DIARY FOR FEBRUARY.

2. Friday Purification B. V. M.
4. SUN... *Sexagesima.*
5. Mon... Hilary Term commences.
9. Friday Paper Day Q B. New Trial Day C.P.
10. Satur. Paper Day C.P. New Trial Day Q.B.
11. SUN... *Quinquagesima.*
12. Mon... Paper Day Q.B. New Trial Day C.P.
13. Tues... *Shrove Tuesday.* Paper Day C P. N.T. Day Q.B.
14. Wed... *Ash Wednesday.* Paper Day Q.B. N.T. Day C.P.
15. Thurs. Paper Day C.P. [Last day for service for County
16. Friday New Trial Day Q. B. [Court.
17. Satur. Hilary Term ends.
18. SUN... 1*st Sunday in Lent.*
24. Satur. *St. Matthias.* Declare for County Court.
25. SUN... 2*nd Sunday in Lent.*

NOTICE.

Subscribers in arrear are requested to make immediate payment of the sums due by them. All payments for the current year made before the 1st March next will be received as cash payments, and will secure the advantages of the lower rates.

The Local Courts'

AND

MUNICIPAL GAZETTE.

FEBRUARY, 1866.

JURISDICTION OF COUNTY COUNCILS OVER ROADS AND BRIDGES.

There appears to have been some doubt as to the meaning, or rather extent of section 339 of the Municipal Institutions Act, which enacts that the County Council shall have *exclusive jurisdiction* over all roads and bridges within any township of the county, which the Council by by-law assumes as county roads or bridges, and over all bridges across streams separating townships, &c.; the difficulty principally arising from section 336, which, whilst it vests every public road in a city, township, town or village in the municipality, does not mention counties.

An action was lately brought by the County of Wellington against one Wilson and others for destroying and removing a bridge which separated two townships in a county. The evidence was that the defendants were taking timber down the stream when a jam occurred at this bridge, which was thereupon partly removed for the purpose of letting the timber pass. It was intimated by the court, though not expressly decided, when the case was before it on demurrer to some of the pleadings (14 U. C. C. P. 300) that this exclusive jurisdiction conferred upon the county some interest beyond a mere naked power, and that it could maintain an action for damage done to such a work.

When the case came on for trial a verdict was, under the direction of the judge, entered for the plaintiffs, which was however moved against by the defendants, on the ground that the plaintiffs did not shew themselves to have been possessed of the road or bridge in question, and entitled to maintain the action; and that the remedy for the injury complained of was by indictment and not by action; and on the ground that the defendants' pleas of justification were proved.

For the defendants it was contended that the bridge was a county bridge, because it was between townships, and the late case of *Harrold* v. *The Corporations of the Counties of Simcoe and Ontario*, shews, that as counties are liable civilly for injuries sustained by a person by reason of the insufficiency of such a bridge, they must have such a power, ownership or jurisdiction over the bridge, as to entitle them to maintain an action against a wrong-doer for any damages which he may do to it.

There is no doubt a township could maintain the action, but it was disputed whether a county could also do so, the bridge being in fact the property of the township. The difficuty lay in the words "exclusive jurisdiction" which is given to counties, and in interpreting them so as not to conflict with the previous section vesting the bridge in the township. On speaking on this subject the language of the court was as follows:—"The reason which probably led the legislature to confer the *exclusive jurisdiction* upon counties over county roads and bridges, and not to vest the soil or absolute property of them in the counties, was that the county has no peculiar or exclusive locality constituting the county apart from the separate municipalities which compose it; and it might seem inconsistent, after vesting every public road, street, bridge, or other highway, in a city, township, town or incorporated village in the municipality, to vest any of the same highways or properties aftewards in the county; and therefore the 'exclusive jurisdiction' was conferred upon the county, as the grant of a power sufficiently large for all practical purposes, and indicating that the local municipality or municipalities were to be excluded from all interference in the exercise of that power."

