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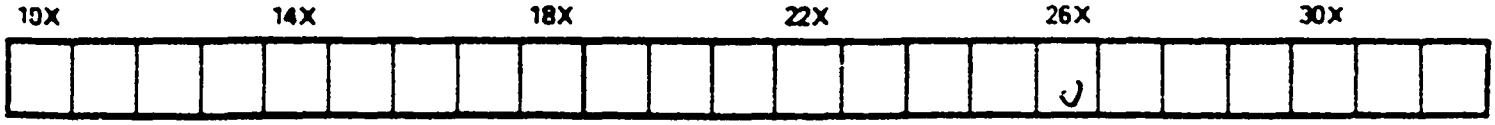

DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS, *liability of.*—By the 14th section of the Extension Act, it is enacted, that no action shall be brought against any person acting by order or in aid of a bailiff, for anything done in obedience to any warrant under the hand of the Clerk and the seal of the Court, unless a demand of the copy of the warrant has been made, &c.; and in case of compliance before action brought, a verdict must go for defendant, unless the Clerk who signed the warrant has been joined in the action; and if a verdict shall be given against a Clerk, then the plaintiff shall recover his costs, to be taxed "so as "to include the costs, such plaintiff is liable to pay "to the defendant for whom such verdict shall be "found as aforesaid, and in any action to be brought "as aforesaid, the defendant may plead the general "issue, and give the special matter in evidence at "any trial to be had thereupon."

This, at first blush, seems a severe enactment, but will not operate hardly if Clerks are careful in making proper entries in the Procedure Book in the prescribed form, as well as drawing up warrants issued according to the guides given in the Schedule to the Rules, and duly sealing them—for the liability of Clerks can only extend to acts done by them which are not commanded or authorized by the Judge. Thus, if an order is made by a Judge which he had no jurisdiction to make, and the Clerk draws up and issues a warrant in accordance with the order, he will not be responsible. But if the order or judgment given by the Judge is properly within his jurisdiction, and the Clerk draws and enters it irregularly, and issues a warrant thereupon, he will be liable. "It would be absurd to throw upon the Clerk the duty of reviewing the decisions of the Judge, his superior officer. The Clerk is a mere ministerial officer to carry into effect the order of the Judge, and cannot be liable in trespass for the mere performance of his duty, cast upon him by the express language of the Act of Parliament."

SUITORS.

Evidence—Sale of Goods.

Delivery to Wife (continued.)—After a man has separated from a woman with whom he has cohabited, and who is not his wife, he may discharge himself from liability, even for necessaries subsequently supplied, by proving that they were not lawfully married.

Where a husband wrongfully turns away his wife there is an implied credit for necessaries, which, as a wrong-doer, he is not permitted to repel. In such a case he cannot by a general advertisement in the newspaper, or even by a particular notice to individuals not to trust her, exempt himself from a demand for necessaries suitable to his station and circumstances, furnished to her whilst so living apart from him, even by a person who had been desired by him not to trust her.

If a husband personally ill-treat his wife, and be guilty of cruelty towards her, so that, from reasonable apprehension of further personal violence, she is obliged to quit his roof, he is responsible for necessaries to the same extent as if he had expelled her therefrom, and under such circumstances, a request by him, that she would return, will not determine his liability for necessaries supplied to her during their separation. Where a wife is guilty of adultery, and either elopes from her husband or is expelled from his roof on that account, or even when, being compelled by his cruelty to leave him, she is afterwards guilty of this offence, and he refuses to receive her, he is not liable even for the bare necessaries of life supplied to her after her adultery and during their separation, although he do not generally or specially notify persons not to trust her.

Goods sold to wife before marriage.—The husband is liable jointly with his wife, during the marriage, upon all contracts made by her while she was single, how improvident soever they may be, and although he may have received no fortune with her. The husband, however, cannot be sued *alone* on such contracts, but *the wife must be joined* in the action with him.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(*Continued from page* 143.)

When the Oath and Affirmation should be administered.—The proper time to swear the witness is before he gives any testimony, and not to take down his examination, read it over to him, and *then* swear him to the contents. A witness ought whilst giving testimony, to be under the solemn obligation of an oath to speak the truth. Magistrates should understand that the oath is to be administered to the witness *before* he is examined and not afterwards.[1] Speaking of the objectionable practice of taking down the examinations of a witness before he is sworn, Stone, in his work on the Practice of Petty Sessions, observes: "A witness may inadvertently or perhaps wilfully state some particulars erroneously in the first instance, which when after-

[1] Per Abbott, C.J. Reg. v. Keddy, 6 D. & R. 734.

wards put to the test of an oath, a sense of shame may prevent him from retracting; and it is obvious that a witness may answer every question correctly which may have been put to him, and very properly swear to the truth of the statement so taken down, as far as it goes,—and yet such evidence may not contain the whole truth; and the most important part of the witnesses' testimony may thus remain unknown—the witness himself being either unconscious of its importance to the case under enquiry, or being determined to assist as little as possible in the elucidation of the case. For these and similar reasons, the Judges have of late often reprobated the system of taking examinations of witnesses before they are sworn."

"It is also material," says the same writer, "that the witnesses should be sworn and examined in the presence of the prisoner or the defendant, if he appear to the summons, that he may confront them, and prepare himself to cross-examine them; and should a witness be examined in the absence of the defendant and the defendant afterwards appear, it will not be sufficient to read over the deposition in the defendant's presence but the witness must also be re-sworn.[2]

Witness refusing to be sworn.—Should any witness, summoned to give evidence, unlawfully refuse, or having been sworn, improperly refuse, &c., to take the oath, or having been sworn, improperly refuse to answer such questions as may be put to him touching the case, the Magistrates are armed with ample powers to coerce him to do so, or to punish for refusal;—the 6th sec. of the Statute 16 Vic., cap. 178, thus enacting:—

"And if on the appearance of any such person so summoned before the said last mentioned Justice or Justices either in obedience to such summons or upon being brought before him or them by virtue of the said warrant, such person shall refuse to be examined upon oath or affirmation concerning the premises, or shall refuse to take such oath or affirmation, or having taken such oath or affirmation, shall refuse to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal—any Justice of the Peace then present and having jurisdiction may, by warrant under his hand and seal, commit the person so refusing to the common gaol for the Territorial Division where such person shall then be, there to remain and be imprisoned for any time not exceeding ten days, unless he shall in the meantime consent to be examined and to answer concerning the premises."

It will be well to try what effect the reading of the above will have on refractory witnesses, before a Magistrate proceeds to make out the order of commitment. It will in general produce the desired effect; should he still persevere in refusing to be sworn or examined, the Magistrate will have no alternative but to commit him, for he cannot allow the administration of Justice to be trifled with. The following form is given in the Act, Schedule G. 4:—

[2] And see Reg. v. Vipont, 2 Bur. 1163; Reg. v. Crowther, 1 T. R. 175.

PROVINCE OF CANADA, (*County* or *United Counties, as the may be*) of ——— } To all or every of the Constables, or other Peace officers in the said (*County* or *United Counties, as the case may be*) of ———, and to the keeper of the Common Gaol of the said (*County* or *United Counties, as the case may be*) at ———

Whereas information was laid (*or* complaint was made) before (*me*) ——— (one) of Her Majesty's Justices of the Peace in and for the said (*County* or *United Counties, or as the case may be*) of ———, for that (*&c., as in the summons*), and one E. F., now appearing before me, such Justice as aforesaid, on ———, at ———, and being required by me to make oath or affirmation as a witness in that behalf, hath now refused to do so, (*or*) being now here duly sworn as a witness in the matter of the said information (*or* complaint) doth refuse to answer a certain question concerning the premises which is now here put to him, and more particularly the following question, (*here insert the exact words of the question*) without offering any just excuse for such his refusal: These are therefore to command you, or any of the said Constables or Peace officers to take the said E. F., and him safely to convey to the Common Gaol at ——— aforesaid, and there deliver him to the said keeper thereof, together with this precept; and I do hereby command you the said keeper of the said Common Gaol to receive the said E. F. into your custody in the said Common Gaol, and there imprison him, for such his contempt, for the space of ——— days, unless he shall in the meantime consent to be examined and to answer concerning the premises, and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this ——— day of ———, in the year of our Lord ———, at ——— in the (*County*, or *as the case may be*) aforesaid.

J. S. [L.S.]

MANUAL, ON THE OFFICE AND DUTIES OF BAILIFFS IN THE DIVISION COURTS.

(*For the Law Journal.*—BY V.)

CONTINUED FROM PAGE 143.

Duties in Court (continued.)—Should there be a Jury, the Bailiff calls the names as given him from the Clerk's list until five Jurors have answered; he then causes the five Jurors to stand up and each to place his right hand on the Testament, while the Clerk administers the oath to them as already spoken of respecting witnesses. When the Clerk addresses the Jury to ascertain if all have been sworn, the Bailiff counts *one*, *two*, &c., as each Juror says, "sworn." Should the Jury or any of them retire by leave of the Court, *and it is deemed necessary* for the Bailiff to take charge of them, his duty in this particular will be sufficiently explained by the language of the oath usually administered to the Bailiff in such cases.

When a Jury returns into Court, as the Clerk calls over their names, the Bailiff counts as before.

Should it become necessary to take a recess during the day or to adjourn the Court to the following

day, the Bailiff can proclaim the same as follows:

Proclamation on Adjournment.

Hear ye! Hear ye! All persons who have anything further to do at this Court may depart hence, and give their attendance here this day (*or* to-morrow morning) at —— o'clock.—God Save the Queen!

On resuming business the Court is opened again by proclamation:

Proclamation on Resuming.

Hear ye! Hear ye! All persons who have anything further to do at this Court, let them give their attendance, and they shall be heard.—God Save the Queen!

In order to prevent parties having business at a Court being taken by surprise in the rising of the Court before their matters are attended to, it is not unusual, after all the business on the list appears to have been gone through, for the Bailiff, by order of the Judge, to make the following proclamation:

Final Proclamation.

Hear ye! Hear ye! All persons that have anything further to do at this Court, let them come forth, and they shall be heard; otherwise they and every one else may depart hence for this time.—God Save the Queen!

The above proclamations should be committed to memory by the Bailiff.

By the 18th sec. of the D. C. Act, Bailiffs "shall "exercise the power and authority of a Constable "and Peace officer during the actual holding of "the Division Court, with full powers to prevent "all breaches of the Peace, riots or disturbances, "within the Court-room, or building, wherever the "Court is held, or in the public street, squares or "other places within hearing of the Court, and to "arrest, with or without warrant, all parties enga- "ged therein or offending against the meaning of "the clause," &c.

Thus it will be seen that Bailiffs possess a right by virtue of their office to act as peace officers, in addition to the authority they will have in acting upon the mandates of the Judge. The Bailiff will in general receive express directions from the Judge as the occasion may require what to do in case of disturbance. For the duties of a Peace officer generally, Bailiffs are referred to the *Canadian Constable's Assistant*, from which we extract the following caution as to arrest without warrant:

"In all cases of arrest it is usual and proper for the Constable to make known his office, and to demand of the party offending, to surrender in the Queen's name, before recourse is had to violent measures. Private persons present may be called upon, and are bound to assist the Constable in effecting the arrest."

If a party makes a disturbance in Court, he will be dealt with by the Judge; and in every case the offender be brought before the Judge, who will give the necessary directions to the officer, in case the matter, in the opinion of the Court, would be better or more conveniently left to another tribunal.—Where an arrest is once made under the 13th sec. of the Act, the party should be detained in custody till his punishment is determined by the Judge, or order made respecting him.

In conclusion: Officers must remember that their individual attention must be given to the business of the Court, and they must not suffer parties to interrupt them or draw their attention from it, and, to use the words of an English writer on the duties of Bailiffs, "It is almost unnecessary to add, that every respect must be paid to the Court, and its Judge; this can be shown in many ways, but chiefly by observing a proper demeanour, by not joining in, but checking, any merriment or indecent conduct on the part of the attendants of the Court."[1]

U. C. REPORTS.

CHAMBER REPORTS.

(*Reported for the Law Journal and Harrison's Common Law Procedure Act, by* J. Leach Talbot, *Esq., Barrister-at-Law.*)

SMYTHE ET AL v. TOWER.

Change of Venue—New Rules—Practice.

[In Chambers, Sept. 12, 1856.]

This was an application on the part of the defendants for an order to change the Venue under the old practice, the writ having been issued previous to the time at which the Common Law Procedure Act and the rules framed under it, came into force.

BURNS, J.—This application must be refused. The course prescribed by the new Rules (R. 19) is that a summons shall be issued calling on the plaintiff to show cause, so that the motion to change the Venue may be disposed of at one hearing. The new Rules are in force as to the old suits, wherever they are applicable.

An application was then made for a summons to show cause, which was granted.

THE QUEEN v. HUNTER.

Interlocutory judgment signed before passing of the C. L. P. Act—Subsequent issue of execution—Practice.

(In Chambers.)

This was a motion on the part of the plaintiff. Interlocutory judgment had been signed according to the old practice before vacation, the defendant not having pleaded, although the declaration had been served with a demand of plea. The application now was that the plaintiff should be at liberty to enter

[1] In England the Clerks and Bailiffs provide themselves with and wear a particular costume; and if officers in this country were so habited also, to distinguish them as officials, it would be a move in the right direction.

judgment and issue execution under the 61st section of the Common Law Procedure Act, as the demand of a plea was equivalent to the notice to plead within eight days required by that section.

BURNS, J.—You must take a rule to compute under the old practice. The 61st sec. refers specially to summons issued under the new Act and declaration, which should be endorsed with a notice to plead informing the defendant fully of his liability in case of neglect. The 61st section only speaks of a declaration with a notice to plead being filed, but I hold that such a notice should also be served—(see Rule 132 and note.) Therefore the order to enter final judgment under the 61st section must be refused.

PAWSON ET AL v. WIGHTMAN.

Satisfaction piece—Signature by plaintiff in presence of attorney according to provision of new Rules, may under certain circumstances be dispensed with.

(In Chambers.)

