DIARY FOR MAY.

1. Tues. . *St. Philip and St. James.*
6. SUN... *Rogation.*
10. Thurs. *Ascension.*
13 SUN... *6th Sunday after Easter.*
16. Wed... Last day for service for County Court.
20. SUN... *Whit Sunday.*
21. Mon ... Easter Term begins.
24. Thurs. Queen's Birthday.
25. Friday Paper Day Q.B. New Trial Day C.P.
26. Satur. Paper Day C.P. New Trial Day Q.B. Declare for
27. SUN... *Trinity Sunday.* [County Court.
28. Mon ... Paper Day Q.B. New Trial Day C.P.
29. Tues... Paper Day C.P. New Trial Day Q.B.
30. Wed... Paper Day Q B. New Trial Day C.P.
31. Thurs. Paper Day C.P. Last day for Ct. of Revis. fin. to revise A. R. & for Co. Coun to rev. Tp. Roll.

The Local Courts'
AND
MUNICIPAL GAZETTE.

MAY, 1866.

COURTS OF REVISION.

A case has lately been decided, which has an important bearing on the duties of members of these Courts, and as to what is to be considered as a final passing of assessment rolls by Courts of Revision, when appeals have been made, and it may be useful to refer to it now when these Courts are about to sit. The case we allude to is *The Law Society of Upper Canada* v. *The Corporation of Toronto*, which is reported in 25 U. C. Q. B. 199, and the report of which we shall give *in extenso* in our next issue.

The plaintiffs had for several years appealed from the assessment of their property to the Court of Revision, who had decided against them, and from thence to the County Court judges, who had reduced it about one-third, on the ground that a large portion of their building was occupied by the three Superior Courts of Law and Equity for the administration of justice. In 1864, the same assessment being repeated, the Society again appealed to the Court of Revision, who said they would consult the City Solicitor, and that the plaintiffs need not appear again. The plaintiffs' solicitor was told by the clerk of the Court of Revision that no judgment had been given, and found none in the book where their decisions were entered. The collector, in October of that year, called upon the plaintiffs' secretary, who, supposing all was right, paid the sum assessed. The mistake was not discovered until the following year, when the Society called the attention of the Corporation to the matter; but being unable to obtain any answer, the Society brought the present action to recover the money back, as having been paid under a mistake of fact.

The question which the court was called upon to decide was, whether by the Assessment Act the plaintiffs were concluded from denying the finality of the assessment roll as to their liability to the amount and value of their property liable to taxation for the year 1864; and the difficulty arose as to whether the roll could be considered as "finally passed,"—it being contended on the one hand that the Court of Revision had virtually confirmed the assessment by returning the roll, so far as this assessment was concerned, unaltered; and on the other hand that this appeal was never in fact adjudicated upon at all, and that it is impossible to say in effect that abstaining from determining a matter referred to them by an appellant is a determination of the matter. The judges were divided on the point, but the majority coincided in the latter view, and held that the money paid for taxes might be recovered back.

We have heard a good many complaints as to the manner in which these Courts occasionally manage the matters presented for their adjudication, and the one before us does not show a very business-like or even equitable mode of proceeding; which remarks apply as well to the members of the Corporation in general, as to the Court of Revision, which in this instance entirely neglected—and apparently wilfully, as was thought by one of the judges of the Queen's Bench—to determine an appeal brought before them.

The Court of Revision must decide upon the appeal before it can be referred to the county judge. The appeal to the latter is from the Court of Revision, not from the assessment as first made; and the performance of the duty of the former must necessarily precede any confirming or altering of the roll. The facts of this case went to show that the want of determination had not been overlooked, and no explanation of any kind was suggested; but the Chief Justice thought that even if it had arisen from accident or oversight, no ratepayer could be thus deprived of his appeal, and at the same time be bound by the assessment complained against. It might happen, as was pointed out on the argument, that a ratepayer, under such circumstances, would escape paying anything for that year; but

even if such a consequence should follow, it is the omission of the Court of Revision which causes it, in neither confirming nor correcting the roll, so far as his appeal is concerned. As to his assessment, they have done nothing; and as to him, therefore, they have not passed the roll so as to bind him, though the other portions of the roll may be held to be final and conclusive.

ACT FOR THE PROTECTION OF SHEEP.

The questions put by our old and valued correspondent Mr. Klotz (from, whom by the way, we are always glad to hear) appear to shew that some provisions of this act are further instances of that hasty legislation which leads to so much unnecessary trouble and litigation,—one brief enactment presenting a number of difficult questions in its construction, which it might be thought could have been avoided by a little care and foresight. The intentions of the framers of the act were undoubtedly good, and there was an evident evil to be cured, but it will be a pity if the usefulness of such a laudable measure (in its intention) should be impaired by the difficulties which are said to impede its working. Answering the queries in our correspondent's letter at all events this time is out of the question; but we shall endeavour to return to the subject again, and in the meantime we shall be glad to hear from any of our friends who have had any experience in the working of the practice, or in fact from any who have any suggestions to offer respecting this act.

MR. O'BRIEN'S DIVISION COURT ACT.

We publish in another place an advertisement of this book. It is now, we are informed, in the hands of the binder, and will be ready for sale as soon probably as this comes to the notice of our readers. We anticipate for it a large and ready sale. A review of it will be given in our next number.

REGISTRAR'S FEES.

Complaints reach us from every side, as to what appear in many cases to be over-charges by Registrars under the late Act. If these Registrars cannot be a little reasonable in their demands, another Act will be necessary, which may considerably reduce their emoluments.

SELECTIONS.

NOTES AND CHEQUES.

In *Williams* v. *Jarrett* 5 Barn. & Adol. 32 it was held, under the 55 Geo. III., cap. 184, sec. 12, that as to stamping a bill, the date borne by the bill on the face of it, and not the date when it was actually made, is to be looked at It is by no means clear, from what fell from the court in a recent case of *Austin* v. *Bunyard* 6 New Report, 202, that if that question had now to be decided *de novo*, it would be decided in accordance with *Williams* v. *Jarrett;* because, as observed by Cockburn, C. J., when you see that the two dates, the date when the instrument was issued, and the date on the face of it—that is, when a bill is dated, say in July, and was made, in fact, in time—are not cotemporaneous, it is impossible to avoid the inference that the intention was to avoid the higher duty, which would be contrary to the policy of the Stamp Act. However, in *Austin* v. *Bunyard*, the authority of *Williams* v. *Jarrett* was held to be binding, especially, as observed by the court, that they were not sitting in error.

In *Austin* v. *Bunyard*, a cheque was issued in these terms: "No. —, Cheapside, London, 22nd July, 1864. The London, Birmingham and South Staffordshire Bank, Limited. Pay Mr. Garrett or bearer £350." This was signed by the defendant and endorsed by Mr. Garrett. The cheque was, in fact, made on the 22nd June, 1864, and then handed to Mr. Garrett. It came to the hands of the plaintiff as a *bonâ fide* and convenient holder for value, without any notice of its being post-dated. It was duly presented on the 23rd July, and dishonoured; and the plaintiff thereupon brought his action against the maker of the cheque, the defendant. The cheque bore only a penny stamp; and at the trial it was objected that it could not be admitted in evidence, as it was in effect a bill at one month, and ought, under the 17 & 18 Vic. cap. 83, to have borne a four-shilling stamp. Nonsuit on that ground, with leave to the plaintiff to set aside the nonsuit, and enter verdict for plaintiff. A rule *nisi* having been obtained for that purpose, it now came on before the full court as to making the rule absolute. On the part of the defendant it was argued that this was not a cheque payable on demand, being post-dated; but it was in fact an inland bill of exchange at a month's date. If it was so, it was clear it could not be received in evidence, as not bearing the proper stamp. On the plaintiff's part, *Williams* v. *Jarrett*, and the first section of 21 & 22 Vic. cap. 20 (which makes all drafts or orders payable on dem nd chargeable with a penny stamp) were relied on; and it was said that this cheque, being on the face of it dated the 22nd July, that must be taken to be the date, and it was a draft payable on demand, at least in the hands of an innocent holder; and so the court held, upon the authority of *Williams* v. *Jarrett*. We have already noticed that judges in delivering

their judgments expressly stated that they decided on the authority of *Williams* v. *Jarrett*, and expressed, or at least intimated doubts, whether that case was rightly decided. The point, therefore, as to whether a note actually post-dated, but appearing on the face of it to be correctly dated, shall be treated as of the date appearing on the face of it, does not seem to be free from doubt, should the matter come before a court of appeal. At the same time, the injustice of allowing a defendant, in such a case as that of *Austin* v. *Bunyard*, himself a party to post-dating a bill, to set up the post-dating as a defence against an innocent holder, would be so glaring that we should doubt whether a court of law even would permit it; and we feel scarcely any doubt that a court of equity would restrain a defendant from using such defence in an action. And here we may, not uselessly perhaps, explain to our commercial readers very shortly, that which appears at first sight an anomaly, viz., that a court of law should decide one way, and a court of equity the opposite, upon the very same matters. The principle of that contradiction, or apparent contradiction of jurisdiction, is this: a court of law is bound to decide upon the dry and positive law. If, therefore, a court of law were to decide that in such a case as *Austin* v. *Bunyard*, a note is to be held as dated, not of the date on the face of it, but as a note dated of the date of its making, it could have no alternative but to decide for the defendant. But a court of equity has a jurisdiction over the conscience of the parties; and if it come to the conclusion, as we think it would, that for a person to post-date a cheque for his own convenience, or for the purpose of defrauding the revenue, and then to set up that fraud as a defence in an action by an innocent holder against the admission of the note in evidence, was a fraud or inequitable transaction: it would restrain, not the court of law from exercising its own proper jurisdiction, but the fraudulent defendant from presenting to the court of law a fraudulent defence.

