipt void in case camphene be used, must imply an immediate insurance continuing on the receipt till it is superseded by rejection, when it is to be cancelled; or, by a policy. The evidence of the manager shows that the agents were authorized to issue these receipts, and that the company had always treated them as creating insurances until they were disapproved by the manager. I should, I think, hold that by means of this receipt, and the payment of the money which it acknowledges, an insurance was effected binding on the company, and that it continued to be binding up to and at the time of the fire; no rejection of it having taken place in the mean time. The company, it is true had no opportunity to reject, because their agent had never informed the manager of the risk; but they, not the plaintiff must suffer by his neglect or fraud. The plaintiff was not bound to see that McLeod, the agent, did his duty to the company. He had a right to presume that this was done, and he heard nothing to the contrary. We know that very often policies do not issue, parties insured resting upon their receipt as evidence of the fact; and, though the plaintiff might have demanded a policy and required and enforced one after sixty days, yet I cannot hold that he lost or abandoned his insurance by neglect to do this. It is proved that the manager issued settled forms of policy, which, with the seal of the company, were transmitted to him from England in blank, to be filled up and issued by him. I think it must by intended as against the company that it was one of these policies they contracted to issue by the receipt, unless the insurance was rejected, or was altered and a special form of policy stipulated for. The plaintiff could not insist on any better terms than those usual forms of policy would have given him; and to one of those I think him entitled, unless his action in regard to the Western Insurance Company shuts him out from his claim on the Royal Insurance Company.

Looking at the fact that McLeod was agent for both companies—that the plaintiff did not contract with the Western Insurance Company, or authorize McLeod to do so for him; that McLeod concooted the papers in the plaintiff's name with that company, and prepared the affidavit which the plaintiff made to sustain it at a time anterior, so far as I can see, to any knowledge by the plaintiff of the attempt of McLeod to transfer the risk to the Western; that McLeod's act was a fraud, by which he hoped to get rid of the earlier fraud practised on the Royal by embezzling the money paid to him by

the plaintiff and concealing the transaction from the company; the necessity in his mind, therefore, for immediate action. I think I am not drawing an unreasonable conclusion, looking besides at the plaintiff's conduct afterwards; that he, the plaintiff, really did not understand when subscribing the affidavit prepared by McLeod, that he was making a claim on the Western or any claim other than upon his original insurance which had been effected with the Royal eight months previously, I think the evidence shows that on the morning of the 21st July, McLeod, hearing that the inspector of the Western Insurance Company was coming down, hurried out to the plaintiff with the receipt issued in the name of the Western Insurance Company, and instructed him that when the agent went out to the plaintiff he was to show him the latter receipt and say that his claim rested on it; the plaintiff seems then at once to have felt that there was something wrong, and without waiting to see the Inspector or attempting to impose upon him or aid McLeod in his fraud, comes on at once on the same day to his legal adviser, tells the whole truth, has it explained to the agents of both companies, for whom McLeod had been acting, and makes his claim upon the Royal, admitting that he has no claim upon the Western. I cannot, under these circumstances, I think, hold that the plaintiff abandoned his right to look to the Royal, or made an insurance in the Western in substitution or otherwise—but that what was done in his respect, was done by McLeod, and the plaintiff made an innocent instrument for him in the matter.

Decree for the plaintiff for amount of insurance and interest according to the terms of the policy, as if it had issued, and costs.

ENGLISH REPORTS.

CROWN CASES RESERVED.

REG. v. GEORGE BULLOCK.

Malicious injury to cattle—24 & 25 Vic. c. 97, sec. 40—Proof of wounding—Instrument.

It is not necessary in order to prove a wounding within 24 & 25 Vic. cap. 97, sec. 40. to show that injury done to the cattle has been caused by any instrument other than the hand of the prisoner.

[C. C. R., Jan, 25,—16 W. R, 405.]