This was an application on the part of the defendant for an order directing the Master of the Common Pleas to enter a satisfaction piece on the Roll, and to grant a certificate thereof. The motion was grounded on an affidavit stating that a compromise has been effected between the parties. A satisfaction piece had been signed by plaintiff's attorney; but one of the new Rules (No. 64) required that in future a satisfaction piece should be signed by the plaintiff and his signature witnessed by his attorney. In the present case, however, the plaintiff resided in England, and perfect adherence to the new rule would entail great and unnecessary delay, and in fact it would be impossible to comply with that part of it which required the witnessing of plaintiff's signature by his attorney. Under these circumstances it was submitted that the order to the Master ought to be granted directing him to enter the satisfaction piece signed by the attorney, and to give the necessary certificates.

BURNS, J.—Take the order.

CRONYN v. ASKIN.

Irregularity in writ—Amendment.

(In Chambers, Sept. 15, 1856.)

In this case a summons had been obtained by the defendant for the plaintiff to show cause why the writ should not be set aside on the ground of irregularity, the Chief Justice's name having been omitted in the *teste*.

Plaintiff now appeared, but had no cause to shew. He sought therefore to amend both the original writ and service by insertion of the Chief Justice's name under the 37th section of the Common Law Procedure Act, which directed that "such "amendment may be made upon any application to set aside "the writ upon such terms as to the Court or a Judge may "seem fit."

RICHARDS, J., granted leave to amend the writ as required, on payment of costs and serving anew.

KEKENDALL ET AL v. MCKRIMMON.

Absconding debtor—Proceedings against—Practice.

[In Chambers, Sept. 13, 1856.]

In this case a writ of attachment had been sued out against the defendant as an absconding debtor, according to the old practice under a Judge's order, on the 6th of March, 1856, for £321 and costs, which writ was executed by the Sheriff of Wentworth on defendant's goods and chattels on the 8th day of March. The usual notice of seizin was published in the Gazette, and the defendant not appearing, a writ of summons was issued on the 15th of March and served according to the practice then existing, by leaving a copy at the last ascertained residence of the defendant, and posting another in the Clerk of the Crown's office.

Under these circumstances liberty was now asked on the part of the plaintiff to proceed with the service of a declaration under the old practice. The 45th section of the Common Law Procedure Act gave power "to the Court or a Judge" after the issue of a writ of attachment "to direct that the plaintiff may "proceed in the action in such manner, and subject to such "conditions as the Court or a Judge may direct or impose."

BURNS, J., granted an order "that the plaintiff be allowed to "proceed in the action by filing the declaration and notice to "plead in the office of the Deputy Clerk of the Crown at Ham- "ilton, and that such filing shall be deemed good service on "the defendant"; also, "that filing notice of assessment for the defendant shall be good service according to the practice in force before the Common Law Procedure Act of 1856."

MCGUIRE v. SNEATH.

Application for order to produce documents.

(In Chambers.)

This was an application for a Judge's order to the Commissioner of Crown Lands, to produce an original document from the Crown Lands office, as necessary for the just trial of the case which was an action of ejectment. The document required was an assignment of a squatter's right, on which the defendant relied to prove his title. A certified copy had been obtained, but it was believed that that would not be admissible in evidence, and the application was made in consequence of the 32d rule, which directed that no subpœna for the production of an original record should be issued unless upon the production of a Judge's order or rule of Court to the proper officer.

RICHARDS, J.—This application must be refused. The document does not come within the meaning of the rule as "an original record" or "original memorial." If it were so, on the same grounds one might include the documents in all the Government offices within the provisions of the rule: and an application might be made for petition to the Governor General on which to ground an action for slander, which might be clearly a privileged communication. Your course is, if the document is necessary at trial, and if a certified copy is not sufficient, to apply to the Governor in Council for leave to produce it at the trial or to obtain a subpœna in the ordinary way, if the officer in whose possession it is, is bound to produce it.

The Rule means records of the *Court* and memorials in the hands of the Registrars.

WALLACE v. FRAZER.

Service of a declaration is necessary, whether in case of appearance or non-appearance of defendant, except where substitution ordered by the Court or a Judge.

(In Chambers, Sept. 15, 1856.)

A writ having been issued under the old practice and served, the defendant did not appear. The plaintiff then, the Common Law Procedure Act having come into force in the meanwhile, *filed*, but did not *serve*, a declaration under the 61st section, endorsed with a notice to plead, in eight days. At the expiration of the time to plead, so endorsed, plaintiff signed judgment by default as final, and proceeded to issue execution.

On the part of the defendant, it was now sought to set aside the judgment on the ground that the declaration, with notice to plead under the 61st section, should have been served on the defendant as well as filed. The 132nd rule required that a copy of every declaration and subsequent pleading should be served upon the opposite party, and its words were, "as "well where the plaintiff has entered an appearance for the "defendant, as where the defendant has appeared in person "or by attorney." The first part of this rule was a mistake, as under the Common Law Procedure Act, the practice of entering an appearance by the plaintiff for the defendant was abolished; but the evident meaning of the rule was that even in case of the non-appearance of the defendant, subsequent pleadings should be served on him, except in cases where it was otherwise ordered by the Judge. (*Queen v. Hunter*, per *Burns, J.*, in Chambers, Sept. 12th.(a)

For the plaintiff it was contended that merely filing the declaration was quite sufficient under the 61st section, and

(a) Reported U. C. L. J., Vol. 2, page 183.

that the meaning of the of the 132nd rule was that pleadings should necessarily be served only in case of the appearance of the defendant.

Richards, J., decided in general that service of the declaration was necessary in all cases, except otherwise ordered by the Court; under the 61st section, service as well as filing was evidently contemplated, though not specially mentioned, and though there was a mistake in the wording of the 132nd rule, it plainly applied to cases of non-appearance. Judgment signed by the plaintiff should accordingly be set aside with costs, defendant having undertaken not to bring any action.

Carruthers v. Dickey.

Practice—Change of Venue.

(In Chambers, Sept. 15, 1856.)

In this case a summons had been obtained, calling on the plaintiff to show cause why the Venue should not be changed. The application to change was grounded on a common affidavit stating that the cause of action, if any, had arisen in York and not Simcoe.

Plaintiff now showed cause. The 19th rule gave power to the Judge fully to consider all the circumstances of the case, and not to change the Venue, as a matter of course, upon a common affidavit. In the present case, although the contract upon which the action was grounded was made in York, the breach of it was made in Simcoe, where the plaintiff's principal witnesses resided, and where the case could be most fitly tried.

Richards, J.—This summons must be discharged. The plaintiff, in his affidavits, has shown that he can give evidence of facts occurring in the county of Simcoe, and no good grounds are shown why the case should not be tried at Simcoe, and unless the defendant, on the other hand, shows some special grounds why it should, the Venue cannot be changed on the common affidavit, it having been sufficiently answered.

Summons discharged.

GENERAL AND MUNICIPAL LAW.

The Queen v. Smith and Corbett.

Habeas Corpus and return—Right of mother to child.

(In Chambers, 7th July, 1856.)

On the 26th of June, A. D. 1856, a writ of Habeas Corpus was issued out of the Court of Queen's Bench, directed to James Smith and Margaret Corbett, commanding them to "have the body of James Corbett, infant son of James Corbett, "now detained in your custody, as it is said, under safe and "secure custody, together with the cause of his being so "detained, by whatsoever name he may be called, before the "Honourable Archibald McLean, one of the Judges of our "Court of Queen's Bench, at the Judges' Chambers at Os-"goode Hall, in the said City of Toronto, forthwith, and then "and there to do and receive all and singular those things "which our said Court shall then direct and consider of him in "this behalf."

To which writ the following returns were made:—

In obedience to the writ of Habeas Corpus hereunto annexed, I, James Smith, therein named, do bring before the Honourable Sir John Beverly Robinson, Baronet, Chief Justice of Upper Canada, presiding in Chambers, the body of James Corbett, jr., and I humbly certify and return to his Lordship that the said Margaret Corbett, wife of the said James Corbett, in said writ named, is my sister; and before and at the time of the issuing of said writ, she was and still is living in my house, in the City of Toronto, with her child, the said James Corbett, jr., of her own free will and voluntary act, and without coercion or force on my part, or of any person or persons on my behalf. And I do further certify that the said Margaret Corbett was married to the said James Corbett in or about the month of March, A. D. 1853, and that within a few months after said marriage the said Jas. Corbett frequently ill-treated the said Margaret Corbett, and used great force and violence towards her, so much so that she left the said James Corbett and went to reside with her aunt Elizabeth Harper, of Thorold, but that some time afterwards, on said James Corbett's promising amendment, she returned to live with him, and so continued to live with him until the ninth day of June last past, when, in consequence of violent and brutal ill-treatment towards her on the part of the said James Corbett, she again left him and came to my house, with her child, where she has since resided. And I further certify that I have heard and believe, that the said James Corbett has frequently since his marriage been greatly intoxicated from the effects of strong drink, and has treated the said Margaret Corbett in a cruel manner, and beaten her so severely that she was apprehensive of her life. All this I hereby certify.

Witness my hand this fifth day of July, 1856.

(Signed) James Smith.

In obedience to the writ of Habeas Corpus hereunto annexed, I, Margaret Corbett, wife of James Corbett, do bring before the Honourable Sir John Beverly Robinson, Chief Justice of Upper Canada, the body of James Corbett, jr., the child of me and of James Corbett, born in lawful wedlock, and now an infant of the age of nearly sixteen months. I also certify that I was married to the said James Corbett in the month of March A. D. 1853, and immediately thereafter went to live with him; that the said James Corbett was in the habit of becoming intoxicated from drinking liquor, and after being married about three months, in consequence of his cruel treatment, he having beaten me severely, I left him and went to reside with my aunt in Thorold, and after being separated from him about seven months, I returned to live with him,—and so lived with him until the ninth day of June A. D. 1853, when I left him and went to reside with my brother, James Smith; that when I returned to live with the said James Corbett, he faithfully and solemnly promised amendment, and not to ill-treat me again; that I am afraid if I am to return to my said husband to live with him I would be subjected to the same ill-treatment I have hitherto received from him, and my life might be in danger from his violence; that on the ninth day of June last past my said husband beat me, and kicked me, and turned me out of his house; that on that day I went three several times and endeavoured to get into the house for the purpose of procuring clothes for the child; that I had the child in my arms when my husband first turned me out on that day; that said James Corbett would not allow me to get into the house—called me ill-names and said I never should get anything from him; that I am apprehensive if the child were given up to said James Corbett, it would not be properly cared for: and I humbly implore his Lordship to allow me to retain possession of my child.

Witness my hand this fifth day of July, 1856.

(Signed) Margaret Corbett.

The following order was thereupon made:—

Robinson, C.J.—After hearing the parties before me on the return to this writ, I discharge the mother and child, leaving her at liberty to return with her child or not to her husband, as she thinks proper.

O'Donahoe v. The School Trustees of Sec. No. 4, Thorah.

(Trinity Term, 19 Vic.)

School Trustees.

Upon an application for a rule *Nisi* for a mandamus by the teacher of a school section against the trustees of such section, requiring them to levy a rate sufficient to pay the applicant the balance of his salary as such teacher, recovered in the Division Court against former trustees; the court refused to grant such rule, it not appearing on the application when, for how long, and by whom the said teacher was employed. [5 C. P. R., 297.]

Application by *M. C. Cameron* on the 4th Sept., 1855, for a rule *Nisi* on the said trustees, to show cause why a mandamus should not issue to them, requiring them to levy a rate, or

cause to be assessed and collected, a rate sufficient to pay the said O'Donahoe £26 8s. 6d., being the balance due him as teacher of the said section, and the balance of costs due on the judgment recovered by him for said salary, with costs of this application. It is stated in the affidavit of D'Arcy Boulton, Esq., attorney for O'Donahoe, that about the 21st August, 1851, said O'Donahoe obtained a judgment in the Eighth Division Court of York and Peel against William McCarkill, George Proctor, and Duncan Calder, trustees of School Section No. 4, township of Thorah, in an action on contract for £24 10s. 6d., debt, and £1 17s. 2d. costs—£26 7s. 8d.—against the corporate property of said trustees, ordered to be paid in one month; such judgment being recovered within the jurisdiction, &c. That execution issued thereon against the goods of said trustees as a corporation, returned by the bailiff made £1 4s. 6d. and no more goods. That on 29th April, 1852, the said judgment was duly certified into the county court, and *Fi. Fa.* issued thereupon against the corporate lands of said trustees for £25 7s. 2d. returnable 1st day of June term, 1853, returned, made £5 5s., and no more lands. That a summons was issued by the County Court judge under section 91 of Division Court Act of 1850, afterwards discharged on the ground of want of authority in the court, (date not stated.) That there is still due O'Donahoe £26 8s. 8d. That the school trustees of said school section have been frequently requested to pay said balance and have refused so to do, and still refused, and set him at defiance; that said trustees have no goods or lands whereof, &c. That the said debt was incurred by the above-named trustees, as such trustees, on account of the salary of said O'Donahoe as teacher of the said school section; and that he, O'Donahoe, on several occasions requested the trustees of the said school section for the years 1853 and 1854 (not named) to levy a rate as by law provided, for the payment of said debt; and that the said trustees of the said years declined so to do, and as he believed so declined by reason of the ratepayers of the said section having met to consider the question whether the said bill should be paid or not, and decided at such meeting that it should not.

Affidavit sworn the 24th August, 1855.

MACAULAY, C.J.—Upon reference to the statute 13 & 14 Vic. cap. 48, sec. 12, No 16; ib., sec. 17, No. 5; sec. 6, No. 4; secs. 17 & 6, No. 4; 16 Vic., cap. 185, secs. 6, 11, 15, 17, and 24; and the statute 13 & 14 Vic., cap. 48, sec. 6, No. 4, and sec. 12, Nos. 5, 7, 9 and 16—upon which this application depends; and having carefully examined those clauses, we cannot find authority to grant this application. Nothing is laid before us to show when, where, or upon what terms, or for what time the applicant was employed to teach the school, and we are in effect called upon to enforce a Division Court judgment in favour of a school teacher against the trustees as a corporation by mandamus to them to levy a rate retrospective in its object.

The statutes confer certain powers and impose certain obligations upon the trustees, and if it be legally in their power and their legal duty to do what the mandamus is asked to compel, the statute seems to afford another remedy by action. If not legally so empowered and in duty bound to act, the court cannot confer authority by a writ of mandamus, nor will it grant such a writ to order the trustees to do that which it is not a duty incumbent upon them to perform.

