DIARY FOR JULY.

1. Wednesday... Long Vacation commences. Last day for County Councils to equalize Rolls of Local Municipalities.
5. SUNDAY..... *5th Sunday after Trinity.*
6. Monday..... County Court and Surr. Court Term com. Heir and Devisee Sittings commence.
11. Saturday ..... County Court and Surrogate Court Term ends.
12. SUNDAY ..... *6th Sunday after Trinity.*
14. Tuesday ..... Last day for Judges of County Courts to make return of Appeals from Assessments.
19. SUNDAY..... *7th Sunday after Trinity.*
21. Tuesday ..... Heir and Devisee Sittings end.
26. SUNDAY..... *8th Sunday after Trinity.*
31. Friday ..... Last day for County Clerk to certify Co. Rate to Municipalities in County.

The Upper Canada Law Journal.

JULY, 1863.

THE LAW OF GUARANTEES.

The statute 26 Victoria, chapter 46, passed during last session of the Provincial Legislature, and entitled, "An Act to amend the laws of Upper Canada affecting Trade and Commerce," deserves some attention.

In considering a new law of a remedial character, it is well to examine the old law—discern the mischief to be remedied—and then the nature and effect of the remedy intended will be the more apparent.

In this manner we purpose to consider the nature and effect of the 26 Vic. cap. 46, sec. 1, which, in a legal point of view, is the most important statute passed during the last session of the Provincial Legislature.

It is provided by the fourth section of the Statute of Frauds (29 Car. II, cap. 3) that no action shall be brought whereby to charge the defendant upon *any special promise* to answer for the debt, default or miscarriage of another person, unless *the agreement* upon which such action shall be brought, or some memorandum or note *thereof*, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

What is required to be in writing? Not the promise, but the agreement or some memorandum or note thereof.

The word agreement as here used is not to be understood in any loose sense as synonymous with promise, but in its legal sense, as signifying a contract based on good consideration. There can be no binding agreement without consideration. A promise without consideration is not a binding agreement. Unless the binding agreement, *i. e.*, the consideration, as well as the promise, appear in writing, the party signing is not chargeable within the meaning of the act. The person to be charged for the debt of another, it is true, is to be charged upon his special promise; but, without a legal consideration to sustain it, that promise would be *nudum pactum*. The statute never meant to enforce any promise which, before the Statute, was invalid, merely because, under the statute, it was put in writing. The obligatory part is, indeed, the promise; but still, in order to charge the party making it, the consideration for the promise, as well as the promise itself, *i. e.*, the agreement, must be in writing.

Such was the construction put upon the statute in the well-known case of *Wain* v. *Walters*, 2 Smith's Leading Cases 146, and in many subsequent cases amply confirmed.

The statute, therefore, according to the legal interpretation of it, required at least two things: first, that there should be a good consideration for the promise; secondly, that the consideration, being an essential part of the agreement, should be in writing.

The law on the first point is unaltered. The law on the second is altered. Until recently it was not considered safe to allow the consideration to be supplied by oral testimony. The consequence was that in all cases it became a question of much nicety whether or not the consideration was sufficiently expressed; and in many cases right was defeated owing to the neglect to express the consideration with sufficient legal precision.

If Smith were to write to Jones—"I will engage to pay you this day fifty-six pounds, and expenses on bill for that amount, which Robinson owes you," this would not be sufficient, because of the omission to shew the consideration for Smith assuming the liability to pay Robinson's debt. But if Smith were to write to Jones—"If you will forbear to sue Robinson for one week on the over-due bill for £56, which you now hold, of his, I will see you paid," this would be held sufficient, because the consideration for Smith's promise is Jones undertaking not to sue Robinson for a week, and so the statute would be satisfied.

Such was the old law in all its strictness. In course of time it became most embarrassing to trade and commerce.

Even the courts appear to have been desirous to relax its strictness. It was soon held that it was sufficient either if the consideration appeared on the face of the writing in express terms, or by necessary implication. Next, evidence was received to explain the meaning of words in themselves really free from ambiguity, so as, in the explanation, to let in evidence of consideration.

Thus, plaintiff in his declaration alleged that one Andrew Little had requested plaintiff to sell and deliver him goods