On the subject of bills, we notice another case recently decided—*Chapman* v. *Cotterill*, 6 New Rep. 237—in which the point was, whether, where a promissory note is signed by the maker without the jurisdiction, but delivered by the maker's agent within the jurisdiction of the court, the cause of action arises at the place of delivery, or at the place of the making of the note. In that case the defendant was, jointly and severally with his brother, indebted to the Union Bank of London. The defendant resided at Florence, his brother in London. It was agreed that the defendant's brother should pay off the debt, except £600, and that the defendant should join with his brother in two promissory notes to pay off that balance. Accordingly, two notes were made, signed by the defendant at Florence, and sent by him to his brother in London; and the brother deposited them with the bank. In an action brought on the notes against the defendant, it was contended on the part of the defendant that the proceedings should be set aside as irregular, on the ground that the cause of action did not arise within the jurisdiction. But the court held that the cause of action arose where the notes were delivered. Martin, B., said, "The question is, was the contract in Florence or in London? I am of opinion that no contract arose at all, till the note was handed over to the bank" (and he referred to *Cox* v. *Troy*, 5 Barn. & Ald. 474); and Bramwell, B., said, "There is no pretence whatever for saying that any interest passed till the note was handed over to the bank. The cause of action arose, therefore, in England."

In another case—*Maccall* v. *Taylor*, 6 New Rep. 207—an instrument was made in this form:—"4 months after date, pay to my order the sum of £300 value received. To Captain Taylor, ship 'Jasper,' 11 Great St. Helens, London."—The instrument was accepted by W. Taylor, the captain of the "Jasper." It was held that this was neither a bill, because there was no drawer's name to it, nor a note, because it did not promise to pay any one; it was an inchoate instrument, capable of being, but not in fact, perfected, and that no action could be sustained upon it. — *Banker's Magazine.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

PAWNBROKERS—C. S. C. CH. 61.—*Held*, that a conviction under the Pawnbroker's Act, Consol. Stat. C. ch. 61, for neglecting to have a sign over the door, as directed by the seventh section, was not sustained by evidence of one transaction alone; for the penalty attaches only on persons "exercising the trade of a pawnbroker."—*The Queen* v. *Andrews*, 25 U. C. Q. B. 196.

INSOLVENT ACT, 1864, SEC. 8, SUB-SEC. 4—UNJUST PREFERENCE—ANTICIPATED DELIVERY.—S. on the 25th of November, 1864, agreed to deliver certain timber to the plaintiff, at T., in the State of New York, in May, June, July, and August, 1865, $1,500 payable down, the same sum on the 15th of January, 1st March, and 1st April, 1865, and the balance on delivery at T. On the 14th of December following he assigned the timber to L. as security for certain advances in goods which L. agreed to make to enable him to get it out, and on the 27th of February, 1865, formally delivered it to L's son, who after consulting with S. wrote to the plaintiff that S. desired to deliver the timber to the plaintiff, but was in difficulty: that some of his creditors refused to wait until he could complete his contract, and had commenced actions—and recommending that the plaintiff should anticipate their actions by taking a

delivery before they could interfere. On the 11th of March the plaintiff accordingly paid L's claim, and took a delivery. On the 3rd of March L. had served a writ on S., telling him it was to secure precedence: an execution was obtained in this suit, under which the sheriff seized. On the 14th of April, S. made an assignment under the Insolvent Act of 1864 to the defendant. He admitted that he was insolvent on the 11th of March, and long previous, though he said he did not then know it, and had not informed the plaintiff of it.

Semble, that these facts shewed the delivery to the plaintiff to be a transfer by S. "in contemplation of insolvency," the effect of which was to give him "an unjust preference over the other creditors," and that it was therefore void under sec. 8, sub-sec. 4 of the Insolvent Act 1864;—and the jury having found for the plaintiff, a new trial was granted, with costs to abide the event. — *Adams* v. *McCall*, 25 U. C. Q. B. 219.

ACTION ON PROMISSORY NOTE—PRINCIPAL AND SURETY—RELEASE UNDER "INSOLVENT ACT"—PLEADING.—*Quære*, as to the right of a creditor under a composition deed, either under the Insolvent Act or otherwise, to give a general release and subscribe for a particular sum, as being apparently his whole claim against the debtor, and afterwards to advance other demands as not having been included in this discharge and as still enforceable against the debtor.

Semble, that this would be a contravention of the policy and provisions of the Insolvent Act, and also of private composition deeds, as being, in the absence of its recognition by the other creditors as well as by the debtor, a fraud upon them.—*Fowler* v. *Perrin et al.*, 16 U. C. C. P. 258.

INSOLVENT ACT—CONFLICTING ASSIGNMENTS.—One of two parties a few days before a writ of attachment against both under the Act of 1864 had issued, assigned his estate for the benefit of his creditors.—*Held*, void as against the official assignee.—*Wilson* v. *Stevenson*, 12 U. C. Chan. R. 233.

CONSTITUTIONAL LAW.—MUNICIPAL CORPORATIONS.—The legislature has not power to compel a municipal corporation to submit its disputes with private persons to arbitration.—*Baldwin* v. *The Mayor, &c., of New York.* (U. S. Rep. N. Y. *Transcript.*)

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

WAREHOUSE RECEIPTS.—*Per* Draper, C. J., "The facts elicited in this case shew what complications may arise from the system of warehousing and the dealings connected therewith, especially where the warehouseman being owner gives receipts either for wheat which he has not got, or disposes of wheat for which he has already given receipts to purchasers, in fraud of them or of those to whom he professes to make a subsequent disposition of the same grain. The liability to prosecution for a misdemeanour will hardly prevent such a fraud; at least it is to be feared it has not done so in this case."—*Clarke* v. *Western Assurance Co.*, 25 U. C. Q. B. 218.

FIXTURES—EXECUTION—DISTRESS FOR RENT—LANDLORD AND TENANT.—Although the rule of law is clear that goods seized by the sheriff cannot be distrained in his custody, still such goods must be removed within a reasonable time after the sale, in order to protect the rights of the purchaser against a distress for rent.

In this case the seizure took place on the 20th October, and the sale to plaintiffs on the 6th December following, but in consequence of an attachment from the Insolvent Court, a claim for taxes, and defendant's claim for rent, the sheriff was not in a position to give plaintiffs possession before 27th December, when he notified them that they might remove the goods. Plaintiffs did not, however, commence to remove them before the 5th of January, on which day defendants put in or threatened to put in a distress for rent, which had accrued on the 1st December previously, and after the seizure of the goods.

Held, A. Wilson, J., *dubitante*, that the goods had not been removed within a reasonable time either after the sale or after notice to plaintiffs to remove them, and that they were liable to defendant's distress for rent.

The rule respecting trade fixtures, as between landlord and tenant, is, that all such as can be removed without materially injuring the building may be removed by the tenant, and that what is so removable is liable to sale under an execution against him.

In this case it appeared that the execution debtor had leased from defendant certain premises, in which were an engine and boiler, to be left by him in repair on the determination of his lease; that finding both unfit for his purposes, a larger cylinder was put into the engine with

defendant's consent and partly at her expense, which on being broken was replaced by another at the tenant's expense, as also a shaft, crank, fly-wheel, connecting-rod, slides, &c., with a different kind of engine-pump. A new boiler, also, instead of the old one, was put into the premises by the tenant, and was by brick-work attached to the freehold: it was, also, removable. All the additions made by the tenant had been so made for the purposes of his trade, and though attached to the freehold could be removed with little injury thereto, the machinery being admitted by holes made in the walls and the shafting attached to the building. There were, also, certain drying presses, vats and cocks in the building, and all were placed upon a temporary flooring supported on scantling and trestle-work not let into the walls or ground: the partitions of the building were of wood.

Held, that the engine in its entire state belonged to the defendant, as part of the freehold, and was not liable to seizure under execution; but that the temporary floors, scantling, partitions, presses, shafting, other than had been before in the building, vats and cocks, were all trade fixtures, and so liable to seizure under execution.—*Hughes et al.* v. *Towers*, 16 U. C. C. P. 287.

R. W. Co.—Injury by Fire—Limitation—C. S. C. ch. 66, sec. 83.—In an action against a Railway Company for so negligently managing a fire which had begun upon their track that it extended to the plaintiff's land adjoining—*Held*, that "The Railway Act," sec. 83, limiting suits to six months after the damage sustained, did not apply, the injury charged being at common law, by one proprietor of land against another, independent of any user of the railway.—*Prendergast* v. *G. T. R. Co.*, 25 U. C. Q. B. 193.