Case reserved by the chairman of the Quarter Sessions for the County of Gloucester.

George Bullock was tried before me on an indictment which charged him with maliciously and feloniously wounding a gelding, the property of James Ricketts. The prisoner pleaded not guilty.

On the trial it was proved that the prisoner, who was sent by his master with a cart and horse to fetch stone from a distant field on the 20th of December last, at half-past one p.m., returned about four p.m., bringing back the horse with his tongue protruding seven or eight inches, and unable to draw it back into his mouth. The veterinary surgeon who examined the horse the following day proved that he found the roots and lower part of the tongue much lacerated, and the mouth torn and clogged with clotted blood; the injury he considered might have been done by a violent pull of the tongue on one side. He was obliged to amputate five inches of the tongue and the horse is likely to recover. The prisoner's statement was that the horse bit at him and he did it in a passion. There was no evidence to show that any instrument beyond the hands had been used. The prisoner's counsel contended that no instrument having been proved to be used in inflicting the injury, the prisoner could not be convicted under the 24 & 25 Vic. cap. 97, sec. 40. For the prosecution it was maintained that under the statute it was not necessary to show that the injury had been caused by any instrument other than the hand or hands of the prisoner. The prisoner's counsel, on the point being reserved, declined to address the jury, and a verdict of guilty was found by them.

I respited the judgment and liberated the prisoner on recognisance, in order that the opinions of the justices of either bench and the Barons of the Exchequer might be taken on the question—whether the prisoner was properly convicted of the wounding, there being no evidence to show that he used any instrument other than his hand or hands?

No counsel appeared for the prisoner.

Sawyer for the prosecution.—This was a wounding within the meaning of 24 & 25 Vic. cap. 97, sec. 40. COCKBURN, C. J.—This indictment was simply for wounding?] Yes. There was no count for maiming, as there is authority that such a count could not be sustained where there is no evidence of a permanent injury: *Reg.* v. *Jeans*, 1 C. & K. 539. That case was upon statute 7 & 8 Geo 4, cap. 30, sec. 16, which in terms is substantially the same as the present section; but it is no authority that such an injury as this is not wounding. There the point seems not to have been argued by the counsel for the prosecution, and the decision only goes to show this injury would not be a maiming: *Reg.* v. *Owens*, 1 M. C. C. 205; and *Reg.* v. *Hughes*, 2 C. & P. 420, are there cited by the counsel for the prisoner to show that an instrument is necessary to constitute a wounding; but the former case only shows that pouring acid into the ear of a mare by which her sight was destroyed is a maiming; and in the latter case, biting off the end of a person's nose was held not a wounding within 9 Geo. 4, cap. 31, sec. 12, where the words are "stab, cut or wound any person." In *Jenning's case*, 2 Lewin's C. C. 130, where the prisoner with his teeth bit off the prepuce of a child three years old, it was held not a wound within 1 Vic. cap. 85, sec. 4; but there also the words of the Act are "stab, cut, or wound," and very different from those of the section on which this indictment is framed.

COCKBURN, C. J.— You have satisfactorily accounted for the decisions referred to; but no difficulty exists in the present case as this statute makes it felony, unlawfully and maliciously to "kill, maim, or wound" any cattle, and we may interpret the word "wound" in its ordinary acceptation, which means any laceration which breaks the continuity of the internal skin. It may not manifest so much malice on the part of a man if, in his passion, he uses his fist only; but it is within the words of the statute, and it is probable that in altering the words of this statute the Legislature may have intended to get rid of the difficulty.

The rest of the Court concurred.

Conviction affirmed.

CORRESPONDENCE.

Insolvent Acts—Assignees.

BELLEVILLE, 31st March 1868.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—"A communication under the caption, *Assignees in Bankruptcy matters—The operation of the Act*, appears in the *Local Courts and Municipal Gazette* of March, 1868; wherein the "Scarboro" correspondent asserts that, "The working of the Act since 1864 clearly proves it to be a bungled, defective affair," and he proposes, "to point out a few of its defects and in addition to refer to the conduct of *official assignees*."