Before we should be disposed to grant a rule to show cause, we should desire to hear it determined that no action does lie against the trustees individually. Although the court should consider it in their power to levy the rate required, such a suit ought to be instituted in the County Court; but if the trustees have been changed since the Division Court judgment was recovered, I by no means am to be understood as intimating that the action could be maintained against the trustees for the time being. We decline granting a rule on the facts before us; but the applicant can, if so advised, take the opinion of the Court of Queen's Bench on the subject next term, by moving that court for a mandamus, either on the same or upon additional facts.

McLEAN J., and RICHARDS, J., concurred.

Rule refused.

REID v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF HAMILTON.

(Trinity Term, 19 Vic.)

Notice of action—Evidence under general issue.

Case, for wrongfully, negligently and carelessly digging and excavating streets in the City of Hamilton, adjoining plaintiff's close, and thereby injuring said close, &c. Plea, not guilty per statute.

Held, 1st. That a by-law should have been passed by the Corporation to sanction the act complained of. (McLean, J., dissenting.)

2nd. That when there is no by-law, and when the act complained of is done under the statute 13 & 14 Vic., cap. 15, the defendants are entitled to notice of action, coming as they do fully within the spirit of the protecting statute.

3rd, That if the defendants are liable for the tortious acts in the declaration complained of, they are entitled to give special matter in evidence under the general issue.

[5 C. P. R. 200.]

Writ issued, 11th day of January, 1854. Declaration, 10th day of May, 1854.

First count states, that plaintiff before and at, &c., was possessed of a close or parcel of land in the City of Hamilton, composed of lots, numbers 26, 27, 28, 35, 36, and 37, in the survey of lots made by Peter Hunter Hamilton, bounded on the east by a street or highway called James Street, on the south by a street or highway called Robinson Street, and on the north by a street or highway called Duke Street; yet that defendants, wrongfully intending, &c., to wit, on the 1st of August, 1853, *wrongfully*, and *negligently*, and *carelessly*, &c., *dug* and *excavated* the *said streets* adjoining said close, and so near the same, and also took and carried away therefrom the earth and soil so dug and excavated, in a negligent and careless and improper manner, and without leaving any sufficient or proper support to prevent the soil and earth of plaintiff's close from falling away from said close into and upon the said streets, or prevent the fences of plaintiff, standing on said close, from falling, and lowered thereby the said streets so much, that by reason thereof a quantity of soil and earth of plaintiffs' said close gave way and fell in and upon the said streets and was washed down and carried away, and whereby also said plaintiff's said fence surrounding said close fell, and plaintiff was thereby greatly incommoded, &c., and obliged to build a stone wall to prevent the further falling of the earth, &c., of the said close, and the value of said close hath been greatly diminished, &c.

Second count: That before and at, &c., plaintiff was possessed of a dwelling-house and close in the City of Hamilton, bounded on the east by James Street, on the south by Robinson Street, on the north by Duke Street, and on the west by lands of Robert Roy, which streets before and at, &c., were on or about the same level with the said close of plaintiff, whereby the soil and earth of said close was supported and kept from falling, and plaintiff had free access to and from said streets into and from said close at all times, for carts, carriages, horses, and foot passengers, &c.; yet defendants, well knowing, &c., wrongfully, negligently, improperly and injuriously, to wit, on the 1st of August, 1853, dug and excavated the said streets, and lowered the same below the original level without leaving sufficient support to prevent the earth and soil of plaintiff's close from falling away; by reason whereof a great portion thereof did give way and fall in and upon the said street, and was washed down and carried away, and also thereby the plaintiff's fences around said close gave way and fell down, and plaintiff prevented access in any manner to his said close and house from the said streets until he made a foot-way at great expense from Duke street up to said close, and at large expense built a stone wall and stair-case to allow access on foot, and hath been deprived of any access from said streets to said close, for horses, carts, carriages, &c., whereby, &c.

Third count: That before and at, &c., plaintiff was possessed of a dwelling-house and close in the City of Hamilton, bounded as before described; that before and at the time when, &c., the said streets were, and from time immemorial

had been, on or about the same level with said close of plaintiff, by means whereof the soil and earth was supported, &c., and plaintiff had free access therefrom into and upon, and to and from said close, at all times, for all horses, carriages, foot passengers, &c.: yet defendants, well knowing, &c., to wit, on the first of August, 1853, wrongfully dug and excavated the said streets adjoining said close, and took and carried away the soil and earth thereof, &c., and greatly lowered the same, &c., as in last count—omitting any charge of negligence.

Plea—Not guilty *by statute*. Defendants referring to 14 & 15 Vic. cap. 54, on being called upon by a judge's summons.

At the trial, before Draper, J., autumn, 1854:

On plaintiff's part evidence was given—that by the defendants' book of minutes it appeared that on the 24th of August, 1852, the council passed a *resolution* for the preparing plans and specifications for grading and gravelling Upper James Street; that tenders be advertised for according to such plan. That on the 1st of September, 1852, the council passed a resolution appointing Carr (or Kerr) to superintend the improvements on John, James and York Streets, or any other work let out on contract. That on the 15th September, 1852, the council resolved that the tenders for grading and gravelling James Street be referred to a committee to accept the most beneficial tender: that on the 20th September, 1852, by articles of agreement, executed under hand and seal of Garratt Kenny and Patrick Cain, (but not by defendants) but stated to be entered into by said Kenny and Cain of the first part, and the Mayor, Aldermen and Commonalty of the City of Hamilton, of the second part; the parties of the first part agreed, according to the specification annexed, to grade, drain, macadamize and gravel that part of James street in said specification mentioned and described, &c., on or before the first of December then next, to be paid as the work progressed upon the estimates of (defendants') engineer, and the ultimate balance upon his certificate of satisfaction with the work, &c., with various stringent clauses or checks upon the contractors. It concludes as if the Mayor had, or was to sign and seal it with defendants' seal. The specification stated that the work on upper James street would consist in lowering parts of the hills, filling up hollows, building culverts, and repairing the same; macadamizing, gravelling, forming and regulating the surface throughout to one uniform and regular plan as therein described, and according to grades laid down on the profile plan of said street. It then refers to the plan, showing the length and levels, &c., as they were, and were to be made; the breadth of the road to be thirty feet inside or between the water tables or ditches, and the breadth of metalling to be 20 feet. The side-slopes, &c., to be one and a half horizontal to one perpendicular, &c. The side streets leading to and from it to be graded at the junction to a rise or fall of one in twenty, so as not to have a steeper slope than one in twenty where they join James street, with a variety of detailed particulars; to be observed and approved of by the engineer in charge, in relation to the grading, metalling, &c. That opposite plaintiff's property in upper James street there is a very steep hill, and also on McNab street, to both of which streets plaintiff's property extended. That there was a sharp turn from James street into Augusta street, so as to render it likely a carriage might over-turn, but at the time of the trial the road was on a moderate scale, as one witness stated. Kerr the engineer, being called for plaintiffs, stated, that the work had been done under his superintendence by Kenny and Cain, and it was proved they had received payments on account of their contract. That the intention was to cut the road thirty feet wide and about two feet on each side, but that the contractors did in fact cut nearer than that to plaintiff's land without directions. That Duke street was cut and lowered on the north of plaintiff's land and the soil taken by Kenny from Robinson street, which is south of plaintiff's property, and used upon part of James street: that James street was raised three or four feet higher than Augusta street, but Augusta street was not adjoining plaintiff's close. That at thirty-four feet width for the improved road, there would at the base (or bottom) be sixteen feet left to plaintiff's land, measuring from the centre ($17 \times 16 = 33$, or half a chain.) That the defendants' cut at plaintiff's was about six feet, and allowing seven feet to be cut off the sixteen feet at the top, nine feet would remain untouched before reaching the plaintiff's land; that so far as the James' street work was concerned, no part of it was done carelessly or negligently: that the alteration of the street was a great general improvement. Kenney the contractor said, that opposite plaintiff's they cut James street according to the plans and specifications and directions of the engineer, and opposite to the plaintiff's lot cut up to the lot very nearly, and went the distance they were obliged to go: that the cutting was very hard, and he had to blast the underpart; that they cut on the street south of plaintiff's land, though forbid by him (plaintiff); that he, Kenney, informed the mayor, and aldermen, and members of the street committee, who told him he might take soil from there and they would stand any damage for his so doing. That the soil removed from Duke street was taken to fill up and level on James street, but that Duke street was not cut up to the line of the plaintiff's land. Allan, street-inspector in 1852 and 1853, said he had in that character cut away soil from the street, (Duke street) north of plaintiff's, but did not cut it down very much, four or five feet, nor within six or seven feet of plaintiff's. That defendants paid for that work. That before this a place had been cut nearly close to the plaintiff's fence near the corner of James street, but Duke street was not then a travelled road, that the natural level of the street (James street) sloped upwards to plaintiff's land which also sloped upwards, and that plaintiff could have got out from his land on the level of Duke street before the cutting, if his fences were removed. That Duke street is now a good travelled road; that plaintiff had not access to all parts of James street, but there might have been at the upper part near Robinson street, and there is not now much difference in the grade between the grade of plaintiff's land and the improved street; that before the improvement James street was scarcely passable, and now there is an excellent road; that according to the present grade plaintiff's land is now higher above the present level of the street than formerly: that land sufficient to support plaintiff's close and fences was left by this witness in what he did.

Another witness, McIntosh, stated that in consequence of cutting down James street, plaintiff's fences required support, and the earth from his lot falls into James street, and so along Robinson street for sixteen or twenty feet; that there is no way to get from James street or Duke street into plaintiff's land except a foot stairway of thirteen or fourteen steps made by plaintiff, and that he must drive round to the rear to get a waggon in, and in winter, owing to the ice, the staircase at times is often impassable: that at the corner, James street is four or five feet below the level of Robinson street; that in Duke street it is graded off to within one foot of plaintiff's fence, done by persons acting under the defendants' inspector.

Another witness (Nixon) proved that he put up a stone wall for plaintiff last summer to prevent the earth falling into James street, which street is lowered ten feet, as also Duke street, and at the corner near Robinson street the grade of the street is five feet below the level of plaintiff's land. That it would cost £75 to put a wall along Duke street, and £80 to do so along James street, and that plaintiff erected steps, and put up a wall two years ago worth £50.

That plaintiff erected his house in 1851 and 1852; and about one hundred feet from Robinson and James streets, and had to cut the slope along James Street to get a perpendicular or flat surface for his foundation walls. That the first five feet of plaintiff's land is light, and can only be secured by a

retaining wall, below that level it is heavy and solid. This witness thought it would cost half the price of the land to cut it down to a level, for houses on James Street.

It appeared upon the whole of the plaintiff's evidence that his close was on the side or ascent of what is called the mountain, bounding the city of Hamilton on the south, and that his land, in common with all others, slopes or inclines downwards from south to north, and consequently the improved grades of the streets passing his property form inclined planes, and do not leave his land at a uniform higher level, but varying. At the close of the plaintiff's case the court adjourned till the next morning, and it was arranged by consent of parties that the jury should in the meantime view the premises.

For defendants, Kerr, the engineer, was called, and denied instructing or authorizing Kenny to work James Street, otherwise than the specifications, &c., directed and required; but said that, being requested, he refused. That he planted posts as near the centre of James Street as he could for the guidance of the contractors. That they acted under his orders, and he acted under the specification. That opposite plaintiff's house, James Street had been considerably lowered, and cut down before the work complained of was executed, in some parts one foot, in others six feet, in some not at all, and that in doing the work below plaintiff's land, they had to fill up in some places; that four feet was the deepest cutting at any part along plaintiff's line; at the corner of Duke and James Streets it was one foot, a half feet, and then from three to four feet. He described again the space left at the base and top of the cutting in James Street, and said the widest at the top would not exceed forty-six feet, and that all along the plaintiff's land a distance of at least seven and a half feet was left, allowing for the natural slope of the land, and he thought none of the work done under his directions approached nearer; that there was previously very little cutting at the corner of Robinson and James Streets, and that they cut about two feet nine inches at the north side of Robinson Street, and deepened it as they came north.

Hodgins, a surveyor, said he had taken the levels of James Street for sewerage, and that opposite plaintiff's it was not too steep, and was as favourable to plaintiff as it can be, being a grade of from one in twenty to one in twenty-six, whereas one in thirty is what it should be where practicable; but that plaintiff's property was not as well situated for the road as before the cutting, and which was so far injurious, and is less valuable for building purposes, but improved as a private residence; that the land itself was not less valuable, meaning apparently, the soil, as gravel, &c. That the public must have had a very dangerous road if the alterations in the levels had not been made.

Mr. Mitchell, one of the street and side-walk committee, denied permitting or directing gravel to be taken from Duke Street by Kenny, &c., but said that if he wanted such permission, he should memorialize the council. He further stated that he knew plaintiff's property ten years ago, when the original level was altered, and people took away gravel and sand from that part of the road, cutting it down six feet; and that the whole surface had been cut away across into another property. He described also how holes had been made by the excavation of sand; and that the cutting he spoke of did not extend to the south part of his land, but from a little above the centre of his lot north. He thought James Street was an original allowance for a side line road. David White said James Street had been graded and levelled by subscription many years; and that people trespassed on the land now owned by the plaintiff, by taking away sand and gravel next the road, and cutting three or four feet deep.

The learned judge remarked upon the three counts in the declaration, and the only plea of not guilty, which denied the wrongful acts alleged, and that, according to the case of Brown v. The Municipal Council of Sarnia, 11 U. C. Q. B. R. 87, the statutes 14 & 15 Vic., cap. 54, did not apply for the protection of Municipal Corporations to entitle them to prove special matters under the general issue; at all events not after having referred to that act as the one upon which they relied; and submitted it to the jury to decide—1st, whether the plaintiff had proved the work complained of in the first and second counts to have been done by the defendants, saying it was clear that, as regarded James Street, the defendants had contracted with Kenny and Cain to grade and gravel it in front of and above and below plaintiff's property, and that defendants endeavoured to show that all required to be done under it could not have extended so near the plaintiff's property as to injure his fences or cause the land to slide down, or cause the specific injuries alleged in the counts, of which the plaintiff had given evidence with a view to prove the contrary.

For the purposes of this trial, he ruled that if the defendants authorized or directed the excavation, or contracted to have it done in such manner and to such extent as to produce the damage complained of, they were on those pleadings liable; but that if the contract specification, and engineer's directions were as their witnesses represented, then they were not liable under those counts, because their contractors, for their own purposes, exceeded the terms of the specification and the engineer's directions, and did that which occasioned the damage to the plaintiff by improperly, injuriously, and negligently excavating. That on the other streets the evidence connecting the defendants with the excavation complained of was not so distinct, but there was evidence which he left to the jury subject to the same ruling as to James Street.