Act superseding legal remedy.—An act of Assembly which provides a remedy for an injury to private rights does not supersede the existing legal remedy, unless it gives an adequate and effective means of redress.

The Mill-dam Act, in taking away the trial by jury, is unconstitutional.—*Rhines* v. *Raught* (U. S. Rep. *Legal Intelligencer.*)

Statute of Frauds, sec. 17—Contract in writing — Subsequent parol variation. — A subsequent parol variation of a contract in writing for the sale of goods under the 17th section of the Statute of Frauds is wholly void and does not rescind the original contract which may be sued upon notwithstanding.—*Noble* v. *Ward*, 14 W. R. 397.

Contributory negligence—Leaving horse and cart unattended.—The plaintiff's horse and cart were standing at his shop-door unattended, and close behind them were drawn up the defendants' horse and cart, also unattended. The defendants' cart came into collision with the plaintiff's cart, and the plaintiff's horse broke through his shop-window.

Held, that there was evidence of contributory negligence on the part of the plaintiff, which the judge was bound to leave to the jury.—*Walton* v. *The London, Brighton and South Coast Railway Co.*, 14 W. R. 395.

Infant — Necessaries.—In the absence of special circumstances to make them so, cigars and tobacco cannot be necessaries for an infant.—*Bryant* v. *Richardson*, 14 W. R. 401.

Copyright—Infringement.—Copyright may exist in a compilation. The publisher of a work may not use the information published by another person to save himself trouble and expense, even when that information is accessible to all.—*Kelly* v. *Morris*, 14 W. R. 496.

Will written partly in ink and partly in pencil—Probate of—Intention—Appearance of document—Indorsement of envelope—Codicil.—Where a will seemed to have been first written in pencil and afterwards traced with ink, but not completely, words in some cases being written in ink above, and apparently in substitution for, the pencil writing, and in other parts the pencil writing standing alone.

The court declined to include the pencil writing in the grant of probate of the will.

The fact that a will is found with a codicil in an envelope indorsed as containing the codicil only will not raise any presumption that the will was not meant to take effect.—*Re Bellamy*, 14 W. R. 501.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

Warne v. Coulter.

Taxes—Non-resident lands—27 Vic. cr. 19.

A lot of land being in arrear for taxes for six years up to 1859 inclusive, during which it had been assessed as "non-resident" land, was duly returned in 1865, under 27 Vic. ch. 19, as occupied by the plaintiff, who had become tenant of it on the 1st of April of that year. These taxes were placed upon the collector's roll, and in order to satisfy them he seized the plaintiff's goods *upon another lot* in the same township.

Held, that such seizure was unauthorized.

[Q. B., H. T., 1865.]

Replevin, for goods taken upon the lot of land on which the plaintiff resided in concession "B" of the Township of Etobicocke, in the County of York.

Avowry—That the inhabitants for the time being of the Township of Etobicoke, in the County of York, one of the United Counties of York and Peel, are and have been before and since the year 1853 a body corporate, having through the council thereof for each year authority by law to impose taxes on land situate in the said township: that all that part of lot number 21 in concession "C" of the said township, lying west of Scarlett's Road, is and was before and since the year 1853 a parcel of land situate therein, patented by the Crown, subject to municipal and other taxes: that during the years 1854, 1855, 1856, 1857, 1858 and 1859 the said parcel of land was duly assessed, and the corporation of the township of Etobicoke, by the council thereof for the said years respectively, by by-laws in that behalf duly imposed on the said prrcel of land certain taxes for each of the said years: that none of the said taxes on or in behalf of said parcel of land were ever paid: that the arrears of said taxes on said parcel of land, together with county rates according to the statute in that behalf duly imposed, and ten per cent. on arrears added by the county treasurer as hereinafter mentioned, according to the provisions of the said statute, in the aggregate made a large sum of money—to wit, $182 63: that during each and all of the years aforesaid the said parcel of land was unoccupied, and duly assessed as land of a "non-resident:" that when the assessment roll of said township for each of the said years had been finally revised and corrected according to the provisions of the said statute, the clerk of the said township did without delay in each of the said years transmit to the county clerk a certified copy thereof, shewing the said parcel of land assessed as aforesaid, and did also in each of said years duly transmit to the county treasurer a certified copy of the collector's rolls of said township for each of said years respectively, as far as the same related to the lands of "non-residents:" that the said county treasurer in each of the said years kept books, in which he duly entered under the heading of every local municipality, (including the said township of Etobicoke) in the United Counties aforesaid, all the lands in the municipality (including said parcel of land) and on which it appeared from the returns made to him by the clerk that there were any taxes unpaid, and the amounts so due, and did on the first day of May in each and every of the said years duly complete and balance his books, by entering against every parcel of land the arrears, if any, due at the last settlement, and the taxes of the preceding year which remained unpaid, and ascertained and entered therein the total amount of arrears chargeable upon the land at that date: that thereupon the collection of the said arrears of taxes belonged to the treasurer of the said United Counties alone, subject to the provisions hereinafter mentioned: that the said last mentioned treasurer afterwards, according to the provisions of the said statute, duly added to said arrears ten per cent. on the amount thereof: that the said arrears for more than five years thereafter remained wholly unpaid and unsatisfied: that the treasurer of the said United Counties afterwards, during the month of January, 1865, and after the passing of the statute 27 Vic. ch. 19, furnished to the clerk of the township of Etobicoke a list of all the lands patented or described for patent in the township of Etobicoke, including the said parcel of land, in respect of which any taxes had been in arrears for five years preceding the said 1st day of January: that the clerk of the said township of Etobicoke afterwards delivered to the assessor of the said township for the year 1865, as soon as the said assessor was appointed, a copy of the said list: that thereupon it became and was the duty of the said assessor to ascertain if any of the lots or parcels of land contained in the said list were occupied, and to notify the occupants and the owners thereof, if known, of the amount of taxes due on each such lot or parcel of land, and enter in a column (reserved for that purpose) the words "occupied and parties notified," or "not occupied and parties notified" (as the case might be): that the said plaintiff was before and at the time of the delivery of the said list to the said assessor occupant of the parcel of land aforesaid: that the said assessor aftewards, and before the return of the said list as hereinafter mentioned, ascertained the fact that the plaintiff was occupant of said parcel of land as before mentioned, and duly assessed him as such: that the said assessor afterwards duly notified the plaintiff so being such occupant, and also notified the owner of said parcel of land of the amount of taxes due thereon, and entered in the column (reserved for the purpose) the words "occupied and parties notified": that the said list containing said parcel of land was duly signed by the said assessor, and attached thereto was a certificate, signed by the said assessor and verified by oath, in the form required by said last mentioned statute: that said list so signed and verified was afterwards, with the assessment rolls of said township for the year 1865, by the said assessor duly returned to the clerk of the said township: that the clerk of the said township afterwards examined the roll returned to him as aforesaid, and ascertained that the said parcel of land embraced in the said list last received by him from the treasurer of the United Counties of York and Peel was entered upon the roll for the said year 1865 as then occupied: that the said clerk afterwards, to wit, on or before the 15th of May, 1865, furnished to the said treasurer a list of the several lands, including said parcel of land, appearing on the assessment roll to have become occupied as aforesaid, and the said treasurer afterwards, to wit, on or before the 1st of July, 1865, returned to the clerk of the said township an account of all arrears of taxes due in respect of such occupied lands, including the said parcel of land: that during the year 1865 defendant was the duly appointed collector of taxes in and for ward No. 3 of the said township of Etobicoke, in which ward said parcel of land is situate: that the clerk of the said township afterwards, in making out the collector's roll of the said township for the said year 1865, duly added and included the arrears of taxes aforesaid in respect of said parcel of land, to wit, $182 63, to the taxes assessed against the same for the year

1865, and duly delivered the said roll with the addition aforesaid to the defendant as such collector aforesaid, and thereupon it became and was the duty of defendant as such collector to collect such arrears in the same manner and subject to the same conditions as all other taxes entered upon the collector's roll for said last mentioned year: that thereupon defendant, so being such collector, proceeded to collect the said arrears of taxes, and for that purpose called at least once on the plaintiff (being the person taxed) at his usual residence in the said township, and demanded payment from the plaintiff of said arrears of taxes, and that the plaintiff neglected to pay such arrears of taxes for the space of more than fourteen days after such demand—whereupon the defendant, so being such collector as aforesaid and the proper officer in that behalf, seized and took at the said township of Etobicoke the goods and chattels in the said declaration mentioned, being the goods and chattels of the plaintiff (being the person who ought to pay the said arrears of taxes as therein mentioned), and being goods and chattels at the time in plaintiff's possession in said township of Etobicoke, and detained the same for a distress for the arrears of said taxes, as he lawfully might for the causes aforsaid.