The court decided that such an action as the one spoken of could be maintained by the county; thinking "that the civil responsibility, which we are of opinion does devolve upon a county, to answer in damages for an injury sustained by the non-repair of a bridge or highway, carries along with it the correlative right to protect that property, and to maintain an action against any one for the wilful damage to or destruction of it."

As to the case in point the court considered that the verdict for plaintiffs should stand, seeing nothing in the evidence which precluded the plaintiffs from recovering.

THE REGISTRY ACT.

Every new statute has been from time immemorial a more or less fruitful subject of discussion and litigation. The one we now refer to is no exception to the rule, at all events so far as discussion is concerned. The time has not yet arrived for litigation as to any of its provisions—that time may come and probably will, unless amateur conveyancers and even some of those who ought to be "learned in the law" are a little more careful than are some we know of.

One of the points in dispute is, are two witnesses necessary for the proper registration of a deed? One used to be sufficient for a deed, two were necessary for a memorial; but memorials are done away with and in their place is put a duplicate original, or if no duplicate, then *the* instrument must be left in the Registry office. The affidavit now required may be and probably will be an additional protection against fraud, but then it is not absolutely necessary so far as we see that the witness should state that he knows the parties or any one of the parties. Could the Registrar refuse to register the deed without such a statement of knowledge, we imagine not. It is also argued that the first part of section 39 uses the words "one of the witnesses to such instrument," and section 46 speaks of "the witnesses to any instrument." It is impossible to say with certainty what the Legislature intended—there is nothing express upon the point, and we are left to our own individual judgment on the point. The cautious ones take the not very troublesome precaution of having two witnesses, others confident in their opinion only require one.

Some again say that there should be duplicate affidavits, one on each instrument (when executed in duplicate). We can scarcely think that this is necessary, but it is very commonly done. It is, say the careful ones "better to be sure than sorry." But whilst speaking on the subject of affidavits, we must warn such of our readers as need the caution not to trust implicitly to all the forms of affidavits that are to be found on the backs of printed deeds and mortgages, supposed by the vendors thereof to be in accordance with the statute. In some of these there is no such statement of the name, place of residence and calling of the witness, as some assert the act requires. It appears to be necessary, say they, an eminent equity counsel to the contrary notwithstanding, that this statement should be a substantive part of the affidavit.

It has been suggested, and the suggestion is a good one, that instruments executed in duplicate should shew the fact by a short declaration at the commencement after the words "This Indenture," or in some other convenient place.

No certificate of identification such as was formerly required in the case of instruments executed out of Upper Canada appears to be necessary under the new act. It is also to be noticed that the affidavit of execution must be made *on* the instrument (sec. 40) and it will not be sufficient as it formerly was *to annex it.*

Some persons have suggested difficulties in the reading of section 36, though we do not at present see the force of the objections raised. There are also some unimportant mistakes in some of the forms.

Sect. 40 of the act as amended in committee of the session previous to the one in which it was ultimately passed contained certain clauses which are not now to be found under the corresponding section (sec. 39) in the present act. They were these

"6. But if he do not know them or do not know the whole of them, he shall state the fact;

"7. And as to such of them as he does not know, he shall state the circumstances which lead him to believe that the party or parties whom he does not know and whose signature or signatures he attests, is or are in truth the party or parties named in the instrument, such as—that the party declared himself to be the person in question, and the witness had no reason to doubt the truth of the same, or that the party whom the witness does not know was identified to him by such person [naming and describing him] who is a

person well known to the witness and whose statement the witness believes to be true."

Sub-sections 4 and 5 of section 39 as it now stands are bald in the extreme. Surely the expunged clauses which are given above would, if nothing else, have been useful in suggesting the sort of information which may still be given with advantage. If it were provided that the witness *must* swear to a knowledge of the parties to the instrument, or one of them, we could understand what was intended, though such a provision would occasionally be one of great inconvenience. But it is only necessary to state that the witness knew the parties "*if such be the fact.*"

Various other questions and difficulties have been started respecting this act to which we cannot now refer. We shall be glad to hear from any one interested in the subject as to these or any other points which admit of or require discussion. Upon the whole we do not think the act has been quite as carefully drawn up as the public had a right to expect, considering the time that it has been under discussion by the legislature, and the numerous suggestions that have from time to time been made with reference to it by competent persons; but many of which, it is alleged, have been overlooked, or have not been sufficiently carefully worded.