2nd. That as a general principle, applicable in the case more perhaps to the question of damages, the defendants, as a municipal corporation, under the Act 12 Vic., cap. 81, had authority, and were particularly intrusted with the power to make and improve roads and streets within the limits over which their jurisdiction extended, being a public corporation for strictly public purposes. That on the two first counts, if the jury found the acts of the defendants were limited as they contended and endeavoured to prove, though what they did rendered access from plaintiff's close to the highway as constructed difficult or more limited than before, or than in the natural state of the ground, and so cause some damage in law, and also in fact, yet such damage was not recoverable; wherefore if the defence was established on such principles, in fact, the jury were told to find for defendants, but to find for plaintiff if the work was done as he contended, and injurious, as represented specifically in the declaration. As to the third count, that nothing was in issue but whether the lowering of any of the streets was done by the defendants, or by their authority or direction, nothing else being denied by the plea of not guilty. That on this count the plaintiff seemed entitled to a verdict, with such damages as the jury thought had been done to the general value of the plaintiff's property—that is, to its fair marketable value, &c.; also, to sever their verdict, if they found for the plaintiff, stating what they gave on the first and second counts, and to distinguish between general and specific damages in reference to the third count &c. The plaintiff's counsel objected that the mere fact of doing the acts complained of without passing a by-law was a wrong, and that the jury should be so directed. The jury, after a short consultation, being out only a few minutes, found for the defendants.

In the following term (Michaelmas Term, 18 Vic., December, 1854) *Read*, for plaintiff, obtained a rule on the defendants to show cause why such verdict should not be set aside and a new trial granted, as being contrary to law and evidence, and the judge's charge, and also for misdirection, and for the reception of improper evidence for defendants, and upon affidavits filed.

The affidavits are of the plaintiff John McIntosh, and Isabella Reid, a sister of plaintiff, and represent that on the morning of the second day of the trial, before the opening of the court, the jury went to view the plaintiff's premises, and that Mr. Mitchell, one of the Municipal Council, and a member of the street

committee, when the work complained of was done, was with them at the plaintiff's premises, conversing with one or more of the jurors, and speaking loud enough for all to hear him, and pointing out to them different spots or places, &c. The object being to show improper interference with the jury by persons interested in the defence on that occasion.

MACAULAY, C.J.—The 12th Vic., cap. 81, sec. 60, No. 1, empowers the municipalities to make bye-laws for *opening, constructing, making, levelling, raising, lowering, repairing, improving, preserving, maintaining*, &c., and for *stopping up, pulling down, widening, altering, changing or diverting* any new or existing highway, road, street, bridge, or other communication, &c.

Sec. 195, upon the passing of any *by-law* for the purpose of authorising the opening any road, street, or public thoroughfare, or of changing, widening, or diverting any road, street, or public thoroughfare, so as to cause the same or any part thereof to go through, or to be placed upon, or injuriously to affect the land or other real property of any persons, &c.; such persons may name an arbitrator, and give notice thereof to the corporation, &c., and the head of such corporation shall within three days name another, &c., who may award the amount of damages, if any, to be paid to such person, &c.; and if the corporation neglect or refuse to arbitrate, such person may maintain a special action on the case at law against the municipality by which the by-law shall have been passed, &c. Sec. 197, benefit and advantage to be considered when it is for the *opening, widening* or *diverting*, any road or street, &c. The compensation words are *opening, changing, widening or diverting, so as &c.*

The 13 & 14 Vic., cap. 15—The right to use as public highways all roads, streets, &c., vested in the municipality, and such roads, streets and highways shall be maintained and kept in proper repair, &c., by and at the costs of such corporations, &c.—16 Vic., cap. 181, (14th June, 1853) sec. 33, substituted for sec. 195 of 12 Vic., cap. 81.

14 & 15 Vic., cap. 109, sec. 35—Whenever any by-law, order or resolution shall be passed or adopted by any municipality whatever, and such by-law, order, or resolution has been quashed or declared illegal or void by any court having competent jurisdiction therein, the municipality by which such by-law, order or resolution shall be passed, shall alone be responsible in damages for any act or acts done or committed under such by-laws, order, or resolution; and any clerk, constable, or other officer acting thereunder, shall be freed and discharged from any action or cause of action which shall accrue or may have accrued to any person or persons by reason of such *by-law being illegal and void*, or having been quashed, &c.

Sch. A. No. 21, provides for quashing by-laws in reference to 12 Vic., cap. 81, sec. 155, and among other things enacts that no action shall be sustained for or by reason of anything required to be done under such *by-law*, unless such *by-law*, or the part thereof under which the same shall be done, shall be quashed in manner aforesaid one calendar month at least previous to the bringing of such action, with a proviso added for tendering amends, not saying within what time; and upon such tender being pleaded, if no more than the amends tendered shall be recovered, then, &c.

The King v. Commissioners of Sewers, County of Somerset, (7 East, 71) Leader v. Moxon, (3 Wil., 461-6-7.) The statute 11 Geo. III., cap. 21, empowered the *commissioners* to *cause order* and *direct* the street to be paved, sunk or altered; and it was contended the power to alter gave power to raise, with appeal to Quarter Sessions for anything done under the Act, &c., but with power only to give costs, not *damages*—per Blackstone, J., S. C. 2 W. B., 924.

The Governor & Company of the Plate Glass Manufacturers v. Meredith (4 T.R. 794)—The words of the act were—paved, repaired, raised, sunk, or altered, and the defendants had raised the pavements. Sec. 46 contained a compensation clause, on which Buller, J., and Groves, J., relied, where the pavement was *necessarily raised or lowered*—Boyfield v. Porter (13 East. 200) Roberts v. Reid, (16 East. 216) Gillin v. Boddington, (1 C. & P., 541) Rex v. Commissioners of Sewers, Pagham, &c., (8 B. & C. 356.) Using a canal-way wider or deeper—Rex v. The Justices of Glamorganshire, (7 B. & C. 722,) Sutton v. Clarke. (6 Taunt. 29, S. C. 1 Mar. 429) Jones v. Bird, (1 D. & R. 497, S. C. 5, B & A. 837) Matthews v. West London Water Works Co., (3 Camp. 403) Boulton v. Crowther, (2 B. & C. 703, S. C. 4, D. & R. 195) under 3 Geo. IV., cap. 126, sec. 85.

The *trustees* were empowered to *make, divert, shorten, vary, alter* and improve the course or path of any of the roads under their care, &c.; much in point, if plaintiff not entitled to compensation—Humphrey v. Mears, (1 M. & R., 187,) The Grocers' Co. v. Dunn, antecedent cases reviewed, (3 B. N. S. 34) Reg. v. Manchester and Leeds R. W. Co., (3 Q. B., 528) Peters v. Clarson, (7 M. & G., 518, S. C. 8, Jur. 648) In re Armitage (Ambler 295.) Upon motion to quash a writ *ad quod damnum*, the object being to make a wooden waggon-way in a lane of 320 yards in length, it was called "*changing the condition*" of the road.—Brown v. Clegg (16 Q.B. 681), Overton v. Freeman (8 Eng. Reports 479, S.C. 16, Jur. 65, S. C. 11, C.B. 867); as to the side roads taking earth, &c., 9 Moore 226, Hall v. Smith (2 Bing. 156) Humphreys v. Mears (1 M. & R. 187) Peachey v. Rowland (13 C.B. 182) Rex v. Commissioners of Sewers, Pagham, supra (8 C. B. 355) Glover v. North Staffordshire R. W. Co. (16 Q. B. 923-4.) Reg. v. Eastern Counties R. W. Co., (2 Q. B. 347, S. C. ib. 569) Caledonia R. W. Co. v. Ogilvie (25 vol. Law Times, 633, 19th May, 1855, H. of Lords, page 1067.) Not necessary to allege a by-law in pleading.—The corporation of Ipswich v. Martin (Cro. Jas. 411) The Dean of Windsor v. Gover (1 Saud. 304) Arnold v. The Mayor of Poole (4 M. & G. 860) Brown v. Municipal Council of Sarnia (11 U.C.Q.B.R. 87) Kerby v. Grand River Navigation Co. (ib. 334) Farrell v. Municipality of London (12 ib. 353) Yonge v. Grand River Navigation Co. (ib. 75), Ellis v. The Sheffield Gas Co. (18 Jur. 146, S. C. 32, Eng. R. 198), Dennis v. Hughes et al (8 U. C. Q. B. R. 444), Wilson v. Port Hope (10 U. C. Q. B R. 411.)

The first consideration is whether had there been a by-law, the facts in evidence present a case which would have entitled the plaintiff to the compensation under the 12 Vic., cap. 81, sec. 195, and 16 Vic., cap. 181, sec. 33, had a by-law been passed; and upon the best attention I can bestow upon the the question, I am not able to satisfy myself that the facts bring the acts complained of within the words *opening, changing, widening*, or *diverting*, the road. The word "opening" seems to relate to the original opening of a road to be used as a highway, the word "changing" to some deviation therein, and not a mere alteration of the level by raising or lowering it upon the same line and within the same breadth; "widening," of course, applies to an enlargement of the width; and "deviating" to an alteration or deviation, or successive alterations or deviations in the line or course of the road from one direction to another. I have hesitated upon the force of the word "changing," for a road may be said to be changed on the same line as from a rough original road to a turnpike or to a macadamized or plank road, and from a free to a toll road; but the difficulty is to hold that macadamizing, which necessarily required more or less change of the level or grade of the line of road, constituted a "changing" within the true intent and meaning of the compensation clauses. The 12 Vic., cap. 81, sec. 60, No. 1, mentions levelling, raising, lowering, altering, &c., and changing or diverting, which seems to indicate that changing meant something different from levelling, raising or lowering, or altering; at all events such alterations are termed changing the condition of the road, not changing the road itself; and I do not feel authorized in holding that they are to be understood in the same sense, or that the word changing includes levelling, raising, and lowering, and more, or that it does not mean exclusively some other alteration. I adopt the conclusion, therefore, that the plaintiff is not entitled to claim compensation under the statutes. The improvements made in public highways may

often prejudicially affect individual proprietors, whose lands abut upon such roads, and compensation might often be just, and in England seems at times to be provided for; but if intended to be granted, the intention of the Legislature to that effect should be more explicitly expressed. At present it appears to me the Legislature did not mean to acknowledge in the proprietors of lands bounded by public roads a vested right to have such roads maintained at the existing level, however inconvenient in its use as a public highway, or to grant compensation for such alterations, so long as the original line of road was adhered to, and no encroachment made upon the soil of such adjacent proprietors; and that consequently compensation had not been reserved in those cases where (without touching the adjacent closes on the one hand, or deviating from them on the course of the road on the other) the levels only have been raised or lowered, whether in turnpiking, macadamizing or planking—such alterations not being considered infringements upon vested private rights, entitling the parties suffering injury, loss, or inconvenience, to compensation.

If entitled to compensation, a question would arise, whether the plaintiff's remedy was restricted to the course pointed out by the statute. If a by-law had been passed, I apprehend such would have been the consequence; but in the absence of one, the plaintiff would seem left to a common law remedy, if he had any; the want of a by-law deprives him of the opportunity of raising the question of statutory compensation in direct terms. If not a case for compensation, the next consideration is, whether the plaintiff can maintain an action on the case for consequential injury, if he has sustained a damage for which he could recover at common law against individual wrongdoers under like circumstances. This raised the question whether injuries of the kind complained of, if otherwise actionable, can be inflicted by the municipality of the city justifiably, without passing any by-law to authorize and require the work to be done. There was an order or resolution of the municipal council for that purpose, and a regular sealed contract entered into for its performance, sealed by the contractors if not by the defendants; and it is seen that the 35th section of the 14 & 15 Vic., cap. 109, speaks of by-law, order, *and* resolution, by-law, order, *or* resolution, and of by-law alone; while schedule A., No. 21, mentions by-law only.

This statute, by analogy to justices of the peace and constables executing their warrants, seems to extend protection to clerks, constables, or other officers acting under by-laws, orders, and (or) resolutions similar to that afforded to constables by other statutes, and to refer injured parties for redress to actions against the municipality exclusively; it moreover extends protection to the municipality, so far that no action shall be sustained for or by reason of anything required to be done under any by-law, unless it shall be quashed one calendar month at least previous to such action being brought, with leave to tender amends and plead it; while *orders or resolutions* may apparently be declared illegal or void, by any court of competent authority in the premises, though not previously quashed. If there be no by-law, of course no by-law can be quashed, nor can anything be required to be done under it. Then, is every order or resolution a by-law, and are they identical, if duly *sealed* and *signed*, (12 Vic., cap. 81, sec. 198, and 5 Ex. R. 61) and otherwise sufficient on the face of it? I suppose it would be such: Hopkins v. Mayor of Swansea, (4 M. & W. 630-3); Dunston v. The Imperial Gas Co. (3 B. & Adol. 125); Gosling v. Veley, (7 Q. B., 451.)

But a mere order or resolution of the municipal council, not duly authenticated, is not a by-law under the 12 Vic., cap. 81; for section 198 requires certain formalities to be observed, such as sealing and signing—10 U. C. Q. B. R. 411. It is said the municipal council are neither *the* corporation nor *a* corporation: Regina v. Mayor of Bridgewater (10 A. & E. 286); Regina v. York (2 Q.B. 850); Reg. v. The Inhabitants of St. Edmunds—(2 Q.B. 73); Reg. v. Dunn (5 Q.B. 963.) But it is the governing body of the corporation: Reg. v. Ledgard (1 Q. B., 619.) And all the powers of the corporation (that is, the inhabitants of the city, &c.) shall be exercised through and in the name of the municipality of such city, &c. (12 Vic., cap. 81.) It is therefore the legislative and governing body. As to a quorum, see 12 Vic., cap. 81, sec. 168—16 Vic., cap. 181, sec. 30. If the order or resolution under which the work in question was contracted for and executed was not a valid by-law within the 12 Vic., cap. 81, sec. 60, No. 1, it would not be in itself a sufficient authority if a by-law was necessary. And if there was no sufficient authority conferred independently by any by-law, I entertain the opinion that although the acts complained of were confined to lines of road or streets that were public highways and were for the improvement of the public easement, still for a consequential injury so directly affecting the plaintiff's property and himself as the occupant thereof, that an action on the case would lie at his suit against mere wrongdoers for like acts, and against defendants, if to be regarded as wrongdoers under the circumstances in evidence. I find the question whether work of the kind in question can be justified without a by-law when it infringed upon private rights to a degree that would entitle the parties injured to actions at common law against wrongdoers, very difficult to decide satisfactorily; so much may be said in favour of a conclusion either way when the party would not be entitled to compensation under the statutes, that is, if a by-law had been passed. I am, however, disposed to think that in such circumstances a by-law is essential. The corporation (that is, the inhabitants at large as a corporation) possess no direct powers of the kind, nor did they pretend to exercise them except through the municipal council; and in conferring powers upon the council, the Legislature has not said that they may raise or lower public streets, &c.; but that they may make by-laws for that purpose, whence it is argued that, being empowered to pass by-laws for such purposes, they can justify the act without a by-law, when prosecuted civilly as wrongdoers, and the act complained of did not constitute an indictable nuisance to the public easement or highway, but was a benefit thereto.