Plea to the avowry—That the plaintiff never was the occupant or tenant of that part of lot No. 21 in concession C of the township of Etobicoke, in the said avowry mentioned, or in any way interested therein, until the 1st of April, 1865, after all the arrears of taxes in the said plea mentioned had accrued due: that he, the said plaintiff, although in possession of and cultivating the said lot as a tenant before and at the time of the delivery of the list in said avowry mentioned to the assessor, and thence up to and at the time of said seizure, under a lease from one Marianne Arnold, the owner thereof, to him the said plaintiff executed on the said 1st day of April, 1865, had never lived or resided thereon, but upon lot No. 21, in concession B of the said township of Etobicoke; and that the goods in the declaration and in the said avowry mentioned were seized for such arrears, not upon the said lot No. 21 in concession C, in respect of which the said taxes accrued due, but upon the said lot No. 21 in concession B, on which the said plaintiff was resident at the time of such seizure.

Demurrer and joinder, raising substantially the question, whether under the facts admitted the plaintiff's goods were liable.

Robert A. Harrison, for the demurrer.

C. Robinson, Q. C., contra.—*Municipality of Berlin* v. *Grange*, 5 U. C. C. P. 211; *Holcomb* v. *Shaw*, 22 U. C. Q. B. 92; *Fraser* v. *Page*, 18 U. C. Q. B. 337, were referred to on the argument.

The sections of the statute bearing upon the question are cited in the judgment.

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

The case turns upon the construction to be given to the act of 1863 as to "non-resident" lands.

This statute, after giving directions how the township clerk is to be furnished with a list of non-resident lands five years in arrear for taxes, and how the assessor to any such list is to return if any and which of the lands are occupied, and notify the occupants and owners, directs that "the clerk of each municipality shall, in making out the collector's roll of the year, add and include such arrears of taxes to the taxes assessed against such occupied lands for the then current year, and such arrears shall be collected by the collectors of the municipalities, in the same manner and subject to the same conditions as all other taxes entered upon the collector's roll,"

The act contains no special provision for the disposition of the moneys levied for arrears; but section 5 directs that the county treasurer shall not issue his warrant for the sale of any lands returned to him as occupied under sec. 8 of the act.

The statute seems, in very express words, to direct that these arrears are to be collected in the same manner as all the other taxes on the roll. We must now see what that "same manner" is.

Under "The Assessment Act," Con Stat. U.C. ch. 55, land is assessable against the occupant, if the owner were not resident or unknown; but if unoccupied and the owner non-resident, then it is returned as non-resident land, under sec. 24. When assessed against both owner and occupant, the taxes are recoverable from either, or from any future owner or occupant.

By sec. 89 it is provided how taxes are to be entered on the collector's roll, the names of persons assessed, number of lot, any amount for county rate in a separate column, in another the local municipal rates, and in separate columns any special rate for schools, &c.

Section 96 allows the collector to levy the taxes "by distress of the goods and chattels of the person who ought to pay the same, or of any goods or chatteis in his possession wherever the same may be found within the county in which the local municipality lies."

By sec. 97 in case of the land of non-residents, the collector may distrain "any goods and chattels which he may find upon the land."

If the amount of taxes be not levied on non-resident lands, return is made to the county treasurer, to whom the future collection belongs; and sec. 122 enables him, whenever satisfied that there is distress upon non-resident lands in arrear for taxes, to authorize the sheriff by warrant to levy "upon any goods and chattels found upon the land."

Sec. 134 enables the sheriff to distrain goods on the land after the warrant for sale comes to his hand.

To the time of the passing of the act of 1863 it seems clear that as this land was "non-resident," only the chattels actually on the land were liable to distress. The avowry expressly states it is to be non-resident land up to 1865. The case turns upon the effect of the new act—whether it makes the plaintiff's goods, he being merely the tenant and occupant, in any part of the municipality, and off the land, liable for arrears accrued before his tenancy.

The act of 1863 says: "For the greater protection of persons owning non-resident lands in Upper Canada, and also for the more sure collection of taxes thereon," be it enacted, &c. Except in this place and in the title, the words "non-resident" do not occur throughout the act.

it speaks generally of land five years in arrear. It provides for the ascertaining of any occupations of the land, and as soon as an occupation is found, then the arrears are to be put into the collector's roll: they are to be "added and included to the taxes assessed for the current year." No express direction is given as to keeping them separate from the current taxes.

Down to 1865, when the plaintiff became tenant, the land was simply assessed as non-resident land. In 1865 the owner was apparently known, as the avowry states that he was duly notified, and the plaintiff was assessed as occupant. It does not appear that the owner had ever desired to be entered as owner.

We have, therefore, an occupant becoming such for the first time in 1865, after all arrears accrued. These arrears are added to his current assessment for 1865 They are to be collected "in the same manner and subject to the same conditions as all other taxes entered upon the collector's roll."

We think they could certainly be collected by distress of any chattels on the land. The plaintiff's taxes for the current year 1865 could be collected by seizure of the goods found anywhere in Etobicoke, or indeed within the county. This is done under sec. 96, "*in case any person neglects to pay his taxes,*" the collector may levy "by distress of the goods and chattels *of the person who ought to pay the same,*" wherever found in the county.

The next section provides, that in case of lands of non-residents distress can only be made upon the land itself.

The act of 1863 places the arrears on the same footing as taxes assessed in the ordinary way against an occupant. This, however, is apparently only as to the manner of their collection; it does not declare any personal liability against an occupant. The taxes for 1865 assessed on the plaintiff as occupant, were clearly "his taxes," and he was the person "who ought to pay the same," under sec. 96; and see sec. 24 as to the recourse being saved.

In a popular sense these arrears certainly never were his, nor ought he to pay them. We think the words must be very clear which will render him legally responsible.

For many years the legislature have held all property actually on the land of residents or non-residents liable for the taxes, and the arrears formed a gradually increasing lien, recoverable at any time by distress of goods on the land down to the ultimate sale of the land itself by the sheriff. It may well be doubted if the act of 1863 meant to create any new individual liability or intended to go beyond the creation of a simple machinery for effecting by the local assessors and collectors, what could previously, with far greater difficulty and much less accuracy, be done by the county treasurer through the sheriff. (See sec. 122).

It would seem the more reasonable construction that these arrears, whether kept separate from or included in the plaintiff's taxes for the current year, did not thereby become a charge against his property to be found any where within the County of York at any distance from the lands chargeable, and never having been on the same.

It may be just that any person bringing property on a lot in arrears for taxes for the purpose of cultivating or occupying the same, should incur the responsibility of making such property liable for all arrears of taxes. He either knows or ought to know the law which has been in force for years. The land cannot be cleared of the burden, and everything upon it is equally bound. It is far different, however, with chattel property which belongs to the temporary occupant, and which may never have been within miles of the land or used for any purpose connected therewith.

We think we can allow full effect to the provisions of the act of 1863 without doing the very serious injustice which the defendant's view of the law would render necessary.

McLean, C. J., in *Holcomb* v. *Shaw* 22 U. C. Q.B. 100, expresses an opinion that taxes due by former occupants are not taxes which a future occupant "ought to pay" under sec. 96; but that case was decided before the act of 1863.

Judgment for plaintiff on demurrer.

HENDERSON v. GESNER ET AL.

Promissory note—Stamps.

The plaintiff in September, 1865, sued the maker of a promissory note, due in January, 1865, payable to H. or bearer, and by H. endorsed to the plaintiff. Defendant pleaded that it was not duly stamped when the plaintiff became a party thereto, nor until it fell due; and the jury were directed that it was sufficient if the stamps were put on before action brought.

Held (reversing the judgment of the County Court), a misdirection, for the plaintiff became a party to the note by becoming the holder or endorsee, and was bound to stamp it then.

[Q. B., H. T., 1866.)

Appeal from the County Court of the County of Kent.

The declaration was against Gesner, the maker of a note for $170 86, dated 24th October, 1864, payable to Henry Henderson, or bearer, three months after date: that Henderson endorsed the note to defendant Stewart, who endorsed it to the plaintiff.

The defendant Stewart, who alone defended, pleaded want of presentment and notice; and, 3. That he endorsed the note without value, to accommodate Gesner, and so endorsed before the issuing or delivery of the same to the plaintiff by Gesner, and the plaintiff became a party to it and accepted it so made and endorsed; but the said note had not at the time it was so made and delivered to the plaintiff, and at the time when the plaintiff became a party thereto and accepted and received the same, the stamps required by law thereto affixed, impressed or placed thereto, to wit, revenue stamps of the denomination of bill or note stamps to the value of six cents, nor were the same affixed thereto in double value as required by law, to wit, twelve cents in such stamps, by the plaintiff when he became the endorser thereof, nor till the note became due.

Issue was taken on these pleas.

The payee's name was the same as the plaintiff's, but no evidence of identity was given, so that it might be assumed that the plaintiff's interest in the note accrued after defendant Stewart's endorsement.

The notary swore that four three cent stamps were put and obliterated on the note by the plaintiff before it became due: that the plaintiff

put on two stamps shortly after the note was drawn, in October, 1864, and two nine cent stamps before the note fell due.