"Scarboro" points out what he thinks are defects in the Act, and refers to the conduct of official assignees, but omits (except by his own assertion, that the working of the Act clearly proves it to be a bungled affair) to give instances where there has ever been any failure in the working of the Act. Many insolvents have been refused, and many more have obtained discharges; and it must be assumed, that these insolvents, who have been refused discharges ought not to have obtained them; and, if they deemed the judges decision erroneous, the Superior Court, on appeal, might have rectified the error or confirmed the decision; and any one creditor has the right of appeal against the decision granting the discharge. Therefore, it follows, that, if any insolvent has been wrongfully refused or has improperly obtained a discharge—it is not the fault of the Act, but of the insolvent or his creditors as the case may be. It is denied that because the assignee is corrupt, and deceives the creditors—that the Act is a bungle, or defective. The official assignee is bound to give security "*for the due performance of his duties*," and the creditors assignee is bound to "give such security and in such manner as shall be ordered, by a resolution of the creditors; and shall conform himself to such directions, in respect thereof and in respect of any change or modification thereof or addition thereto, as are subsequently conveyed to him by similar resolutions"—which bond is to be taken in favor of the creditors and deposited in the proper Court. The assignee is likewise under the summary jurisdiction of the Court and the performance of his duties may "be enforced by the judge on petition in vacation or by the Court on a rule in term under penalty of imprisonment, as for contempt of Court whether the duties are imposed on him by deed of assignment, by instructions of creditors communicated to him or by the terms of the Act."

His duties are well defined and performance can be enforced which proves there is no bungle or defect in the Act in that respect. If "Scarboro" knows that "the working of the Act since 1864 *clearly* proves it to be a bungled, defective affair," because the insolvent "selected the official assignee *to get him through for a certain fee generally* $50," he impliedly admits that his creditors allowed a public officer to deceive and injure them whilst the Act affords a most severe and certain remedy. If creditors neglect to secure professional assistance and permit assignees to deceive them, "Scarboro" ought to blame the bungling, careless creditors, not the Act.

No doubt many men have obtained discharges who have not made a full disclosure of their estate, some owing to perjury—others through the neglect of the creditors. But this does not prove the Act a bungled or defective affair. "Scarboro" reminds me of Lord Palmerston's reply to the Scotch Clerical petition to the Government to set apart a day of prayer to our Lord, to remove pestilence, which was that the pestilence was caused by filth and to remove the cause instead of praying, and the pestilence would abate, so I say, if creditors will employ good counsel and remove the corrupt assignees, "Scarboro" will fail to see the bungled, defective Act.

For instance, if an assignee gives a certificate that the insolvent "has complied with all the provisoes of the Act, has attended all meetings, has filed a statement of his affairs on oath, fairly showing how he has disposed of his property," &c., and it can be proved that the certificate is untrue, there can be no difficulty in applying a remedy. If it cannot be shown or is neglected, it is presumed true, and creditors have no cause of complaint; at all events it is not the fault of the Act. It is admitted that legislation is not always perfect but it is denied that it is always imperfect. In ninety-nine cases out of one hundred, Statutes are declared defective by persons too lazy to study them or too ignorant to understand or properly construe them, or too negligent to take advantage of their provisions.