The defendants, however, rely upon the 12 & 14 Vic., cap. 15, and their right to give the special matters in evidence under the general issue under the 14 & 15 Vic., cap. 51. If the evidence warranted the inference that the work done under the contract with the defendants was a duty incumbent upon them as being bound to maintain and keep the road in proper repair at the peril perhaps of an indictment or an action if they did not do so, I think they may well justify such repairs without a by-law, having in fact done it, not under a by-law, but in obedience to a statute of the Provincial Legislature. The jury seem to have taken this view of it; and the verdict being consistent with the merits, inasmuch as the defendants acted *bona fide*, and what they did was a decided improvement of the street, and for which plaintiff could have maintained no action had a formal by-law preceded the execution of the work, and as he would not be entitled to compensation had a by-law been passed, it perhaps becomes a matter of discretion with the court whether the verdict ought to have been disturbed, unless there was misdirection upon a point so material as to require it on that ground; the defendants ought only to be liable for what their contract required to be done: Peachey v. Rowland (13 C. B. 182); and for any excess in the performance of the work by the contractors, injurious to the plaintiff, and not required or directed to be done by the defendants, the plaintiff's remedy would be against the person who did or caused the injury. That an action like the present may be maintained against a municipal corporation—that is, an action on the case for a tort, whether for non-feasance or mis-feasance—I expressed my opinion, in the case of Croft v. Town of Peterboro, upon what I considered sufficient authority, and need not therefore do more at present than to refer to that case upon the general question, and also upon the point above mentioned; also referring to my observations in that case in reference to the cases, The King v. The Commissioners of Sewers for Pagham (supra, 8 B. & C. 355); Glover v. The N. Staffordshire R.W. Co. (16 Q.B. 923.)

The evidence would show a wrong and damage committed to the plaintiffs, though not a criminal wrong to the public, and such a wrong as would entitle him to an action at common law had no statute been passed on the subject.

If no private right of the plaintiff has been infringed, he has nothing to complain of, if it has the importance of a by-law (if not otherwise justifiable becomes material.) The statute does not say the municipalities may raise, lower or alter roads, &c., leaving it to themselves to execute such authority their own way, but merely enacts that they may pass by-laws for such purposes. It is a legislative power that is conferred, not an executive one. They may by law require the work to be done; they are not empowered to execute such work themselves *ad libitum*, without any previous by-law on the subject. The protection of the corporation, as well as of private rights, seems to require a strict adherence to the requirements of the law. If by-laws are passed, they protect the corporation until quashed, and exonerate those who execute them from responsibility; they protect individuals when they are entitled to claim compensation under them, or if not, they enable them to apply to be heard against them, if apprised of their being proposed, or at all events move to quash them if they authorise an injurious violation of their rights to a degree rendering them illegal. But if the municipal council can execute public works of the kind without by-laws, they may involve the corporation in responsibility, civil or criminal, for debts or for tortious acts incurred or committed though the members of the council, their officers or servants, or they may inflict private injuries with impunity. Suppose in this case what was done amounted to a public nuisance, instead of a public benefit, could the defendants be indicted? I suppose they could under the 13 & 14 Vic., cap. 15, if not otherwise. It is contended that corporations are not liable on contracts entered into by their officers on their behalf, even though executed by the contractor, because not made under the seal of the corporation. If so, upon what principle can they justify such acts when injurious to individual corporations except on the same ground, that of non-liability, because not authorised under seal, but they may be liable for torts not so authorised. If one street may be raised or lowered to the positive damage of one or more householders inhabiting the line of such street, so may all, and if by one municipality so by all; and it would follow that the county council, as well as those of cities, towns and villages, might change the condition of the roads under their jurisdiction, &c., without by-laws. I cannot think this was intended. If by-laws may be dispensed with so may penal contracts, and in the absence of an explicit by-law, followed by a sufficient contract and specification, what is to be the test of what the municipality directed to be done, as compared with what their contractors, officers or servants, may have done? And a dispute on the point arises in this very case, although there was a specific contract. The plaintiff complains of two principal descriptions of injury: 1st, the removal of the natural support to the soil of his close, whereby much of it has slid or fallen away; 2nd, the rendering of access to his premises much more inconvenient, and rendering it necessary for him to incur expense to make them accessible at all on those portions which butt upon King street and the other streets that have been lowered injuriously to him, and the evidence went to show damages in both respects.—14 & 15 Vic., cap. 109, sec. 35, and Sch. A. No. 21; The Queen v. The Eastern Counties Railway Co. (2 Q.B. 347); Regina v. The Manchester and Leeds R. W. Co. (3 Q. B. 528.)

My present impression is, that whenever the acts to be done by the municipality will invade private rights, which may be so invaded legally through the medium of by-laws, and for which, if not legalized by the statutes creating, or the powers conferred upon, the corporation, the party injured may maintain an action against the wrongdoer, a by-law is essential to enable the municipality to justify the act, unless it can be shown to be a repair of the highway, &c., under the 13 & 14 Vic., cap. 15.—Goezter v. The Corporation of Georgetown—6 Wheaton, S. C. U. S., Marshall, J., 1821.

Whether the work done constituted a repair or not, does not appear to have been distinctly raised at the trial. It formed a mixed question, and the jury seemingly considered it fairly within the statute as a repair of the road. I have not been able to satisfy myself that it can be in strictness regarded as such a repair, but that it was rather an alteration or improvement in the condition of the road within the discretion of the defendants to make through a by-law, but not incumbent upon them at the peril of the prosecution under the 13 & 14 Vic., cap. 15. When I had got this far it occurred to me, whether the defendants could give the special matter in evidence under the statute 14 & 15 Vic, cap. 51, and if so, whether they were not entitled to notice of action, in which event a new trial, if granted, could be of no ultimate avail to the plaintiff; and at the request of the court the case was spoken to again on this point, and the course taken at Nisi Prius to be further considered. If not within the protection of this statute, I do not see under what authority the defendants could be permitted to give the special matter of defence or justification relied upon in this case in evidence without pleading it specially, and they refer to no other statute but the one last above mentioned. If, on the other hand, they could give the special matter in evidence under the plea of not guilty per statute, referring to that act, they would be entitled to notice of action. It is said such an objection was not taken at the trial, but the learned judge who tried the cause ruled that they were not within the statute at all. They did however rely upon it in their plea, and whether entitled to do so was raised as a question in relation to the special matter of defence; and if a new trial was had, the other objection of want of notice would of course be made. It is material therefore to decide the point.

The 12 Vic., cap. 10, sec. 5, No. 8, enacts that the word "person" shall include any body, corporate or politic, or party, &c., to whom the context can apply, according to the law of that part of the province to which such context shall extend.

The P.S. 7 Wm. IV., cap. 14, secs. 2, 11 and 19, contains a similar provision—See 12 Vic., cap. 81, sec. 22.

The 14 & 15 Vic., cap. 51, sec. 2, enacts that no writ shall be sued out against any justice of the peace, or other officer or person fulfilling any public duty, for anything by him done in the performance of such public duty, whether it arises out of the common law, or is imposed by act of parliament &c., unless notice in writing be given at least one calendar month, &c.

Sec. 3 provides for tendering and pleading tender of amends.

Sec. 5, For pleading the general issue, &c.

Sec. 6, For payment of money into court without leave of a judge.

Sec. 8, For limitations of actions to six calendar months after the *act committed*, &c.; also 16 Vic., cap. 180, sec. 16.

The Court of Queen's Bench in the case of Brown v. The Municipal Council of Sarnia (11 U.C.Q.B.R. 215) held that the word "person" did not extend to municipal corporations, &c.

The 7 Wm. IV., cap. 14, secs. 14 and 19, is material to be remembered, as also 3 Wm. IV., cap. 7, sec. 12, and cap. 63, sec. 28, as to service of process, &c.; and 12 Vic., cap. 56, sec. 31, 12 Vic., cap. 81, sec. 32; 13 & 14 Vic., cap. 14; 12 Vic., cap. 81, sec. 155; 14 & 15 Vic., cap. 109, sec. 35, and sch. A., No. 21, ib. cap. 51, sec. 20; I. S. 8 & 9 Vic., cap. 87, sec. 117.

Reference may be made to Fisher v. Thames Tunnel Railway Co.—5 Dowl. 773; Boyd v. Croyden Railway Co.—4 Bing. N. S. 669, S. C. 6 Scott 46; The Kennet & Avon Canal Co. v. The Great Western Railway Co—7 Q. B. 825; I. S. 11 & 12 Vic., cap. 63, sec. 139; Davis v. The Mayor of Swansea—8 Ex. R. 808; I. S. 5 & 6 Vic., cap. 89, sec. 52, 9 Vic., cap. 48, sec. 18; Kent v. The Great Western Railway Co.—3 C.B. 714; Parker v. The Great Western Railway Co.—7 M. & G. 253; Palmer v. The Grand Junction Railway Co.—4 M. & W. 749; Carpue v. The London & Brighton Railway Co.—5 Q.B. 747; Eastham v. Blackburn Railway Co.—9 Ex. 758; Jeffries v. Williams—5 Ex. 792.

As to the time of the act or fact committed, see Lord Oakley v. The Kensington Canal Co.—5 B. & Ad. 138; Cane v. Chapman—5 A. & E. 647; Roberts v. Reid—16 East. 216; Gillon v. Boddington—1 C. & P. 541; Marsh v. Boulton—4 U. C. Q. B. R. 354; White v. Clark—10 U. C. Q. B. R. 490; and cases referred to in Croft v. Town Council of Peterboro', ante p. 141.

I cannot but think the defendants entitled to the protection of the statute 14 & 15 Vic., cap. 54, if liable to be treated as wrongdoers in a civil action like the the present and under the present circumstances. The reasons and views stated by Mr. Justice Burns in delivering the judgment of the court of Queen's Bench are of great force, and it is with much hesitation that I adopt an opposite conclusion. My impression is, that the defendants were entitled to notice of action notwithstanding the argument, that if so, they would have been equally entitled to it whether a by-law had been passed and afterwards quashed, in which event the action might be outlawed before steps could have been taken to quash the same. By-laws, as affording protection to those enforcing or acting under them, bear analogy to convictions, which afford a like protection until quashed; and yet justices and others having acted under them are entitled to notice of action, and such action is limited in point of time.—16 Vic., cap. 178, sec. 26; 16 Vic., cap. 180, secs. 2, 7, 8, 9, 10.

If a by-law had been passed, no action could have been brought without its being quashed a full month before such action. In such an event the municipality would of course know, and have notice by the statute already mentioned, that no action could be brought within a month, and that they might tender amends in the meantime. But where there is no by-law, and where the act is done under the 13 & 14 Vic., cap. 15, I do not see why the municipal corporation (if liable at all) should not be entitled to notice of action, coming, as they would fully, within the spirit of the protecting statute.

The individual members of the municipal council, when acting *bona fide* in the execution of by-laws or other public duties, would be entitled to notice; and if the members acting severally would be so entitled, on the same principle the corporation would be entitled when the members of council acted collectively in relation to the subject matter, if (as already observed) the corporation be liable at all for the tortious acts complained of. I also consider the defendants entitled to give the special matter in evidence under the general issue; and although the learned judge at *Nisi Prius* held a contrary doctrine, the special matter seems to have been admitted, and the whole merits of the defence gone into, and the learned judge held, that the defendants had power under the 12 Vic. cap. 81 to make and improve roads and streets, and that if the jury found their acts limited, as they contended and endeavoured to prove, though it rendered access from plaintiff's close to the highway difficult or more limited than before, &c., so as to cause damage in law and in fact, yet such damage was not recoverable; wherefore, if the defence was established on such principles, the jury were told to find for defendants, but to find for plaintiffs if the work was done as he contended, &c.; the distinction being between the work expressly contracted to be done on the defendant's part and what was actually done in excess thereof by their contractors. I am not able to subscribe to this doctrine to the full extent. If what was contracted for came within the 13 & 14 Vic., cap. 15, as a necessary or incumbent repair of the roads only; or, if a by-law, based upon previous survey or professional report of their surveyor, had authorised and governed the contract for altering the level of the road beyond mere repairs, I agree that the defendants would not be liable for deficiencies or excess in the execution of the work not authorised or directed by them, but those only who transgressed and inflicted the damage upon the part of plaintiff extra the contract.