Defendant's son swore that the note attached to the notarial instrument was presented at his father's house to him, and there were no stamps on it then.

The learned judge directed the jury to find for the plaintiff, if they found the stamps were put on before action brought; and they gave a verdict for the plaintiff.

After motion in term a rule for a new trial was discharged, on the alleged authority of *Stephens* v. *Berry*, 15 U. C. C. P. 548.

The propriety of this direction was the only point raised on this appeal.

J. B. Read, for the appellant.

Kingstone, contra.

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

It would seem that no stamps were on this note when originally made.

The case seems governed by the words of 27-28 Vic. ch. 4, sec. 9, "Except that any subsequent party to such instrument or person paying the same, may at the time of his so paying or becoming a party thereto, pay such double duty by affixing," &c., &c., "and such instrument shall thereby become valid."

The act of 1865, 29 Vic. ch. 4, which became law on the 18th of September, 1865, and which it is enacted shall be construed as one act with the preceding act, in its fourth clause says: "No party to or holder of any note, draft, or bill of exchange, shall incur any penalty by reason of the duty thereon not having been paid at the proper time and by the proper party or parties, provided that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays such duty as soon as he acquires such knowledge; and any holder of such instrument may pay the duty thereon, and give it validi y under sec. 9 of the act cited in the preamble, without becoming a party thereto."

The case of *Stephens* v. *Berry* was decided wholly on the act of 1864. Richards, C. J., says: "I think we are certainly bound to decide, that when a person becomes the holder of an unstamped bill so as to sue and does sue on it, he must, to make it valid in his hands, have put the double stamp on it before commencing the action. Indeed, I personally take a much stronger view of the necessity of a holder protecting himself by the double stamp, when the bill without it would be void. The holder, in my judgment, can only be considered safe when he put on the proper stamp at the time he would in law be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter."

This note matured in January, 1865. The action seems to have been commenced in September following, and the trial was in December ast.

The new act imposed new duties from the 1st of January, 1866, with certain directions as to obliterating stamps from and after the 1st of October, 1865. The fourth section is silent as to time of operation, and the fifth directs its being construed as one act with the previous one.

If we should read sec. 4 as part of or explanatory of sec. 9 of the former act, there would be no room to question the correctness of the learned Chief Justice's "personal" view.

But when the latter statute became law the note had been six months at least in the plaintiff's hands. He was then the holder of it, and the action was pending before the statute was passed.

By sec. 9 of the earlier act the note was void if not duly stamped at its making, &c., except in the case of any subsequent party affixing the double stamp at the time of his becoming a party thereto. This note, therefore, if no subsequent party stamped it on becoming a party, was avoided. If the plaintiff has saved it by stamping, it must be because as a subsequent party he stamped it on becoming such party. He therefore became a party in some way, and no other way can be imagined than by becoming the holder or endorsee of the note. He did not become a party by merely bringing the action.

We therefore think the direction given to the jury cannot be upheld.

The statute would be completely defeated if the stamps could be affixed at any time before action commenced. Parties could hold notes and pass them from hand to hand, and only affix stamps if legal proceedings became unavoidable.

If the fact really were, as is most probable, that the plaintiff is the payee and first endorser of the note, the time of his first connection with it is quite plain.

We think the appeal must be allowed, and that the rule for a new trial in the court below should be made absolute without costs.

Appeal allowed.

COMMON LAW CHAMBERS.

(*Reported by* HENRY O'BRIEN, ESQ., *Barrister at-Law*)

IN RE ANDREW CLEGHORN AND THE JUDGE OF THE COUNTY COURT OF THE COUNTY OF ELGIN, AND DUNCAN MUNN.

Insolvent Act of 1864, *sec.* 4, *ss.* 4, 16—*Jurisdiction of county judge to order payment of claim by assignee—Costs—Dividends—Appeal from assignee—Prohibition*—28 *Vic. cap.* 18.

A demand for wages alleged to be due by the insolvent to the claimant was made, as a preferred claim, to an assignee in insolvency. The creditors, at a meeting, passed a resolution authorising the assignee to pay all claims for wages, but the assignee refused payment of this claim as made. At this time no dividend sheet had been prepared. A summons was subsequently issued by the County judge, calling on the assignee to shew cause why he should not pay the claim. The assignee not appearing on this summons, evidence was taken before the judge, and an order made for the payment forthwith, with costs, of a sum less than the original demand. The assignee afterwards paid the claim as reduced, but refused to pay any costs; upon which the judge's order for the payment of the claim and costs was made a rule of court and execution issued thereupon against the goods of the assignee. Upon an application by the assignee for a writ of prohibition to prohibit further proceedings in the county court on the writs or orders, &c., it was *held*—

1. That the County judge had no power to adjudicate upon the claim until it had been decided upon by the assignee. It might have been brought before him as on an appeal from the decision of the assignee, but not for his decision in the first instance, and in this case there was nothing to appeal from.
2. That the assignee should not have been ordered, so far as appeared, to pay costs.

3. That the direction by the creditors to pay these preference claims without putting them on the dividend sheet was illegal.
4. That the power given to the judge by s. 4, ss. 16, to control the assignee is in the nature of giving him personal directions as to his duties, enforceable by imprisonment on default, but that the judge has no power to enforce his orders by judgment and execution though he might possibly compel an assignee to pay costs incurred by his disobedience by making it a condition that he should pay them before he could be considered purged of his contempt.
5. That the only remedy of the assignee under these circumstances was to apply for a prohibition.

Remarks as to how far admitting jurisdiction waives right to prohibition.

[Chambers, Jan. 23, 1866.]

A summons was issued on 20th December last, calling on the Judge of the County Court of the County of Elgin, and on Duncan Munn, to show cause why a writ of prohibition should not issue to prohibit the further proceeding in the same County Court upon two writs of *fi. fa.* issued on 29th November, 1865, at the suit of Munn, against the goods of Andrew Cleghorn, assignee to the estate of Charles Roe, an insolvent, and upon the rules of court or judgments upo which the said writs of *fi. fa.* issued, and the orders of the judge mentioned in the rules of court, on the ground that the judge had no jurisdiction in the matter to which the said orders, rules, judgments and writs relate,—the resolution of the creditors of the said Roe, to enforce which the orders were made, not having been validly passed by the creditors under the Insolvent Act of 1864, and, even if valid, not containing any instructions which the said judge could lawfully enforce; and no duty being imposed by the terms of the said act upon the said assignee, such as the said orders assume to enforce. And on the ground that the judge of the County Court, even in cases in which he had jurisdiction to enforce the performance of the duties of assignees, has no power to award costs, but can only proceed for contempt of court.

From the papers filed, it appears that the estate of Charles Roe, of St. Thomas, in the county of Elgin, was put into compulsory liquidation; and Andrew Cleghorn, of the city of London, was about the 6th February, 1865, appointed assignee of the estate.

That at a meeting of creditors held at London, on 21st of May, 1865, the following resolution was adopted by the creditors then present:—"That the assignee be authorized to pay at once all claims for wages, upon being satisfied of their correctness, according to the provisions of the statute in that behalf."

That at this time no dividends had been allotted, or dividend sheets prepared, nor had any dividend been made up at the time this application was made.

That Munn claimed wages out of the estate, amounting to $127 35, and demanded payment shortly after the meeting of creditors held in May, and the assignees refused payment.

About the 11th of July last, Munn filed a petition, addressed to the judge of the County Court of Elgin, signed by his attorney on his behalf, praying that a summons might be granted calling on the assignee to show cause why he should not pay the claimant the amount of his claim, or so much thereof as, upon examining witnesses thereon, might be found due to claimant; and that the assignee be ordered to produce all books, &c, and also to show cause why the judge should not order the said claim to be peremptorily paid.

The attorney of Munn, with the petition, filed his own affidavit, in which he stated that, after the meeting of creditors and on the day thereof, the assignee told him that he would settle about said claim soon after the said 24th May. That since that day he had on two occasions demanded payment of the claim from the assignee, but he on both occasions refused, and refused to appoint a day for receiving evidence of the claim, and said he would not pay that or any other claim for wages, without a judge's order.

The assignee, in his affidavit, states he had no notice of the filing of the petition by Munn, on which the summons issued. He also stated that it is not true that he said he would not pay the claim of Munn, or any other claim for wages, without a judge's order. But when he, the assignee, had declined to pay Munn's claim, Munn's attorney said he would get a judge's order and compel him to do so. Whereupon the assignee said, "if you compel me to do so, I cannot help myself."

The claim of Munn was as follows:

Charles Roe to Duncan Munn.	Dr.
To 19 days' wages, from Nov. 11, 1864, to Nov. 29, inclusive, as seaman, on schooner Josephine, at $1 25...	$23 75
Amount of due bill dated Oct. 4, 1864, for wages due me for sailing Indian Maid to Oct. 3, 1864.	59 35
To wages from Oct. 4, 1864, to Nov. 10, 1864. inclusive, at $35 per month	44 25
	$127 35

The summons issued on July 11, 1865, by the judge of the County Court of Elgin, upon reading the petition of Munn and the affidavit of his solicitor, requiring Andrew Cleghorn, the assignee of the estate of the insolvent (Roe), to show cause why he should not pay the claimant the amount of his claim filed, or so much thereof as might, upon examining witnesses, be found to be due and payable to claimant; and he was also required to produce the books, and to show cause why the judge should not order the claim to be peremptorily paid.