It is a remarkable suggestion, "that if a man has once gone through the insolvent court," he should not again go through without paying 10*s.* on the pound." That is, if a

man, whether trader or non-trader, is twice unfortunate, and on the first failure obtains a discharge—he must on the second pay 10*s.* in the pound although he discloses and assigns all he has for the benefit of his creditors. The tendency of legislation of late both in England and Canada seems to point more towards mercy to insolvents than otherwise. With that view the Statutes have been construed in both countries with more consideration for the honest insolvent than the grasping creditor. As to notice of discharge although not required to be personal, it is given after the creditors have received personal notice of the examination before the assignee, and if the creditors attend the meeting they can judge for themselves whether there is any fraudulent retentention or concealment of the insolvent's estate, or whether there is any evasion, prevarication, &c., or whether he has not subsequent to the act kept an account book showing his receipts and disbursements, and they can then, or soon afterwards, decide whether they will oppose his discharge or not; and if they do so decide, it cannot be believed that publicity of application for discharge in the Gazette and local paper could escape them unless by neglect. As to an assignee acting as agent, it is apprehended there is ample remedy already for such misconduct; and if such conduct is difficult of proof now, it would not be less so if it should be distinctly stated that such assignee should act as the agent of the insolvent under a penalty.

If the assignee refuses to perform, or improperly performs his duties, or if his appointment is not contemplated by the act, he may be removed: *Small ex parte, in re Day*, 7 L. T. N. S. 376, or if he refuses to perform his duties or misconducts himself in that behalf, he may be punished, or creditors may resort to his bond: sec. 6 & 16, Act 1854; *Singlehurst ex parte, in re Tristam*, 3 DeG. & J. 451: *Maddegan, in re Stiff*, 10 L. T. N. S. 914. Under the same sections and ample authorities, there is now power not only to impose on or withhold costs from assignees, creditors or insolvents, or to impose terms for contempts or delays. If "Scarboro" will consult the tariff of fees promulgated by the Superior Courts of Common Law, it will enlighten him at least in that respect.

The insolvent must wait, if he makes a voluntary assignment, twelve months, before he can apply for a discharge, and after two examinations and such ample time, if a creditor possesses ordinary firmness, he ought to decide in that time whether he will appeal or not.

"Notice of application for an allowance of appeal, must be served in eight days from the day judgment appealed from is pronounced, *but the application itself may be made after the eight days*:" *Re Owens*, 3 U. C. L. J. N.S. 22. And even if the notice is irregular it may be amended. *Ib.*

It seems absurd to expect an insolvent to pay a certain rate in the pound, except under the sections for composition and discharge, if he assigns his estate. The tending of modern legislation is that the insolvent and his estate shall not be more embarrassed and diminished by costs, and that his creditors shall take his whole estate. If they obtain this they ought to be satisfied to allow the unfortunate to try his luck again and benefit by experience which may ultimately be an advantage to himself, to his creditors and to the public generally. The rules under which the Judge exercises his direction of granting the discharge absolutely, conditionally, or suspensively, or refuses it absolutely, are laid down by Westbury (Lord Chancellor) in *Re Mew* v. *Thorne*, 31 L. J. N. S. (Bankruptcy) 87, to which "Scarboro" is referred, which if he reads carefully, the writer ventures an opinion, he will arrive at the conclusion that the Act of 1864 is neither a bungle nor so defective as he imagines.

Again "Scarboro" thinks it should be enacted distinctly, that the insolvent "shall be discharged only from the debts or liabilities mentioned in his Schedule of debts." Upon this point "Scarboro" puts the question to you in the 3 U. C. L. J. N.S. 193, and you drily ask him "to look it up." He is now referred to *Philips* v. *Pickford*, 14 Jurist, 272, where it was decided that a final order granted under the English Acts, similar to our then bankrupt and Insolvent Acts, could be set up as a defence to any debt not included in the Schedule. See also *Stephen* v. *Green*, 11 U. C. Q. B. 457; *Greenwood* v. *Farrie*, 17 U. C. Q. B. 490; *Romillio* v. *Holahan*, 8 Jurist, N. S. 11; *Franklin* v. *Busby*, Ell. & Ell. 425; *Booth* v. *Caldman*, 1 Ell. & Ell. 414. None of the Acts under which these decisions were had, contained any such special provision as stated; yet the courts have always held that no creditor is bound whose name and debt is not mentioned in the Schedule.