But, when the defendants, without being required by the statute or authorized by a by-law, direct the performance of works in the *bona fide* execution of which their officers, servants or contractors, commit actionable injuries to the property of others, I apprehend they would be liable. If the agents or contractors, wilfully and of their own wrong, executed what the defendants directed or required, it would be otherwise. As applied to this case, I am disposed to think the defendants liable for the consequences of the work done on King street, but I do not think them liable for independent acts in other places or upon other roads, if not embraced in those contracts, even though verbally sanctioned irregularly by one or other of the aldermen in casual conversation, and not sitting or acting in council or under the orders thereof. I am of opinion, therefore, that in my view of the legal rights and liabilities of the parties, there was, strictly speaking, misdirection in reference to the work done upon King street and its injurious consequences to plaintiff's premises, both as to withdrawing support from the soil and destroying access to and from his lands and house &c., by such road or highway. At the same time, however, since there was a special contract on the occasion showing all that the defendants desired to have done; and as what they so required might have been legally authorised by the formal passing of the by-law, in which event the plaintiff would be clearly without redress in this form of action; and as the omission of a by-law was probably a mere inadvertence; and as the jury seem to have been of opinion that the defendants did not, in what their contract required, cause anything to be done otherwise injurious to the plaintiff than as the lowering of the road rendered access to his house and grounds more difficult and entailed expense upon him in rendering it accessible, and as to such lowering that it was not only necessary to admit the grading and macadamizing the road to the great improvement of the public way, but fairly within the statute 13 & 14 Vic., cap. 16, as a repair of the road; I am not prepared to hold that after the whole merits were gone into and fully discussed and submitted to the jury, we are bound to set aside the verdict for misdirection under the circumstances in evidence, and in the way it was left to the jury, merely because a formal by-law was not passed, upon the absence of which alone the plaintiff is at last obliged to rely in support of the action. If there had been a by-law, I do not think the defendants could be held liable for excess, if any, beyond what the by-law and contract prescribed; and the defendants having acted in good faith for the improvement of the public highway, and in the discharge of a public duty, though, as it seems to me informally and injuriously to the plaintiff; and as the jury, upon evidence more or less conflicting, found for them; there is much to be said in favour of letting the verdict rest now, even if I did not think the defendants entitled to the protection of the 14 & 15 Vic., cap. 4; upon which, however, my opinion is to be understood as more especially founded. I mention this, because of the impropriety felt of not expressing myself conclusively upon the other important and difficult question which the case has presented.

If the plaintiff had shown that what the defendants did was a public as well as a private nuisance, the complexion of the law would have been materially altered—for then, instead of being a repair or improvement of the road, it would have been the reverse, and they would have exceeded the just exercise of their powers, even though a by-law had been passed, and could have claimed no protection under the 15 & 16 Vic., cap. 15; and instead of an informal exercise of their legal power, it would have been a positive violation of their duty.

As to the last count, the verdict was certainly against the direction of the court at *Nisi Prius;* but the merits of this action did not turn upon that count—all the evidence related to the prior counts; and if the defendants could justify themselves under those counts, the plaintiff would not be entitled to apply the facts or causes of action to this count. I look upon it therefore as not involving the merits of the case, and not a case sufficient to require us to set aside the verdict, for under it, had the jury found for the plaintiff, the damages could not have been expected to be more than nominal.

McLEAN, J.—The passing of a by-law, without anything more, can never raise, or lower, or improve a street; the corpo-

ration, after all, must act ministerially in carrying out by-laws; their powers are ministerial as well as legislative, and when the law imposes upon them the duty of making, improving, and keeping in repair the public highways, they require no by-laws, as it appears to me, to enable them to do what is enjoined upon them as a duty, and for not doing which an action could be maintained against them: I have already expressed this opinion in the suit of *Croft v. The Town Council of Peterboro'*, when that suit was before us on a motion to set aside a non-suit. The proceedings of the defendants, of which the plaintiff complains, have been in strict accordance with the views expressed at that time, and I have therefore no difficulty in joining in a judgment that this action cannot be maintained, without reference to the other grounds which the learned Chief Justice has so fully and ably stated in his judgment. I must however state, that with respect to these also, I concur in the view which he has taken. In the case of *Brown v. The Municipality of S[illegible]nia*, I ruled at Nisi Prius that the defendants were entitled to a notice of action; and though that ruling was held to have been erroneous, I have not been able to satisfy myself that it was so.

I think the plaintiff cannot succeed in this action, and that the rule must be discharged.

RICHARDS, J., concurred.

Per Cur.—Rule discharged.

REVISION OF ASSESSMENT.

IN RE THE GREAT WESTERN RAILWAY COMPANY.

What does the "Land occupied by the road" consist of?—What is the "Road" or "Roadway"—How assessed—Fixtures and erections, &c., "part of the realty."

(The G. W. R. Co. in appeal from the Court of Revision of Windsor, Essex.)

The whole property in Windsor was assessed at about £120,000, of which the property of the Company was assessed at £78,000. The Court of Revision confirmed the assessment.

On the hearing, some errors in assessing land *not* the Company's were admitted, and also, that £3,925 for property *other* than the road was rightly assessed. The real difficulty was that the assessors *first* valued the "*land*" *only* by itself, being a strip partly on the banks and over the water of the Detroit River of 5,000 feet by 200, occupied as a Terminus, Works, and approaches thereto, according to the average value of *land* in the locality, on a scale supposed to to be nearly of the value of the improved and unimproved land there, considering the whole length and width taken as "*land*" occupied by the "*road*" at an assessment price per foot front by the depth from Sandwich street towards the channel bank, mostly filled in and graded over shallows to deep water, as follows: £20 per foot front for the first 1000 feet from Ferry up stream, £15 for the next 1000 feet, £10 for the next 1000 feet, and £7 10s. each for the next 2000 feet, which gave a *mean* of £12 per foot front, making £60,000 for 5000 feet front. They then valued the fixed erections on this *same* land separately at £18,000, which, added to the *first*, made £78,000. This, in cases of individuals, would be right under the 3rd section of the statute. But the 21st section virtually provides as to Railways, that the "*land*" occupied by the road only shall be valued according to the average value of land in the locality.

The "*land*" occupied by the "*road*" (which latter is the *roadway* mentioned in the same section, and is, when in working order, "*the*" "*railway*,"—which, by 14 & 15 Vic., cap. 51, sec. 7, means *the railway and works*, &c.,[a] in contradistinction to the *mere land* occupied in the first instance to build the railway upon) is the *space defined* in some Railway Acts, and where not so defined, is the reasonable length and breadth of land, and land covered with water, allowed to be occupied under any Act for the purposes of the road or roadway, also called *railway*, of which, in this and most other instances, the Terminus is a part—it *here* forming a portion of the means of transit from Canada to on and over the River Detroit,[b] to connect with the railways in the United States, and without which connection this Railway would be of little use or profit; and includes fixed erections on and for this road with the tracks, and approaches *to* and *through* this land used for Terminus—and it is to be valued and considered as *land* occupied by the *road* only—and is not to be assessed as *land* and *erections* separately or together, as in case of individuals. The land only, by force of the 21st section, is to be valued by the average value of land in the locality—but which land occupied by the roadway does not include the extra widths or pieces of land occupied for other purposes than those necessary and convenient to the railway; in other words, it is the *mere land* occupied by the railway and its appurtenances, of which the actual value is to be ascertained for the purposes of taxation.

The Railway and its appurtenances, built on this *land*, is not to be assessed, *though the land is.*

This *land*, once *mostly* under water *but reclaimed* by filling in and grading at great expense, taken by the assessors as "*land*" *occupied by the road*, seems properly so considered, as it really was taken for the main and adjoining tracks, offsetts, switches and turn-tables, being fixed machinery and works appertinent thereto, erections and approaches without which the Railway could not be worked. Though the average width on the line of route is but 110[c] feet, yet the General Railway[d] and other Acts show what would be necessary and reasonable, by allowing at particular points on land or water *more* to be taken than the ordinary 90 feet, namely, 450 by 600 feet for offsetts, depots, stations, fixtures, switches and turn-table, &c., or where the graded road has to be lowered or raised more than five feet; and this Company not being restricted in this respect could hardly be considered unreasonable in taking (or rather *making*) a *less* width—but making it up, as it were, in length at this point.

As to the value of this *land:* The Company thinks its own valuation of the whole assessable property here nearer the truth, being less than £40,000; but the Assessors are respectable men, and though "*of* the locality" are sworn to assess to the best of their skill and ability, and could not well do otherwise than be something guided by prices on the spot, and nothing but time will tell if it is an over or under valuation; but which, as far as at present can be seen, does not appear to be out of the way, as compared with the quoted value of land adjoining at £12 per foot front by the considerable depth occupied, and which, though almost entirely land *made* by the Company, has still to be valued by the average value of the adjoining land—though that land acquired much of its high value by the enterprize of the Company—the Assessors having apparently no right (though perhaps fair enough if they had) to take into consideration the disadvantages incurred, or the benefits conferred, by the Railway operations there, as a reason for raising or reducing the assessable valuation of the property, which mainly caused either the disadvantage or benefit, as Railway Arbitrators have for raising or reducing the price of the same land when purchased for the same purpose, but which the Statute in some degree provides for by the 21st section in another way, in directing the *mere land* to be valued by itself for assessment purposes.

[a] 15 Vic., cap. 89, sec. 18.

[b] 8 Vic., cap. 86,—14 & 15 Vic., cap. 73.

[c] This 110 feet would naturally (same as the 90 feet) be taken as the land occupied by the road in the first instance, for the general line of route, varied by greater widths, as required at some points; but it has been said, that the *more* space occupied by the *gradual* bearers, ties, rails, and track laid down, is such "land" only, and that all beyond that is "other" space than the roadway: this would seem a rather *narrow* construction of the statute, not warranted by the general language of the Railway Acts.

[d] 14 & 15 Vic., cap. 51, secs. 7, 9 & 10—cap. 73, sec. 24—cap. 74, sec. 1; 16 Vic., cap. 28, secs. 4 & 18.

Therefore the present valuation of the real property of the Company occupied for road or roadway will be allowed to remain at £60,000. And the value of the Company's real property, other than that occupied by the road or roadway, will be reduced from the sum of £18,000 to the sum of £3,925, making £63,925 as the whole assessable value of the Company's property, instead of £78,000.

TO CORRESPONDENTS.

T.H.—Many thanks for the suggestion. If we can make room the programme shall appear, but we think the Officers of the Institution should see the necessity of publishing it as an advertisement.

M.P.E.—Always glad to hear from you: matter sent is to the point.

H.—Papers returned to your address.

J.J.—We had already determined on the course suggested.

TO READERS AND CORRESPONDENTS.

All Communications on Editorial matters to be addressed to

"The Editors of the Law Journal,"
Barrie, U. C.

Remittances and Letters on business matters to be addressed (*prepaid*) to

"The Publishers of the Law Journal,"
Barrie, U. C.

Whatever is intended for publication must be authenticated by the name and address of the writer, not necessarily for publication, but as a guarantee of his good faith.

Matters for publication should be in the Editors' hands three weeks prior to the publication of the number for which they are intended.

NOTICE.

The *Upper Canada Law Journal* is not liable to postage. The Terms are 20s. *per annum*, if paid before the 1st of March in each year—if paid after that period 25s. The Scale of Charges for

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Card, for one year, not exceeding four lines	£1	0	0
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THE UPPER CANADA LAW JOURNAL is published at the *Barrie Herald* Office, Dunlop-Street, Barrie.

THE LAW JOURNAL.

OCTOBER, 1856.

DECISIONS ON THE COMMON LAW PROCEDURE ACT.

The recent Act, and the orders of Court made by the Judges thereunder, having effected such a thorough change in procedure, it became obvious that the alterations made, by the Statute and Rules, involved are construction of the practice of the Courts, and that every decision would tend to this end.

Early information of the cases decided is most important, for the sooner the decisions are known and acted upon, the sooner and firmer will the practice be settled.

A great variety of cases will now arise under the new Practice, and be disposed of in Chambers; through the ordinary channels of communication these cases would be for many months unknown to the country practitioners, and imperfectly known to the greater number of those resident in Toronto; added to this, *viva voce* decisions could not be expected to be produced under existing arrangements.

The Practice in the County Courts must henceforth conform to the Practice of the Superior Courts, and numbering more than thirty, it is extremely desirable that these tribunals should have all the assistance, that is to be derived from the light which the decisions in the Superior Courts will throw on the new Procedure.

These considerations urged upon us the necessity for procuring full Reports of every important point decided in Chambers under the new Act and Rules,—not only those cases in which the Judges give written decisions, but also those wherein the decisions of the Judges are pronounced orally.

We are happy to inform our readers that we have made arrangements for obtaining Reports of this kind, and that, in conjunction with Mr. Harrison, we have secured the assistance of a gentleman of experience in Reporting, and, as will be seen by the Reports in the present number, fully equal to the undertaking.

The Reports will be for this Journal, and for "Harrison's Common Law Procedure Act," and will appear in our pages with as little delay as possible.

Mr. Harrison is desirous to make his new work as valuable as possible, and desiring ourselves to lose no opportunity of making the *Law Journal* more generally useful to the profession, the arrangement referred to has been completed.

The Reporter, J. Leach Talbot, Esq., Barrister-at-Law, will attend Chambers regularly.

We trust this intimation will be a sufficient inducement to professional men generally, out of Toronto as well as in Toronto, to give in their names as subscribers—for a large addition to our subscription list will compensate for the increased outlay. If the Profession, as a body, will not support the only Law Periodical in the country, we must look to other quarters to sustain us, and surrender our pages more exclusively to subjects of special interest to them. With a liberal support

from the Profession, we can make the *Law Journal* acceptable to all—Lawyers and Laymen.

New subscribers will be furnished with back numbers of Vol. I and II, or those more desirous of commencing with the July number will be charged 12s. 6d. for the numbers up to December inclusive.

PROCEEDINGS IN THE INSOLVENT COURT.

In the August number "P. M." asks certain questions in relation to the Insolvent Debtors Extension Act of last Session:—1st. In what office or Court the petition is to be filed—what Clerk is to register the proceedings? 2nd. Has not the County Judge the power to appoint a Clerk, whomsoever he pleases? 3rd. What are the costs and disbursements to be paid and received? 4th. If there be no assets belonging to the estate of the petitioner, by whom are they to be borne and paid? 5th. In proceedings under this Act, in a new county, what orders and rules are to govern the proceedings where the County Judge has passed none? 6th. Do fees "to the Judge" go to the Fee Fund?

We have not had time to examine the question ourselves, but subjoin answers from a well informed quarter, which, in the hasty examination we have been able to give the subject, appear to us to be correct.

1st. In "the Insolvent Court for the County," and the Clerk thereof is to register the proceedings.

2nd. The appointment, doubtless, would rest with the Judge, but it would be obviously proper to appoint the Clerk of the County Court—whose office must be kept regularly opened, and who is already under bonds to the Crown for the due collection and accounting for the fees belonging to the Fee Fund—and this has been generally acted on.

3rd. The costs are regulated by order of the Court of Queen's Bench. The table of costs was published in the last number of the *Law Journal*.

4th. A party who has no assets seems scarcely to come within the meaning of the Act; but there need be no difficulty as to fees, as the must be paid on or before each proceeding.