The summons was served on the assignee on the 19th of July.

On the 24th of July, the matter was proceeded with before the judge. Evidence was gone into. It was proved that a note, given by the insolvent for $59 35, was on a settlement for wages due Munn, as a mariner on board of a vessel, to the 4th of October, and in addition another sum of $23 75, in the whole $83 10; and that Munn was paid on account of the due bill, $35 25; leaving due him $47 85. The learned judge thought Munn entitled to be paid that sum, and ordered the same to be paid him accordingly forthwith, with costs.

The assignee did not attend on this summons; and he stated in his affidavit, that believing the judge had no power to make the order asked for, he did not attend on the summons.

On the same day, a formal order was drawn up, by which the judge ordered "that Andrew Cleghorn, the said assignee, do, upon service on him of a copy of this order, forthwith pay to the said claimant, his solicitor or agent, the sum of forty-seven dollars and eighty-five cents, being

the amount found to be due to the said claimant, with costs of this application.

The costs of the application were taxed on the 25th July, at £5 9s. 6d.

This order and allocatur were served on the assignee, on the 29th July, and the amount payable thereunder and the costs were demanded of him, but he refused to pay.

On the 19th day of August, a summons was issued on the application of the assignee, calling on the claimant to show cause why the order of the 24th of July should not be set aside with, without, or on payment of costs; and on the 14th of August, this summons was discharged with costs. This order discharging the summons was served on the assignee about the 22nd August.

On the 22nd of August, the assignee paid the attorney of the claimant $47 85, he being satisfied of the validity of his claim to that extent. He refused to pay the costs which were demanded of him in relation to the proceedings taken. The attorney for the claimant, on receiving the amount of Munn's claim for wages, stated that the same was paid and received without prejudice to his claim for costs on the order granted. These orders were made rules of the County Court of the County of Elgin, on the 3rd of Oct., 1865; and, on the 9th of November, writs of *fi. fa.* were issued to the sheriff of the county of Middlesex, on these rules. The first endorsed to levy of the goods and chattels of Andrew Cleghorn £5 9s. 6d., costs taxed on the judge's order; also £5 13s. 6d. costs taxed on making the same a rule of court, and entering judgment thereon, with interest on both sums from the date (29th November), and £1 for the writ. The other was endorsed to levy of the goods and chattels of Andrew Cleghorn £3 0s. 11d, the costs taxed on the order made on the 14th of August, and £5 2s. 6d., being the costs taxed on making the same a rule of court, and entering judgment thereon, with interest on both sums, and also £1 for the writ.

Each writ was also endorsed to pay sheriff's fees and incidental expenses.

It appeared from the affidavits, that the assignee had not appealed against either of these orders to either of the superior courts of common law, or to the court of Chancery, or to any judge thereof, and that no application had been made to set aside the judgments, or either of them.

E Crombie shewed cause.

C. S. Patterson supported the summons.

RICHARDS, C. J. — The application is made under Prov. Stat. 28 Vic. cap. 18, the 1st, 3rd, 4th, 5th and 6th sections of which are similar to Imp. Stat. 1 Wm. IV. cap. 21, which permits applications for prohibition on affidavits, and directs how certain proceedings shall be taken therein, with provisions as to costs, &c.

The Insolvent Act of 1864, sec. 5, points out the mode in which claims against the estate of an insolvent are to be placed on the dividend sheet; and if any dispute arises as to the right of a creditor to rank on the estate of the insolvent, the matter is first disposed of by the assignee, and he makes his award, and this award may be appealed from. The act seems to be framed in the view that the assignee enquires into the claims of the creditors of the estate. On being satisfied of their correctness, he places them on the dividend sheet, and any creditor or the bankrupt may object within a certain time to the correctness of any claim so placed upon the dividend sheet.

When any dividend is objected to, or any dispute arises between the creditors of the insolvent, or between him and any creditor, as to the correct amount of the claim of any creditor, or as to the ranking or privilege of the claim of any creditor upon the dividend sheet, he calls for proofs and hears the parties, examines the books, makes an award as to the claim and the costs of contesting it. Unless that award is appealed from within three days from notice of it, the same becomes final.

This award may be appealed from to the judge of the County Court; and if any of the parties are dissatisfied with his decision (in Upper Canada) they may appeal to either of the superior courts of common law, or the court of Chancery, or to any one of the judges of the law courts. This power of appeal is extended by 29 Vic. cap. 18, sec. 15, passed 18th September, 1865, to any order of a judge made in any matter upon which he is authorized to adjudicate under the oath. But the party must apply for the allowance of the appeal within (formerly five, now) eight days from the day on which the judgment of the judge is rendered.

The proceedings in this matter do not seem to have been taken in the order prescribed by the statute, for the assignee does not seem to have decided on the claim before the application was made to the learned judge of the County Court.

The sections of the Insolvent Act referred to on the argument, as applying to the case, were sec. 4, sub-secs. 4 and 16. Sub-sec. 4 declares that the assignee shall be subject to all rules, orders and directions, not contrary to law or the provisions of the act, which are made for his guidance, by the creditors, at a meeting called for that purpose. Sub-sec. 16 provides that the assignees shall be subject to the summary jurisdiction of the court or judges, in the same manner and to the same extent as the ordinary officers of the court, and subject to its jurisdiction, and the performance of his duties may be enforced on summary petition in vacation, or by the court on a rule in term, under penalty of imprisonment as for contempt of court, whether such duties be imposed upon him by the deed of assignment, by instructions from the creditors, validly passed by them and communicated to him, or by the terms of the act.

Sec. 5, sub-secs. 4, 10, 13, sub-sec. 4, in the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor. By sub-sec. 10, clerks and other persons in the employ of the insolvent, in and about his business or trade, shall be collocated in the dividend sheet by special privilege for any arrears of salary or wages due and unpaid to them, not exceeding three months.

Sub-sec. 13 relates to disputes on demands being objected to, which are to be decided by award of arbitrator. I have already stated the substance of it.

Sec. 7, sub-secs. 1 & 2, provides for appeal from the award of assignees to the judge of the County Court, and from the decision of the latter to one of the superior courts of law, or the court

of Chancery, or to a judge of any of the said courts.

Sub-sec. 6 of sec. 7 decides that the costs in appeal shall be in the discretion of the court, or of the judge appealed to, as the case may be.

From the best consideration I have been able to give the statutes, I do not think the learned judge of the County Court had the power to adjudicate on the claim of Munn, until it had been decided upon by the assignee. The decision of the assignee might be appealed from; but I cannot see any thing in the statute authorizing the judge to take up the claim in the first instance, and order a certain amount to be allowed. The order also directs the *costs* of the application to be paid by the assignee. The amount of Munn's account as claimed was not allowed him, and the assignee was quite justified in not allowing the whole amount, for it was not due him. The direction of the creditors was only to pay the amount of the wages, on his being satisfied with the correctness of the claim. Why he should have been directed to pay the costs does not clearly appear.

The direction by the creditors to pay these preference claims without putting them on the dividend sheet, would seem to deprive the other creditors or the insolvent of disputing the correctness of the amount allowed, which seems contrary to the spirit if not the letter of the statute.

The power given to the county judge to control the assignee (sub-sec. 16 of sec. 4) seems to be in the nature of giving him personal directions as to his duties, to be enforced in case of disobedience by imprisonment. I do not think, under this section of the statute, the judge had power to enforce his orders by directing judgment to be entered and execution issued against his goods. The judge might possibly compel the assignee who refused to obey his orders to pay the costs incurred in compelling obedience, by making it a condition that he should pay the costs before he should be considered as purged from his contempt. But to order an execution to issue to levy from him the debt allowed, which should certainly be paid out of the estate, as well as the costs, which, if he was wrong, should be paid by himself alone, does not seem quite consistent, nor authorized by the statute.

If the proceeding before the county judge was an appeal from the award of the assignee, there is this difficulty about it, that there had been no dividend sheet prepared and no amount allowed, and the assignee had not decided on Munn's claim. There was in fact at that time nothing to appeal from. If it could be considered as an appeal, and coming within sec. 7 of the statute, then the assignee might have appealed against the judge's decision, as the law stood when it was made. He could not appeal against the order of the judge under the statute 17 of last session, for at the time the order was made the statute had not passed.

The only remedy of the assignee appears to be to apply for the prohibition. It may be contended that the assignee, having applied to set aside the first order of the judge, voluntarily placed himself within the jurisdiction of the court or judge, and, having failed in his application, the power existed to compel him to pay the costs of resisting the application. This would be undoubtedly correct as a general principle where the judge had the power to make the first order, but it seems to me that the right of the judge to amerce the assignee in costs, depends on the question whether he could properly have made the original order, and that as to both orders and writs of execution the same rule must apply.