ESCAPE OF PRISONERS ON TECHNICAL GROUNDS.

In looking over some of our old country exchanges we notice in the *Scottish Law Magazine* some sketches of narrow escapes of prisoners from punishment, owing to the very strict manner in which the rules of criminal law were interpreted in Scotland some years ago. We make a selection from these which we think will be perhaps instructive and certainly amusing to many of our readers, though they do not we are happy to say give any idea of the way in which criminal law is administered in this country in the year of grace 1866.

The first we shall refer to was with reference to the subpœnaing of a witness at a trial for murder at Perth, in 1823. On the first witness being called, it was objected to his citation, and to the citation of all the other witnesses in the case, that, when they were cited, the messenger had not the warrant of citation *on his person.* The designation of the witness was correct, and the citation otherwise unexceptionable; but the fact objected to having been verified, the witness was not allowed to be examined, and the jury, in consequence, found the prisoner *not guilty* of the charge of murder. This objection was founded on a formerly established principle, that if a witness appear without having been cited with all legal formality, he must be rejected, on the ground that he had shown an undue desire to appear as a witness, and that he must be held to appear without due legal compulsion if any error, however trifling, could be discovered in the mode of citation or the messenger's execution.

In another case on a witness being called for the prosecution, it was objected for the panel that the witness resided at No. 158 Trongate street, Glasgow, and not at 128, as designed in the list of witnesses. The objection of erroneous designation was sustained, and as the case could not be established without this witness, no farther evidence was led, and the panel was dismissed with a verdict of not guilty. What made this case particularly absurd was the fact that the incorrect information was quite superfluous and could not possibly mislead any one.

In 1840 a man was charged with having committed an assault in a house in Edinburgh possessed by a certain man named; but during the proof it came out that the house was possessed by the *wife* of that man, from whom she was separated. The court stopped the case, and the Lord Justice (Clerk) directed the jury to return a verdict of not guilty, which they accordingly did. This might be said to be carrying out the idea of woman's rights in quite a novel direction. The next case is, if possible, more technical and seems to go to the extreme length of strictness, and this case was tried no longer ago than the year 1857. A woman was indicted for a theft *within* a certain house; but it appeared from the evidence that the articles were stolen from a *closet* in a lobby of the house. The prisoner's counsel claimed an acquittal on the ground that the theft proved was not the one libelled, and she was acquitted accordingly. The lawyer in this case must have used very ingenious arguments to prove that a closet in the lobby of a house was not within the house. The greater includes the less, though not the less the greater.

Errors in the description of persons who have been the victims of crime are said to be a prolific source of failures in the punishment of atrocious criminal cases. One of the best known cases of this class was that of John Hannay, who, in 1806, was charged with the murder of a young woman who was with child to him. The indictment described her as "Marion Robson or Robertson, daughter of the deceased John Robson or Robertson, late *wright* in West Croft of Lochrutton, in the parish of Lochrutton, and stewartry of Kirkcudbright, and of Janet Macminn, his wife, presently residing at Lochrutton Gate, in the parish and stewartry aforesaid." This description was unnecessary ample, and would have been sufficient without any reference to the deceased father. In the course of the evidence, the fact came out that the father had been a *tailor*, and not a *wright* as libelled. The Solicitor-General thereon gave up the case, and consented to the acquittal of the panel, "in respect there could be no evidence of the charge of murder as specified in the indictment;" but he intimated, and minuted on the record, his intention of bringing the panel again to trial on a new libel. The panel was acquitted accordingly. A new libel was forthwith raised in the same terms as the former, with the single variation of the trade of the girl's father. The panel objected to being sent to trial on this libel, as he had already "tholed an assize," and stood in peril of his life for the same act of murder. He had put himself under the protection of the Habeas Corpus Act, and on this he also pleaded that the indictment previously preferred against him had been prosecuted to a final issue, and that the process was therefore at an end. The judges differed on the question under the Act, but their differences on this point were sunk by a unanimous opinion that the objection at common law was good, and that the panel could not be tried again.