5th. In May 1856 the Judges of certain Counties agreed in submitting certain Rules which were approved of by the then Vice-Chancellor. In a new county the Judge should, for uniformity's sake, obtain the approval of similar Rules for his own County; (a set of Revised Rules for general adoption would be advisable.) In the absence of Rules the Judge must of course be governed by the general principles of law, as applicable to the Insolvent Courts.

6th. Fees mentioned under the 1st head in the Rule, (of Q.B.) Hil. Term, 9th Vic., when the duty is performed by a County Judge, belong to the Fee Fund, and must be accounted for in like manner as other fees: whatever doubt may have existed before is set at rest by the 21st sec. of the County Courts Act.

CHAMBER REPORTS.

We have been obliged to postpone editorial matter to make room for the recent important decisions on the C. L. P. Act. Once for all, we would say to ordinary correspondents that communications on editorial matters must be addressed to "The Editors of the Law Journal," and not to any gentleman connected or supposed to be connected with the *Journal*. This rule must be observed to *secure attention* to communications. Business communications as heretofore should be addressed to the publishers.

THE ANSWER TO "WHO IS THE *IRNERIUS?*"

(Received too late for insertion in the Sept. No.)

We willingly give a conspicuous place to the following letter, and leave it to speak for itself.—The Law Clerk, it is just possible, felt a little nettled by V.'s badinage, and touched fairly enough the same chord, but it has not prevented him giving all the information desired. The pith of the article of the article referred to is in these words: "But seriously, we think such notes objectionable, an innovation on settled forms, &c.; we think some explanation is due to the profession and the public." The Law Clerk candidly enough says, "not finding precedent I made one, and sacrificed routine for the public good." He has evidently not graduated in the "Circumlocution Office," and nearly thirty years in the public service has certainly not induced any lethargy of action in the conduct of the Department, over which he has so ably presided for, we believe, nearly sixteen years.

As suggested in the former article, the Law Clerk has *shown* that the added matter "was intended to

be useful, and gave the person who prepared it a good deal of trouble," and that it *is* useful we are prepared to admit.

It 'would be ungracious to pursue the subject further in the aspect in which it now presents itself, and we will only say, that we also think that the Notes (we will not say *gloss*) upon the Statute Book could not properly "be allowed to pass unnoticed."

My Dear Mr. Editor,—You behaved so courteously and kindly to me, a stranger, in the matter of my Index to the Statutes, that I really cannot refuse you or your correspondent "V." in your August number, any information in my power. I am the author of the Notice and Notes to the Law Procedure Act to which "V." objects, but as I also suggested to the Attorney General, through Mr. Harrison, the "memorandum" which "V." approves, and upon which the Notes are founded, I venture to hope that "V." will set the one against the other, and forgive me. Three-fourths, at least, of our Act are (most wisely) taken *verbatim* from the two English Acts, upon which a great number of decisions have been given by the English Courts, and which have been commented upon by Kerr, Chitty, Stephens, Francis, Finlason, &c., in England, with the benefit of those decisions. Our Act is as yet without commentary by Court or author, and it must remain so for some time at least, whilst at the same time it must be acted upon by every Practitioner throughout Upper Canada. But the clauses of the two English Acts are necessarily intermingled in ours with each other, and with provisions exclusively Canadian, and it seemed to me that the best short commentary on our Act, and indeed the very foundation of all commentary upon it, would be such Notes as should show in a compendious form and upon the face of the Act itself—1. The changes of the English Acts corresponding to those of the Canadian one; 2. The clauses of the Canadian Act corresponding to those of either of the English ones; 3. The clauses of the English Acts not adopted in our Act. Such Notes I prepared, and, with the assent of the Gentleman above mentioned, I appended them to the copies of the Act printed by the Queen's Printer, adding a very short notice, stating, I think pretty clearly, the fact, that while the clauses were taken from the English Acts, as nearly *verbatim* as circumstances would admit, yet that there were necessary changes in some cases, which made a comparison desirable before using the English decision or commentaries on any clause. Far from stating an opinion as "Gospel," I incited examination in every case and furnished the readiest means of making it. I was sorry that I could not insert on the Act printed in its place in the Statute Book all the information I gave in the copy printed in pamphlet form; but the side notes in brackets took no room and cost the public nothing, nor did the foot note add more than a dollar or two to the Printer's Bill, and I thought it would be wrong under these circumstances to let ten thousand copies be circulated at the public cost, without the information which seemed to me to be essential to their utility and the convenience of the Profession. Not finding a precedent, I made one, and sacrificed routine for the public good. I assure you there is no *coup d'etat* concealed in the notes, and the Bureau of Agriculture had nothing to do with them. They are as innocent as the side notes, the Index or Table of Contents, of all designs against the Constitution; and if there be any who can be misled by them into despotic notions of interpretation, it seems to me that he must, in the words of the Poet,

"—— have a most uncommon skull":

he will hardly be fit for an Upper Canadian Lawyer. I admit that "V." has good authority on his side against the use of the word "original" or "new," but I have authority on my side too, for I find it applied in the same way in the "memorandum" which "V." lauds; and as I perceive he has a wholesome respect for professional rank, I propose that he and I withdraw, and leave the author of the "Memorandum" to argue the point with the author of the Proverbs. I think that in this case cause may be shown against making Solomon's Rule absolute.

I am, my dear Mr. Editor,
Your and "V.'s" obed't serv't,
The L. w Clerk.

HARRISON'S C. L. P. ACTS.

We direct attention to the notice from the Publisher, in the advertising columns, respecting this work.

Had the author confined himself to the usual brief method of noting Statutes, his work would have been completed before now; but he has gone thoroughly into his subject, and instead of notes has written a *Treatise*. We saw, after examining the first thirty pages, that he *must* issue in parts, and we think he has acted wisely in yielding to this necessity. Most of the best works on the Practice of the Law are issued in parts in England, and in that shape they are more acceptable to the Practitioner. The early sections embrace the practice, for the most part, up to the trial, and it is better that they should be at once in the hands of the subscribers, rather than be delayed till the work is completed.

U. C. REPORTS.

Owing to the kindness of Mr. Robinson, which we have had occasion so often to acknowledge, we are in possession of some very recent decisions in the Court of Queen's Bench; they have arrived too late for the present number, and are not all of the class we are accustomed to publish in full.

The important case of appeal in the matter of *Gill, plaintiff, and Jackson and others, defendants*, will be given at length in the November number. The following extract, from the Judgment of the Chief Justice, shows an important principle to be kept in view in considering school questions:—

"But independently of the question whether the Local Superintendent's decision upon the point, can be thus incidentally overruled in an action, the learned Judge left out of view that the Trustees who imposed and received this rate, were the Trustees *de facto*, and that until they are removed, the acts which they do in the ordinary current business of Trustees must of necessity be upheld, or everything would fall into confusion."

Regina vs. The Municipal Council of Perth, is upon a point not before settled, and of very general importance. This case will also be published in full; in the meantime we copy Mr. Robinson's head note:—

"Owners of land upon a highway have no claim to compensation for anything done by municipal corporations in the proper exercise of their powers, within the line of road as originally laid out.

The applicant owned land, with dwelling-houses and a foundry thereon, fronting upon a public highway. The municipal council passed a by-law for making, grading and gravelling this road, and the effect of the work was to raise the road along the applicant's land from five to twelve feet.

Held, that he was not entitled to an arbitration under 12 Vic., cap. 81, sec. 105, as amended by 16 Vic., cap. 181, sec. 33, to determine the amount of damage to be paid to him, the injuries not being such as could give him any right to compensation."

McMurtry vs. Munro, will be specially interesting to the country practitioner: the note will serve to show the point decided, until we can publish the case at length:—

"Appeal from a County Court. The declaration contained three counts, claiming each £50, but the damages were laid only at £50, and the particulars were for account rendered £55 15s. less by cash £22 10s.—£33 5s. At the trial the plaintiff relied on the count on account stated, in proof of which he produced a draft by himself on defendant for £55 15s. 1d., 'being the balance in full of your account'; and proved that when presented, defendants acknowledged the amount to be correct, but refused to accept it, as he was afraid he would be sued. A verdict having been found for £34 3s. 3d.:

Held, that the claim was within the jurisdiction of the Co. Court; and *Semble*, that the evidence of an account stated was sufficient."

The following cases will also be found very interesting; as before, we copy Mr. Robinson's pithy and terse head notes:—

Taylor vs. Jarvis: this is a most important decision:

"A plaintiff suing one partner alone upon a note made in the name of the firm, *and for a partnership debt*, cannot under his judgment, and execution against such partner, sell the goods of the firm, except in cases of dormant partnership.

A. having a note signed W. B. & Co., and being ignorant of the existence of any other partner, sued W. B. alone and obtained judgment and execution, under which the Sheriff seized the partnership goods. B. afterwards obtained an execution against W. B. and his two partners, who, it appeared in reality, composed the firm. Both claims were for partnership debts, and the property of the firm was not sufficient to satisfy either in full.

Held, that B.'s execution must prevail."

LONDON GAS COMPANY VS. CAMPBELL.

A Gas Company, incorporated under 16 Vic., cap. 173, by resolution of the directors, appointed certain calls on their stock to be paid on particular days named, but by the notices published they were made payable on different days. The defendant had written to the Company enclosing his note for four of the calls, saying, that for the balance he would send his note soon after, and requesting them to accept this offer, as he had been absent in Europe, and had no knowledge of any of the calls: the Company however declined, and brought this action.

Held, that the calls were illegal, being unauthorised by the resolution, and that the defendant was not estopped from disputing them.

FARLEY VS. GILBERT ET AL.

To an action on a note against two defendants, usury was set up, the plea being that plaintiff lent defendant £200, payable in a year, and that the note (for £250) was given therefor. The evidence showed that the loan was to one defendant only, and that the other signed the note merely as his surety, and was no party to the usurious contract.

Held a fatal variance, and that plaintiff must recover.

GRANT VS. LYNCH.

"A. rented a house to B. by lease, dated Sept. 1st, 1854; B. took possession, and on the 17th of May following entered into an agreement with A. for purchase; 'the one-fourth of the purchase money to be paid by approved endorsed note at three months from date, the remainder to be paid in four equal annual instalments, with interest on the amount unpaid at each time of payment—agreement to be drawn and possession given on the 1st day of June next, from which time payment of instalments commences.'

An agreement was prepared before the 1st of June, but was not executed, owing to a misunderstanding about the note, B. not being prepared with such a note as A. would accept.

Held, that the lease was not determined, and that A. might distrain for his rent.

The lease is set out below, and was clearly held to be a present demise, not merely an agreement for lease."

BARTLET VS. THE MUNICIPALITY OF AMHERSTBURGH.

"The defendants, a municipal corporation, having called for tenders for making plank side-walks in December, 1854,

the plaintiff sent in an offer, which the then Council passed a resolution to accept; and as they were going out of office and wished to leave the work completed, several of the members pressed the plaintiff to proceed. He had purchased materials, and was going on; but in January, being told by one of the late Council that it would be prudent to have an acceptance in writing, he wrote to the Council and received an answer refusing to sanction the contract, and telling him that if he went on it would be at his own risk. He then desisted and sued the corporation—another person having in the meantime been employed by them to finish the work. The jury having found the value of the work, and the damages sustained by the plaintiff from not being allowed to finish the job:

Held, that he could recover the former sum, but not the latter, as there was no contract under seal.

ANDERSON VS. MARRIOTT.

Dower.—The tenant having allowed judgment to go by default, the defendant entered a suggestion of demand made before action brought, to which the tenant made no answer, and a *venire* was awarded, upon which the jury found that such a demand was made.

Held, that this was a *trial* within the meaning of the 5th sec. of 13 & 14 Vic. cap. 58, and therefore that the demandant was entitled to costs.

HARRIS VS. MCLEOD AND FRASER.

H. made a note payable to L. or order, and took it to M., requesting him to endorse it for his accommodation. M., who was in partnership with the other defendant, endorsed it in the name of the firm, but without his copartner's sanction or knowledge. L. afterwards endorsed, but without recourse; and the plaintiff took it with knowledge of the circumstances. The jury found for the plaintiff.

Held, that the verdict was wrong, for M. could not bind his partner by endorsing for such a purpose, and the plaintiff took the note with knowledge of the facts.

The defendant's counsel, at the trial, desired to ask the plaintiff's attorney, what his client told him about the note when he gave instructions for the suit.

Held, that such evidence was rightly rejected.

LATE CASES IN CHAMBERS.

Chamber cases on the Common Law Procedure Act are coming in so fast and so numerously, that in order to keep the Profession properly "posted up," we give notes of several received too late for publication in this number. They will appear in full hereafter.

HALL V. BOWES.

Rule 20 does not debar a Judge from ordering on motion such further particulars as he may think fit.—Per Richards, J., September 19, 1856.

ROSSE V. DOLSON.

Plea of *non assumpsit* to a promissory note struck out under the 101st section of the C. L. P. Act.—*ib.*

DAVIS V. CARRUTHERS.

Plaintiff allowed to amend irregularity in writ, (plaintiff's claim or attorney's name not being endorsed thereon) on condition of re-service.—Per Burns J., Sept. 22, 23.

WARREN V. MUNROE.

A summons *only* will be granted on the first application for an injunction under the 286th section of the C. L. P. Act.—*ib.*, Sept. 24, 25.

GOLDBURGH V. LEESON.

"Not guilty" and justification cannot be pleaded together.—*ib.*, Sept. 25.

CAMERON V. BRANTFORD GAS COMPANY.

Section 193 C.L.P. Act does not apply to corporations.—*ib.*

GAMBLE V. WHITE.

Amendment of a writ of *Ca. Sa.* granted on payment of costs, without setting aside arrest of defendant under it.—*ib.*

BARROW V. CAPREOL.

Between July 1st and August 21st, 1856, arrest on a bailable writ and proceedings thereon were valid under 2 Geo. IV., cap. 106, 5 Wm. IV., cap. 3, sec. 1 and 2, and 5 Vic., cap. 6, and not under 8 Vic., cap. 48, sec. 44, which was only in force until the end of the session, (July 1st); nor under C. L. P. Act, which did not come into operation till August 21st.

The affidavit on which such writ was sued out did not state that the writ was not required from any vexatious or malicious motive whatsoever of defendant towards plaintiff.

Held, only an irregularity waived by the defendant on putting in special bail, but without prejudice to any future remedy against the plaintiff.—*ib.*, Sept. 26.

HORSMAN V. HORSMAN.