On the whole, I am of opinion the learned judge of the County Court had no authority to make the orders on which the rules of court were obtained and judgments entered, on which the *fi. fa.* against the goods of Cleghorn were issued, and that a writ should go to prohibit further proceedings in the said County Court of the county of Elgin, on the said two writs of execution, and on the rules of court, orders, judgments, &c. As this however is the first application on which this question has arisen, if the claimant, Munn, desires to take the opinion of the court on the subject, I will direct the assignee to declare in prohibition before the issuing of the writ.

CORRESPONDENCE.

Act for Protection of Sheep.

To the Editors of the Local Courts Gazette.

Gentlemen,—Among the several Acts recently passed by the Legislature for the benefit of the farming community generally, is one which provides for the protection of sheep (29 Vic. cap. 39,) and as the provisions of that Act will have to be carried into operation almost exclusively by laymen, it may not be deemed out of place for the information of your numerous readers to ask a few questions in respect to that Act.

The 7th section places the sheep and lambs evidently under greater protection than any other animal or even man, since by that section it is not necessary for the owner of the sheep or lamb that has been killed or injured by a dog to prove that that dog was mischievous, while in all other instances where a dog has attacked or injured a man or an animal, except a sheep or lamb, before damages can be recovered it must be proved that the owner or possessor of that dog had a knowledge of the mischievous propensities of such dog.

The 8th section authorises the owner of any sheep or lamb that may be killed or injured by any dog, to apply to two Justices of the Peace in the municipality, whose duty it shall be to enquire into the matter and view the sheep injured or killed, and who may examine witnesses upon oath in relation thereto.

1. Is this application to be made verbally?

2. Are the justices to travel to the place where the sheep were killed, or where else are

they to enquire into the matter and view the sheep? Is the clause intended to compel justices to travel from one place to another for the good of individuals and without remuneration, and if not who is to determine the place for an *enquiry* and a *view?*

3. Can justices compel the attendance of witnesses in such a case? And if they can by what "*form*" are witnesses summoned to attend? (Form A 1 will not answer.)

The 8th section also requires such justices to give a certificate as to the facts of the killing by a dog, and in that certificate they shall state the amount of damages together with the value of the sheep.

4. Is the value of the sheep that which would be paid by the butcher for slaughter meat, or may an additional sum be added to the value, on account of a superior breed; or the intention which the owner had of keeping the lambs or sheep to breed from?

5. May the loss of time sustained by the owner in prosecuting the case, and also the anticipated damages which he sustains by the loss of a lamb which he intended for a breeder, be taken into consideration in estimating the damages?

For instance a man has four lambs killed by a dog, one of the lambs being a full blood Southdown from which he intended to breed in future. A butcher who is called as a witness values the lambs at $2 50 each, the owner however thinks that something extra should be allowed to him in the shape of damages, say $2 for loss of time and $5 for the loss of the breed for one year. Would the justices be justified in taking those $7 into consideration

The 9th section authorises the owner of the sheep killed, to see the owner of the dog that killed the sheep, but before judgment can be obtained, it must be proved that due notice was given to the owner of the dog of the intended application to the justices of the peace.

6. Does it not follow as a matter of course that if the owner of the dog *is not notified before application* to the justices, that no damages or value of the sheep can be recovered of him by any process of law?

The 10th and 11th sections point out the mode by which the owner of the sheep killed may obtain from that municipality payment for his damages and value of the sheep; this amount however, is to be paid by the treasurer from and out of the fund obtained from the dog tax and from no other whatsoever.

7. As there will be no dog tax fund within the meaning of the Act, in any municipality before the general taxes are collected, which will be towards the end of the year; is the Municipal Council before the existence of that fund required to comply with the provision of section 11? Or in other words can any action be taken under sections 10 and 11 before the dog tax fund is a matter of fact?

The 12th section requires the owner of the killed sheep to refund the money which he may thus have received from the Municipal Council, if he afterwards recovers the damages and value, from the owner of the dog.

8. Does not this clause lead to infer that the Legislature intended to give the owner of the sheep killed the power to sue the owner of the dog even after the Municipal Council has paid the damages and value of the sheep? Does not the word "*recover*" as applied in that clause mean recover by suit or by process of law?

9. If the supposition made in the 8th question is correct; *i.e.*, that an action will lie against the owner of the dog that killed the sheep even after the Municipality has paid damages and value of sheep, and that the same may be recovered from such owner of the dog; may it not also be inferred that by section 12 the Legislature intended to give power to the owner of the sheep killed to recover said damages and costs from such person who though at first was unknown, but who afterwards, *i.e.* after application to the justices was ascertained as being the owner of the dog that killed the sheep? (Of course this would render the latter part of section 9 nugatory.)

The 6th section says that the residue of the fund if any, shall form part of the assets of the municipality for the general purposes thereof.

10. At what time of the year is the balance to be struck?

The tax is payable in December, but payment is often extended till February or March. Municipal accounts are balanced immediately after the first sesssion of the council in January. Damages to sheep and lambs by dogs are most frequent in Spring, hardly ever between the collecting time and the auditing of accounts. If the dog tax fund be balanced in January and the surplus added to the general fund there will be no dog tax fund till

next December, and the municipal council may most invariably reply to applicants for damages and payment for costs of sheep that there are no funds on hand.

11. Are magistrates to perform all the work required of them under that Act without renumeration?

Though the process is not identical with that under the Summary Convictions Act, yet they do not merely act *ministerially*, and though it is a "killing" business, they certainly are acting *judicially* when they are requested to judge the value and estimate damages.

As these questions occurred to me on examining the Act, after being called upon by a farmer whose lambs had been killed by a dog, and who desired to avail himself of that statute, I thought it would not be improper to ask you for information on those points.

Respectfully yours,

Preston, 9th April, 1866. OTTO KLOTZ.

[See Editorial remarks on page 66.—EDS. L. C. G.]

Bills of Sale—Renewal.

TO THE EDITORS OF THE L. C. GAZETTE.

GENTLEMEN,—As there is, in this section of the country, a diversity of opinions about the legality of Bills of Sale, if not renewed after the expiration of one year from date of filing, will you please state if it is necessary to renew a bill of sale the same as a chattel mortgage? If renewed, must there be a new delivery of the goods and chattels? For how long a period can the person *giving* a bill of sale, retain possession of the goods he has conveyed away? It often happens when a farmer has run an account with the storekeeper to the tune of $100, that the storekeeper demands security, and for that object takes a bill of sale of the debtor's cattle &c., perhaps, worth three times the amount of the claim — *the farmer still retaining possession.* In the course of the season the farmer will probably deliver to his merchant creditor, grain &c., to the amount of the bill of sale, but as he has still been purchasing new goods, the storekeeper will not give up the bill of sale until all arrears are paid. The farmer, in the mean time having obtained credit from other persons, who were ignorant of the existence of a bill of sale, find too late that they have been most cruelly duped.

Surely some measure ought to be adopted to prevent such glaring fraud.

Your obedient servant,

S. G. LYNN.

Eganville April, 1866.

[A bill of sale, unlike a chattel mortgage, does not require renewal in order to keep it alive. The property in the chattels contained therein passes to the bargainee and remains in him until divested. The principal objects of registration of a bill of sale is to give notice to the public, and the goods still remaining in the hands of the bargainor or vendor are, nevertheless, under certain circumstances, protected, for the benefit of the purchaser, from any execution against the vendor. The books of the County Court clerk, in whose office bills of sale are registered, are open for inspection, and persons can, if they so desire, make the necessary enquiries. Parties who, for the sake of doing a large business, are in the habit of recklessly giving credit to every one who asks it generally suffer for it; and though they, as individuals, may suffer, the country generally is benefitted by every thing that tends to curtail such a system. In the case put by our correspondent we are not so sure that such bills of sale would be a protection against subsequent executions.—EDS. L. C. G.]

Tavern Licenses.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—Under the 3rd section of cap. 53 of statutes of 1860, how many licenses can a Municipal Town Council issue, to sell liquor by retail, which town has a population of 1,000 souls, but which was incorporated as a town by Act of Parliament in 1859. The law *then* required but 1,000 souls for incorporation purposes, *now* 3,000. I contend that under the section referred to, the town is entitled to twelve licenses. An answer in your very valuable journal will oblige,

A TOWN CLERK.

May 2nd, 1866.

[Sec. 3 of 23 Vic., cap. 53, provides that the proportion of Tavern Licenses shall not be "greater than one for every 250 souls resident therein, as shown by the last census, &c.; Provided that no town incorporated by Act of Parliament shall be considered as having less

than the number of inhabitants required by the Act respecting the Municipal Institutions of Upper Canada to entitle a place to be incorporated as a town."

This section seems to provide that it is to be taken as a conclusive presemption (for the purpose of this provision) that any town incorporated as above mentioned has the required number of inhabitants, that is to say 3,000, and having therefore, by force of this presumption, a population of over 3,000 inhabitants, the Munnicipal Council would be entitled to issue twelve tavern licenses. Whilst this is the apparent reading of the statute, it cannot be denied that there is a very palpable anomaly in this particular case. The preamble to the statute says, "Whereas the number of tavern licenses is larger than the necessities of the community require, and it is therefore expedient to reduce the same," but here if the town has only 1,000 inhabitants the proportion of tavern licenses may be *three* to every 250 souls.—EDS. L. C. G.]