(*To be Continued.*)

Our readers will by this time doubtless have received the Index for the *Law Journal*, and the Index for the *Local Courts' Gazette*, for last year. They are more complete than formerly, as well as fuller, owing to the increased width of the column. The Almanac has also been distributed. It is the same as that for last year, with the exception, of course, of the necessary alterations in the calendar, a few slight alterations in the tables of stamps, and some changes in the Judiciary and in the tables of Court and County officials. We trust it may still be found as useful and correct as it has, we are assured by many, hitherto been.

SPRING ASSIZES, 1866.

Eastern Circuit.

The Hon Mr. Justice John Wilson.

Kingston	Tuesday	20	March.
Brockville	"	3	April.
Perth	"	10	"
Ottawa	"	17	"
Cornwall	Thursday	26	"
L'Original	"	3	May.

Midland Circuit.

The Hon. Mr. Justice Hagarty.

Belleville	Monday	19	March.
Napanee	Tuesday	27	"
Whitby	"	3	April.
Cobourg	Monday	9	"
Peterborough	"	16	"
Lindsay	Friday	20	"
Picton	Tuesday	8	May.

Home Circuit.

The Hon. Justice Adam Wilson.

Milton	Tuesday	20	March.
Hamilton	Monday	26	"
Welland	"	9	April.
Niagara	Friday	13	"
Barrie	Tuesday	24	"
Owen Sound	"	8	May.

Oxford Circuit.

The Hon. the Chief Justice of the Common Pleas.

Guelph	Tuesday	20	March.
Stratford	"	27	"
Berlin	"	3	April.
Woodstock	"	10	"
Brantford	"	17	"
Cayuga	Monday	7	May.
Simcoe	Thursday	10	"

Western Circuit.

The Hon Mr. Justice Morrison.

Goderich	Tuesday	20	March.
Sarnia	"	27	"
London	"	3	April.
Chatham	"	17	"
Sandwich	Monday	23	"
St. Thomas	Tuesday	1	May.

City of Toronto.

The Hon. the Chief Justice of Upper Canada.

Monday, 19th March.

York and Peel.

Monday, 9th April.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

ELECTION UNDER MUNICIPAL ACT—COMMENCEMENT—PERJURY.—An election, under the Munipal Act, is commenced when the returning officer receives the nomination of candidates, and it is not necessary to constitute an election that a poll should be demanded.

Where, therefore, in an indictment for perjury, the defendant was alleged to have sworn that no notice of the disqualification of a candidate for township councillor had been given previous to to or at the time of holding the election, the perjury assigned being that such notice had been given *previous* to the election; and the notice appeared to have been given on the nomination of the candidate objected to: *Held*, that the assignment was not proved.—*Reg.* v. *Cowan*, 24 U. C. Q B. 606.

SALE OF LAND FOR TAXES—PAYMENT OF REDEMPTION MONEY UNDER PROTEST—RIGHT TO RECOVER BACK.—Where lands were sold for taxes, and after the expiration of a year the owner paid under protest to the County Treasurer the sum required to redeem them.

Held, that he could not recover this sum from the County as money had and received, for under section 148 of the Assessment Act, it was received, not for his use, but for that of the purchaser; and the payment of redemption money, to deprive the purchaser of his rights, must be unqualified.—*Boulton* v. *York and Peel*, 25 U. C. Q. B. 21.

VOLUNTARY STATEMENTS BY ONE PRISONER AGAINST ANOTHER—INDUCEMENT.—The prisoner, after his committal for trial and while in the custody of a constable, made a statement, upon which the latter took him before a magistrate, when he laid an information on oath charging another person with having suggested the crime, and asked him to join in it, which he accordingly did. Upon the arrest of the accused, the prisoner made a full deposition against him, at the same time admitting his own guilt. Both information and deposition appeared to have been voluntarily made, uninfluenced by either hope or threat; but it also appeared that the prisoner had not been cautioned that his statements as to the other might be given in evidence against himself, though he had been duly cautioned when under examination in his own case.