QUINTE.

Preferential Assignments.

To the Editors of the Canada Law Journal.

Toronto, April 16, 1868.

At page 301, Con. Stat. U. C. 22 Vic. cap. 26, sec. 18, we find these words: "In case any person, being at the time (1st) in *insolvent circumstances* (2nd), or unable to pay *his debts in full* (3rd), or, knowing himself to be on the *eve of insolvency*, makes or causes to be made any gift, conveyance, assignment or transfer of any of his goods, &c. (1st), with intent to defeat or delay the creditors of such person (2nd), or with the intent of *giving one or more* of the creditors of such person a preference over his other creditors (3rd), or over any *one or more of such creditors*, every such gift, conveyance, &c., shall be null and void," &c.

I have above (putting in figures, to denote the material points of law contained in the section) given the substance of section 18, relating to preferential assignments, passed in 1859.

An interpleader case, that was decided recently in the Division Court at Richmond Hill, in which case the law contained in the section was construed by John Duggan, Esq., Q. C., deputy judge, in a certain way new to me, has induced me to trouble you with a few remarks on this branch of the law. The decision itself was, considering the facts of the case, not only a surprise to me so far as the law is concerned, but one which could not but have a damaging effect upon the rights of all creditors, and in effect nullifies the act itself.

We all know—at least those who were in full law practice prior to 1858—how very common it was for dishonest debtors, prior to that year, to give chattel mortgages of all their goods to one creditor, generally a relative, and that the country was flooded with one-sided assignments and covert and secret transfers of goods, whereby one creditor or a few creditors were preferred to the creditors in general. This act of 1859 was passed to stop the mischief, and was so framed and worded that one would have thought that rogues in the shape of debtors had a network thrown around their acts which would catch almost any case of attempted fraud. The act was passed to put down all dishonest dealings and improper preferences; in fact (and so lawyers have heretofore understood it), that a man who was in embarrassed, failing, or even *quasi* insolvent circumstances, had no right, in his troubles, to make over all his chattels to one creditor, leaving the rest nothing to lay hold on. Now this decision at Richmond Hill, of the learned Q. C., acting for Judge Boyd, is in the very teeth of this view of the law. In fact, so fully did the public and lawyers take my view of the law, that it is well known that since 1858 not one chattel mortgage or assignment has been filed and made, where five used to be made prior to that period, under similar causes for them.

The facts of this case at Richmond Hill are briefly these: A., a debtor, owed many debts, and B., C., D. and E., at Richmond Hill, had obtained judgments in the Division Court against him there, on which executions had been issued and returned *nulla bona* repeatedly; and he had in consequence of this been ordered to pay small sums, such as one dollar and half-a-dollar a month, on the judgments, as an insolvent. A. owed also other things elsewhere, and judgments too. He owed $1,100 for rent unpaid; and he owed a sister of his, for borrowed money, borrowed for many years back, nearly $1,500. He had given formerly (in 1863, I think) a chattel mortgage to his landlord to pay his rent, part of the $1,100 above referred to. This chattel mortgage had been neglected, and allowed to run out. One of his creditors (B.), seeing this, took out an execution, and was about to levy on his goods, when he made another chattel mortgage, in January, 1868, to his sister, conveying all his goods to her, and setting at defiance his said creditors. B., notwithstanding this transfer, levied on his goods, and hence the interpleader case, which arose on a claim made by his sister to his goods, under the last chattel mortgage.

Now, there is not a shadow of a doubt but that A. intended, by this transfer, to prefer his sister to all other creditors; to cut off all others, to give her all his goods, preferring one creditor to another. There is no doubt but that his sister knew this, nor that he was in embarrassed circumstances, unable to pay his debts in full—in fact, that he was an insolvent. The goods he conveyed were not worth over $1,000, at a high estimate, which would not pay the chattel mortgage he gave his sister. He owed these creditors, B., C., D. & E., besides, and his landlord over $1,000. He had some valueless interests in lands heavily mortgaged. And if it were possible to find a debtor or a case coming within the meaning of

section 18 of the act of 1859, this debtor A. and this case came within such meaning. Yet it was held at the court by the learned deputy judge, that the chattel mortgage of 1868 must prevail, and the creditors be sent to the wall, the sister of A. taking all the goods!