Kidnapping—29 *Vic.*, *Cap.* 14.

TO THE EDITORS OF THE U. C. LAW JOURNAL.

GENTLEMEN,—An error appears to have been made in the draft or copies of this Act to which it would be well to call attention. The 2nd sec. provides that all the provisions of the 97th Cap. of C. S. C. respecting accessories before or after the fact should be applicable to this Act, whereas Cap. 97th C. S. C. was repealed by 27 & 28 Vic., Cap. 19.

Yours &c.,

Walkerton 28th, March 1866. LEX.

Clerk of the Peace—Fees.

TO THE EDITORS OF THE U. C. LAW JOURNAL.

SIR,—Will you have the goodness to afford me space in the *Law Journal* to ask if the Clerk of the Peace or County Attorney can charge a fee of *one shilling* for looking at the *Canada Gazette*. I had occasion, a few days ago, to request the junior partner of the courteous and very obliging County Attorney (not a hundred miles from Toronto) to allow me to look at the *Gazette* in his office, and on returning it I was informed that I must pay a fee of twenty cents for the search. If the charge was made for the *politeness* of the gentleman in question, I have nothing to complain of; but if made for merely looking for a few moments at a public newspaper, I have grave doubts whether it can be honestly made. I suppose if it was an *imposition* it ought to be exposed.

Yours, &c.,

April 20, 1866. J. F.

[We notice in the tariff of fees for Clerks of the Peace, as given in *Keele's Justice*, the following: "For every search under three years, (to be paid by the party making the same) $0.20." We suppose, unless the whole thing were a joke, that it is under the supposed authority of the above item that the charge was made. But we can scarcely conceive it possible that such a charge could seriously be made for a mere act of common courtesy. If our correspondent is not under some misapprehension as to this, we should certainly agree with him that such a transaction "should be exposed."—EDS. L. J.]

REVIEW.

A JOURNAL FOR OIL MEN AND DEALERS IN LAND. By J. D. Edgar, of Osgoode Hall, Barrister-at-Law; with a new and correct map of the Oil Districts, by J. Ellis, jun.

We fancy we hear our professional readers asking what are "*oil* men?" Fat men, lean men, rich men, poor men, tall men and small men, have for a long time been topics of daily discourse. But "oil men" is an innovation of modern days. They are men interested in the buying and selling of "oil land," or of coal oil itself in the crude or refined state. For all such this interesting little brochure is intended. All such by the study of this book may become sufficiently learned to understand the ordinary requirements of law—as to agreements for the sale of land—mode of enforcing agreements, and grounds of refusal to fulfil agreements—about title to land in Upper Canada—leases, mortgages, and points relating to oil and mineral lands. The remarks of the writer are free from professional technicality.

He mentions in his preface that "any attempt to popularize the rules of law is deprecated by some professional men." We know of none such. A liberal education is not complete without some knowledge of the elements of law, and the more it is popularized the better will be the education of those who acquire even a popular knowledge of its principles. It is true that a little law is said to be a dangerous thing. With the use to be made of the learning when supplied we are not at present concerned. But this we can say, that the man who fancies he can make himself a lawyer by reading "handy books of law" is greatly mistaken. We, however, agree with Mr. Edgar that "a man cannot always have his solicitor at his elbow, and even when he has, he naturally desires to know something about the nature of the secu-

rity in which he is investing his money." If his solicitor be not at hand and not at all communicative, the perusal of the little book before us will afford some instruction to him on such matters. If he discreetly use the knowledge thus acquired, he may profit by it. But if he imagine that he knows enough of law on the subjects treated of to dispense with his solicitor, the chances are that an appeal to his solicitor during the pendency of an expensive law suit will be the reward of his self-sufficiency.

This, however, is no reason why popular law books should not be freely purchased by the classes of the public for whom they are intended. The author means well, and is not responsible for the misguided use to which foolish or vain men may apply the knowledge he supplies them. He cannot with his books give to the purchaser either brains or discretion, and if through the want of the latter learning be misapplied, the fault does not rest with the author.

The book before us is preceded by a well-executed map of the oil district, which of itself is of as much value as the selling price of the book, and the typography of the work is greatly to the credit of Messrs. Rollo & Adam, the enterprising publishers.

JUDICIAL SAYINGS.

(*Selected from the Reports by* J. M. S. G. SCHANK, *Notary Public.*)

WRIT OF RIGHT.—The issuing out a writ of right is odious in the sight of the law. This proceeding was always so disliked, that so far back as 1783 Lord Kenyon brought a Bill into Parliament to provide that if the demandant in a writ of right failed he should pay costs, and that (contrary to the old practice) the demandant and not the tenant should be the party to begin. In 1826, when I had the honor of a seat in Parliament, I also procured a Bill, with similar provisions, to pass the House of Commons, but it was thrown out by the Lords; and now the writ is abolished altogether by the statute 3 & 4 Will. 4, c. 27, except in the particular cases provided for by sec. 37: (*The Vice Chancellor*, 5, L. J., N. S., 14, Ch)

TERMS.—In almost every trade there are certain terms and expressions used by the persons dealing in them, which are not intelligible to strangers to the trade. For instance, in the trade of insurance the word "average" is in constant use, having a meaning quite different from its ordinary understood sense. So also, there is the word "prompt," which is to be found almost universally in London bought and sold notes and contracts of sale. This word, as used, would be unintelligible to persons unacquainted with trade terms and language, and I apprehend that when such terms have been long in use and of frequent occurrence in courts of law, the judges are as much bound to know their meaning and apply them, as they are bound to know and apply the ordinary terms of law, which are quite unintelligible to persons not lawyers. By the "prompt day" is understood the day for payment on sales of goods not payable by bills, which varies in different trades: (*Pulling's Treatise on the Laws of London*, 464; *Martin, B.*, 32 L. J., N. S., 262, Q. B.)

ORIGIN OF THE WORDS BANKER AND BANKRUPT.—In the middle ages, or, at all events, during one portion of that indefinite period, the merchants and money-lenders in Italy displayed on a *banco*, or bench, the money that they had to lend out at interest; and thus the word came to signify a repository of money, or a bank. When one of these money-lending merchants was unable to continue his business, his bench, or counter, was broken, and he himself was spoken of as a *banco-rotto*, or bankrupt.—*Banker's Magazine.*

From Rolls we learn this lesson brief—
A Romilly, with rare luck gifted,
Shows how a lawyer like a leaf
Is by a little *rustle* lifted.—*Punch.*

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

STEPHEN FRANKLIN LAZIER, of the City of Hamilton, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted April 14, 1866.)

JOHN JENNINGS BROWN, of the City of London, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted April 21, 1866.)

EDWARD DEANE PARKE, of the City of London, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.

JOHN A. KAINS, of St. Thomas, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada (Gazetted April 28, 1866.)

CORONERS.

WILLIAM S. FRANCIS, of Invermay, Esquire, M.D., to be an Associate Coroner for the United Counties of Huron and Bruce. (Gazetted April 14, 1866.)

ST. JOHN CASS TISDALE, of the township of Hamilton, Esquire, to be an Associate Coroner for the United Counties of Northumberland and Durham. (Gazetted April 21, 1866.)

ROBERT BURNS, of Pakenham, Esquire, M.D., to be an Associate Coroner for the United Counties of Lanark and Renfrew.

GEORGE D. MORTON, of Bradford, Esquire, M.D., to be an Associate Coroner for the County of Simcoe. (Gazetted April 28, 1866.)

MEMBERS OF "CENTRAL BOARD OF HEALTH," UNDER C. S. C., CAP. 38.

ROBERT LEA MACDONNELL, of the City of Montreal, Esquire, M.D.

GEORGE S. BADEAUX, of the City of Three Rivers, Esquire, M.D.

EDWARD VAN COURTLANDT, of the City of Ottawa, Esquire, M.D.

HAMNETT HILL, of the City of Ottawa, Esquire, M.D.

JEAN E. J. LANDRY, of the City of Quebec, Esquire, M.D.

JOSEPH CHARLES TACHE, of the City of Ottawa, Esquire, M.D.

JAMES A. GRANT, of the City of Ottawa, Esquire, M.D.

JOHN R. DICKSON, of the City of Kingston, Esquire, M.D.

J. CLEOPHAS BEAUBIEN, of the City of Ottawa, Esquire, M.D.

WILLIAM T. AIKINS, of the City of Toronto, Esquire, M.D.

JOHN D McDONALD, of the City of Hamilton, Esquire, M.D., and

CHARLES G. MOORE, of the City of London, Esquire. M.D.

TO CORRESPONDENTS.

"L."—All the answer we can give to your question has been already given.

"OTTO KLOTZ,"—"S. G. LYNN,"—"A TOWN CLERK,"—"LEX"—"J. F."—Under "Correspondence."