Held, following *The Queen* v. *Finkle*, 1 V. K. 453, that both the information and deposition were properly received in evidence, as being statements which had been voluntarily made, uninfluenced by any promises held out as an inducement to the prisoner to make them, and that, too, though they had been made under oath; for that the rule of law excluding the sworn statements of a prisoner under examination applied only to his examination on a charge against himself, and not when the charge was against another; for that in the latter case a prisoner was not obliged to say anything against himself, but if he did volunteer such a statement it would be admissible in evidence against him. —*Reg.* v. *Field*, 16 U. C. C. P. 98.

INSOLVENT ACTS—EXECUTION—ATTACHMENT—PRIORITY.—Judicial proceedings and acts of the Legislature take effect in law from the earliest period of the day upon which they are respectively originated and come into force.

M. recovered a judgment and issued a *fi. fa.* goods against R. The writ was placed in the hands of the sheriff at half-past 10 and a levy made about 11 a.m. On the same day, but after the levy, C. sued out against R. a writ of attachment in insolvency, which was placed in the sheriff's hands at half-past 11, a.m. On the same day, also, an act of Parliament came into force, (the Royal assent being given thereto on that day, but not until the afternoon) by which it was in effect enacted, that no lien upon the personal or real estate of an insolvent should be created by the issue or delivery to the sheriff of any execution, or by a levy made thereunder, unless such execution had issued and been delivered to the sheriff at least thirty days before the issue of an attachment in insolvency; but that this provision should not apply to any writ *theretofore* issued and delivered to the sheriff, nor affect any lien or privilege for costs which the plaintiff theretofore possessed.

Held, that under the circumstances above detailed, the *fi. fa.* goods could not be considered as having been issued and delivered to the sheriff *before* the act came into force, and, therefore, by virtue of the act the writ of attachment prevailed over the execution.

Held, also, that the execution creditor was not entitled to any lien for his costs.

Semble, that the issuing of the writ of attachment was a judicial act, and by virtue thereof under the statute, the property of the insolvent vested in the assignee by relation before it was seized by the sheriff under the execution, and before any lien attached on the property by virtue of the execution.—*Converse et al* v. *Michie*, 16 U. C. C. P. 167.

COMPOSITION DEED—MAJORITY OF CREDITORS IN NUMBER AND VALUE —In computation of the "value" of the debts owing to secured creditors in order to determine whether a majority in number representing three-fourths in value of the creditors of a debtor have assented to a deed under 24 & 25 Vict. c. 134, s. 192, the value of the securities is not to be deducted.—*Whittaker* v. *Lowe*, 14 W. R. 197.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

HIGHWAYS — USER — EVIDENCE — GRANT BY CROWN TO PRIVATE INDIVIDUAL.—*Held*, 1. That a public road, laid out in the original survey of crown lands by a duly authorized crown surveyor, is a public highway, though not laid out upon the ground.

Held, 2. That if a user had been necessary in this case to establish the roads in question as public highways, the facts adduced in evidence shewed a sufficient user according to the nature of the ground and the requirements of the inhabitants.

Held, 3. That after a road has once acquired the legal character of a highway, it is not in the power of the crown, by grant of the soil and freehold thereof to a private person, to deprive the public of their right to use the road.—*Reg.* v. *Hunt*, 16 U. C. C. P. 145.

INFANT—RELIGIOUS EDUCATION.—A father, a clergyman of the Church of England, died, having by will appointed his wife and another clergyman of the same church guardians of two infant children, and the mother afterwards joined the sect called Plymouth Brethren. The Court, on the application of the other guardian, gave directions for bringing up the infants in the faith of the Church of England, and not as Plymouth Brethren, and referred the case to chambers for a scheme for that purpose.—*In re Newbery*, 14 W. R. 173.

RAILWAY—CONDITION THAT GOODS CARRIED AT OWNER'S RISK —The plaintiff knew that there was a certain rate for carrying horses on a railway by passenger train, and in horse-boxes, and that there was a lower rate for carrying them by goods-train and in waggons. He sent his horses by goods-train.