The decision was alleged to be made on the ground that A. swore he did not *mean* to defraud—that he had some interests in mortgaged lands. If we look at the strict, searching clauses of the section, as marked with figures by me, we will see that it matters not what the debtor may swear as to his intents, when those intents are contrary to the patent facts of the case. We are to judge of a man's intents by his acts. If A. conveys all his chattel property to his sister F., leaving all his other creditors with nothing—prefers her by a chattel mortgage, what is the true inference? He has preferred one creditor to another, and put it out of his power to pay any other. He has shown himself unable to pay his debts in full by paying only one, and leaving unpaid many others. Who cares what he may swear about his intents? The law points out the fact of what he has done, and what exists; and that is, that he has divested himself of all his property to pay one, to prefer one over all. If the act did not intend to prevent such a thing, what is its meaning?—what is it worth? A man may have uncertain interests in mortgages of lands, or may even, if the lands are sold well, be able to pay all he owes; but that fact would not make such a sale as I refer to good under the act of 1859.

We yet have to see what it means when it says a debtor shall not prefer one creditor to another, by transferring all his goods. Creditors having judgments and executions are not to be defrauded by chattel mortgages set up by one, and told to go and look to some uncertain interest in mortgaged land. One creditor has no right to step in and take all the available goods of a debtor by a chattel mortgage, and stop other equally deserving creditors from getting anything.

The act of 1859 was not intended to interfere with chattel mortgages, or sales made by persons who had goods amply sufficient to pay all their creditors if sold. A chattel mortgage made by any perfectly solvent person, one who at any time could show chattel property enough to enable a sheriff to make the amount of all executions placed in his hands, is no doubt good in law; but if such a person simply had lands, and were to transfer all his goods to one person, having at the same time judgments against himself on which executions could or were about to issue, then it might be very fairly asked whether that debtor had not preferred—had not given one creditor an illegal preference over his other creditors.

It is quite evident that the act of 1859 was passed for the benefit of creditors, upon a generous view of the law, and no crimping construction should be given to it.

If, as in this case, a debter owes a relative $1,500, which sum more than covers all his chattel property, and on the eve of the levying of several executions gives a sweeping chattel mortgage of all to this one relative or creditor, could any lawyer say that he did not bring himself within the meaning of some part of section 18?

It may be said, he swears his intention was not to do so; but that is simply nonsense, as the act is self-evident. Would he have done so if he had not owed many others—had not been about to be sold out, being on the eve of insolvency? Does he not patently give a preference to one creditor, and set at defiance all others? These are the pertinent questions. It is greatly to be lamented that courts and judges will not construe acts of Parliament in the spirit in which the Legislature passed them. Further, no case can be found, or was quoted or produced, under the evidence in this interpleader case, to warrant the decision.

C. M. D.

APPOINTMENTS TO OFFICE.

DEPUTY JUDGES.

CHARLES ANDERSON SADLEIR of Osgoode Hall, and of the City of Hamilton, in the Province of Ontario, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court, in the County of Wentworth, in the said Province. (Gazetted, March, 14, 1868.)

CHRISTOPHER CHARLES ABBOTT, of the City of London, in the County of Middlesex, in the Province of Ontario, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of and for the County of Middlesex, in the said Province. (Gazetted, March, 21, 1868.)

GEORGE LEVACK MOWAT, of Osgoode Hall, and of the City of Kingston, in the County of Frontenac, in the Province of Ontario, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of and for the County of Frontenac. (Gazetted, March, 28, 1868.)