Interrogatories for the discovery of the nature of the defendant's title under the 176th section of the C.L.P. Act, allowed upon summons to show cause.—*ib.*, Sept. 27, 29.

STREET V. DOLSON.

Action of Dower. Pleas: 1. *Ne unques seizin que dower;* 2. *Ne unques accompli;* 3. That after demandant's right accrued, and before the commencement of the suit, she conveyed and assigned her dower to a certain person unknown. To set aside these pleas as being irregularly pleaded, without leave of a Judge to plead double. Order to strike out 3rd plea—the C.L.P. Act being held to apply to actions of Dower. —*ib.*, Sept. 22, 23.

NOTICES OF NEW LAW BOOKS.

ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA; *by* LUTHER STEARNS CUSHING.—*Boston: Little, Brown & Co.*

The subject of this work is (to use the words of the author) what may be denominated the common Parliamentary Law as modified in the Legislative Assemblies of the United States.

It is an able and comprehensive compilation of the law and practice of Parliament—well written—the subject presented in an orderly and scientific shape—and all the works on the subject worthy of notice have evidently been consulted by the learned author. As the Legislative Assemblies of the United States are identical with their original type, the Parliament of Great Britain, the work before us will be found of great value in every British Colony, and in view of the recent changes in the Constitution of our Legislative Council, specially valuable in Canada.

We strongly recommend this really scientific work to the Canadian Lawyer and Statesman.

And here we may be permitted to notice the manner in which this work has been got up, highly creditable as it is to the publishers. We subjoin a brief note of the contents of the work:—

PART FIRST—*Of the Election of Members.*

Chap. 1st, Of Constituencies; Chap. 2nd, Of the persons competent to be Electors; Chap. 3rd, Of the persons competent to be elected; Chap. 4th, Of the mode of Election; Chap. 5th, Of the return of the persons elected; Chap. 6th, Of controverted returns and elections.

PART SECOND—*Of the Constitution of a Legislative Assembly.*

Chap. 1st, Of the assembling, qualifying, and organizing of a Legislative Assembly; Chap. 2nd, Of the Officers of a Legislative Assembly; Chap. 3rd, Of the place and manner of sitting of a Legislative Assembly, and of the formal proceedings therein for the transaction of business; Chap. 4th, Of the function of the executive in connection with the legislative department; Chap. 5th, Of vacancies and elections to fill them; Chap. 6th, Of the Session, Adjournment, Prorogation, Assembling by proclamation, and Dissolution of a Legislative Assembly.

PART THIRD—*Of the Privileges and Incidental Powers of a Legislative Assembly.*

Chap. 1st, Of the general nature of the Privileges and Incidental Powers of a Legislative Assembly; Chap. 2nd, Of the personal privileges of the Members; Chap. 3rd, Of the collective or aggregate privileges of a Legislative Assembly; Chap. 4th, Of the incidental powers of a Legislative Assembly.

PART FOURTH—*Of the Powers and Functions of a Legislative Assembly as such.*

Chap. 1st, Of the general powers of a Legislative Assembly in the making of Laws; Chap. 2nd, Of the relation of the different branches of the Legislative Department to one another; Chap. 3rd, Of the evidence and information on which parliamentary proceedings are founded; Chap. 4th, Of the forms in which the Power of Legislation is exercised by a Legislative Assembly; Chap. 5th, Of the Rules or Laws by which the Proceedings of a Legislative Assembly are regulated.

PART FIFTH.—*Of Communications between the different Branches of the Legislative Body, as between them or either of them and other bodies of persons.*

Chap. 1st, Of communications between the two Branches; Chap. 2nd, Of communications between the two branches or either of them and the executive; Chap. 3rd, Of accounts, papers, returns presented in pursuance of orders, or in obedience to Acts of Parliament; Chap. 4th, Of witnesses and their attendance and examination before either House or Committees; Chap. 5th, Of hearing parties interested; Chap. 6th, Public Officers subject to the order of Assembly; Chap. 7th, Of Petitions.

PART SIXTH—*Of the Forms and Methods of Proceeding in a Legislative Assembly.*

First Division.—Motions: Chap. 1st, Of Motions in general; Chap. 2nd, Of Motions considered with reference to their substance; Chap. 3rd, Of Motions considered with reference to their form; Chap. 4th, Of Motions considered with reference to the time when they are made; Chap. 5th, Of Motions for the disposition of other business; Chap. 6th, Of the Order, Succession, and Precedence of Motions.

Second Division.—Order in Debate: Chap. 1st, What constitutes a debate, and herein of the Members who are to speak, and of their personal deportment while speaking; Chap. 2nd, Of the rule that no Member is to speak, unless to a question already pending or to introduce a Question; Chap. 3rd, Of the rule that no Member is to speak more than once to the same question; Chap. 4th, Of the rule that a question is open for debate until it is fully put on both sides; Chap. 5th, Of the rules relating to relevancy of debate; Chap. 6th, Of the rules relating to the sources from which the statements introduced by a Member in debate are derived; Chap. 7th, Of the rules relating to the preservation of Order, Decency and Harmony among the Members; Chap. 8th, Of the rules relating to the preservation of the Harmony and Independence of the several Branches of the Legislature; Chap. 9th, Of the rules relating to regularity of proceeding; Chap. 10th, Of the rules relating to the respect due from the Members to the House to which they belong—to its powers, acts and proceedings—and to the Government and Laws of the Country; Chap. 11th, Of proceedings with reference to disorderly or unparliamentary words, or irregularity in debate; Chap. 12th, Rules for the conduct of Members present in the House during a debate.

Third Division.—Of ascertaining the sense of the Assembly in reference to any question before it: Chap. 1st, Of the Right and Duty of Members to vote; Chap. 2nd, Of the different modes of taking a question; Chap. 3rd, Of the Question thus taken; Chap. 4th, Of the Disallowance or Addition of Votes.

PART SEVENTH—*Of Committees and their Functions.*

First Division.—Select Committees: Chap. 1st, Of the different kinds of Select Committees; Chap. 2nd, Appointment of Select Committees; Chap. 3rd, Power and authority of Select Committees; Chap. 4th, Forms of proceeding in Select Committees; Chap. 5th, Of Instructions to Committees; Chap. 6th, Of other intermediate proceedings in the House with reference to Committees; Chap. 7th, Of the Report; Chap. 8th, Of making the Report and Proceedings thereon.

Second Division.—Committees of the Whole: Chap. 1st, Appointment of a Committee of the Whole; Chap. 2nd, Sitting of a Committee of the Whole; Chap. 3rd, Chairman and Clerk of the Committee; Chap. 4th, Duties of the Speaker and other Officers of the House while the House is in Committee of the Whole; Chap. 5th, Proceedings on going into a Committee of the Whole; Chap. 6th, Of the Proceedings in Committee of the Whole; Chap. 7th, Of the Reports of Committees of the Whole; Chap. 8th, Of making the Report and Proceedings thereon; Chap. 9th, Of some particular Committees.

Third Division.—Joint Committees.

PART EIGHTH—*Of the Passing of Bills—History of the present Form of Statutes and the mode of passing them.*

First Division.—Public Bills: Chap. 1st, Introductory; Chap. 2nd, Of the introduction of the subject of a Bill into the House; Chap. 3rd, Of the intermediate proceedings between the Introduction of the subject and the introduction of a Bill; Chap. 4th, Of the authority for the Introduction of a Bill; Chap. 5th, Of the preparation or Drawing and the Different Parts of a Bill; Chap. 6th, Of the presentation and reception of a Bill; Chap. 7th, Of the several stages through which a Bill passes; Chap. 8th, Of the First Reading of a Bill, and order for Second; Chap. 9th, Of the Second Reading and order for Commitment: Chap. 10th, Of Instruction to Committees; Chap. 11th, Of Commitment and Amendment; Chap. 12, Of Report of the Committee and Proceedings thereon; Chap. 13th, Of the Engrossment and Third Reading; Chap. 14th, Of the Passing; Chap. 15th, Of Amendments between the Two Houses; Chap. 16th, Of the Authentication of Bills between the two Houses; Chap. 17th, Of Communications between the two Houses relative to the passing of Bills; Chap. 18th, Of Bills which are required to be commenced in one House in preference to the other; Chap. 19th, Of the rule

which precludes the same Question from being a second time presented during the same Session in its application to Bills; Chap. 20th, Of some particular proceedings, with reference to Bills, which are out of the ordinary course; Chap. 21st, Of communications between the two Houses relative to the reasons or grounds for the passing of Bills; Chap. 22nd, Of the Royal Assent or Approval by the Executive; Chap. 23rd, Of several miscellaneous matters connected with the passing of Bills.

Second Division.—Private Bills: Chap. 1st, Of the Standing Orders and Proceedings peculiar to the passing of Private Bills; Chap. 2nd, Of the Deposit, Presentation, and Reference of the Petition and Proceedings thereon; Chap. 3rd, Bringing in and first and second readings of Private Bills; Chap. 4th, Commitment and Proceedings in Committee; Chap. 5th, Of the Report of the Committee and Proceedings thereon—Recommitment—Third Reading—Passing—Amendments between the Houses; Chap. 6th, Differences in the modes of Proceeding between the two Houses; Chap. 7th, Of Private Bills after receiving the Royal Assent; and of Fees and Costs.

Part Ninth—*Impeachment.*

Appendix.

English Reports in Law and Equity, containing reports of cases in the House of Lords, Privy Council, Courts of Equity and Common Law, and in the Admiralty, and Ecclesiastical Courts; including also Cases in Bankruptcy and Crown cases reserved. *Edited by* Chauncey Smith. *Publishers: Little, Brown & Co., Boston.* Volume XXXIII.

This Volume has just been issued by the Publishers and is got up in their usual good style; the printing and binding are excellent, and the paper good. The Volume before us contains, amongst other matter of general interest, a number of cases on the Common Law Procedure Acts, now of special importance to the Canadian Lawyers; and several cases in respect to County Courts, the Tribunals from which our Division Courts are modelled.

The price is 10s. per Volume to permanent subscribers. It is so well known as a valuable publication of all the important cases decided in England, that the work needs no commendation from us.

CORRESPONDENCE.

To the Editors of the U. C. Law Journal.

Gentlemen,—

Seeing your willingness to give information to Clerks of the Division Courts, I trouble you on the following question.

A. having a Judgment against B. wishes me to issue an execution for the amount and pay the costs. Bailiff makes a seizure of property supposed to be B.'s, and advertises for sale; on day of sale is forbid selling by C., as he claims the property by chattel mortgage, or any other lawful claim; should Bailiff still hold said property and obtain of me as Clerk an interpleader summons for claimant? If so, claimant appears on said summons before the Judge and substantiates his claim, who is to pay the costs? as it appears by your May number of the *Law Journal*, that it is the Bailiff's duty to order out the interpleader summons for his own protection; and there may in many instances be heavy costs in regard of keeping property so seized, before the claimant proves his claim; or if claimed by chattel mortgage, should Bailiff relinquish his hold on said property before he sees a copy of the mortgage, or a certificate of the property being mortgaged from the County Clerk? and has the Bailiff to go at his own expense perhaps 25 miles to examine the mortgage?

If you could conveniently answer the above, you would oblige a subscriber.

Yours very respectfully,

Robert McCammon,

Clerk, 4th D. C., Co. Hastings.

[The Bailiff can either sell or "hold" the property, suing out Interpleader summons for his own protection.

The Bailiff pays the costs in the first instance. The Judge, at the hearing, will give directions as to costs, ordering same to be paid by the claimant—or by the Judgment creditor—or deducted from proceeds of property seized, as the circumstances of the case require. Claimants under chattel mortgage ought to exhibit a certified copy thereof to the Bailiff; should a claimant fail to do so, it is not improbable that the Judge might make him liable for the costs, if the goods were seized in the possession of the defendants.

In all cases the Bailiff should promptly inform the plaintiff when a claim is made, he being the party most interested in the execution.—Ed. L. J.]

APPOINTMENTS TO OFFICE, &c.

QUEEN'S COUNSEL.

MILES O'REILLY, ROLLAND McDONAD, GEORGE SHERWOOD, JAMES SMITH, JOHN WILSON, LEWIS WALLBRIDGE, GEORGE BYRON LYON FELLOWES, SAMUEL BLACK FREEMAN, HENRY C. R. BEECHER, HENRY ECCLES, and ALEXANDER CAMPBELL, of Osgoode Hall, Esquires, Barristers-at-Law, to be Queen's Counsel in U.C.—[Gazetted 4th Oct. 1856.]

REGISTRAR.

HARTLEY DUNSFORD, Esquire, to be Registrar of the County of Victoria.—[Gazetted 20th Sept. 1856.]

NOTARIES PUBLIC.

PHILIP LOW, of Picton, Esquire, Barrister and Attorney-at-Law, FRANCIS GORE STANTON, of Simcoe, Esquire, Barrister-at-Law, and JAMES AGNEW, Esquire, Attorney-at-Law, to be Notaries Public in U.C.—[Gazetted 30th August, 1856.]

CHRISTOPHER CHARLES ABBOTT, of Toronto, Esquire, Barrister-at-Law, DALTON McCARTHY, of Barrie, Esquire, Attorney-at-Law, and THOMAS WRIGHT LAWFORD, of London, Esquire, Solicitor and Attorney-at-Law, to be Notaries Public for U.C.—[Gazetted 6th Sept. 1856.]

JAMES FOSTER BOULTON, of Cobourg, Esquire, Barrister-at-Law, and HEWITT BERNARD, of Barrie, Esquire, Attorney-at-Law, to be Notaries Public in U.C.—[Gazetted 13th Sept. 1856.]

JAMES HALLINAN, of Toronto, Esquire, Barrister and Attorney-at-Law, to be a Notary Public in U.C.—[Gazetted 10th Sept. 1856.]

COUNTY COURT CLERKS.

HORATIO NELSON, of Sandwich, Esquire, to be Clerk of the County Court for the County of Essex, in the room of room John McEwan, Esquire, resigned.

WILLIAM HERBERT CAMPBELL of Brockville, Esquire, to be Clerk of the County Court for the United Counties of Leeds & Grenville, in the room of T. D. Campbell, Esquire, resigned.—[Gazetted 30th August, 1856.]

ASSOCIATE CORONERS.

DANIEL COATE, of Bowmanville, Esquire, M. D., to be an Associate Coroner for the United Counties of Northumberland and Durham.

Notice to Subscribers.—Our list of Remittances is unavoidably crowded out.