Held, that it was a reasonable condition of the contract for conveyance that the horses should be carried entirely at the owner's risk, and that such condition would protect the railway company if the horses were injured on the journey, but would not protect them from the consequences of delay where the contract was to deliver in a reasonable time.—*Robinson* v. *Great Western Railway Co.*, 14 W. R. 206.

MISDESCRIPTION OF LEGATEE IN WILL—PROBATE.—Where a legatee was erroneously described as the sister of deceased, being her daughter, the court, on being notified that it was a mistake, allowed the grant of administration *cum testamento annexo* to pass to such legatee —*In re Hooper*, 14 W. R. 210.

DEVISE—EASEMENT—USE OF PUMP ON LAND OF ADJOINING HOUSE.—A will contained the following devise: "To my nephew, W. P., I give the house I now live in, with the outhouse and garden and orchard, in my own occupation, to him and his heirs and assigns for ever. I give to my niece, C. P., the house and outhouse and garden, as now in the occupation of T. A., to her and her heirs and assigns for ever." The houses adjoined each other. The house in the occupation of the devisor had a pump belonging to it, from which T. A., who had occupied the other house as yearly tenant of the devisor for two years, had been accustomed to draw water with her knowledge.

Held, that the right to the use of the pump was not an easement and did not pass to C. P.—*Polden* v. *Bastard*, 14 W. R. 198.

COPYRIGHT—ALIEN—COLONY, LAWS OF—RESIDENCE.— An alien friend, coming into a British colony and residing there for the purpose of acquiring copyright during and at the time of the publication in England of a work composed by him, and first published in this country, is entitled to copyright in England in the work so published, though he may not, under the laws of the colony where he is residing, be entitled to copyright there.

An alien, coming into a British colony, becomes temporarily a subject of the Crown; he thus acquires rights both within and beyond the colony, and the latter cannot be affected by the laws of the colony into which he comes.—*Low* v. *Routledge*, 14 W. R.

PROMISSORY NOTE—3 & 4 ANN, C. 9—DAYS OF GRACE.—A note was made in favour of A. B. simply, and not either to order or bearer. It was payable by instalments, the whole amount to become payable upon default in payment of the first instalment.

Held, (per Bramwell, Channell, and Pigott, BB., Pollock, C. B., dissentiente) that the note was a promissory note within the statute of Ann, and that days of grace must be allowed upon the first instalment.—*Miller* v. *Biddle*, 14 W. R.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

IN THE MATTER OF DAVID HARTLEY AND THE CORPORATION OF THE TOWNSHIP OF EMILY.

Temperance Act of 1864.

Where a by-law was passed under "*The Temperance Act of* 1864." having been adopted by the electors at a meeting at which the township clerk took the poll, and conducted all the proceedings, no person presiding thereat as directed by sec. 3, sub-sec. 3.—*Held*, that the provision was imperative: that in the absence of the person appointed to preside, no poll could be legally taken; and the by-law therefore was quashed, with costs.

Although no one appeared to shew cause, the court, having regard to the evident intention of the legislature to sustain such by-laws unless clearly bad, would not make the rule absolute without seeing that the objections were fatal.

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

In Easter term *C. S. Patterson* obtained a rule calling upon the Corporation of the Township of Emily to shew cause why the by-law submitted to the electors of the said township on the 9th and 10th of January, 1865, for adoption under "*The Temperance Act of* 1864," should not be quashed, on the grounds, *first*, that no person presided at the meting in pursuance of the third sub-section of section three, of the said statute; and, *second*, that the township clerk closed the poll on the second day before all the electors had polled their votes, and before the hour of five o'clock in the afternoon.

These objections were sustained by affidavits, stating that although the reeve was present at a part of the meeting, neither he nor any municipal councillor or municipal elector presided thereat, nor was any person chosen to preside; and that he opened the poll on the second day, and closed it finally at or about thirty minutes after three o'clock in the afternoon of such second day, alleging as his reason for so finally closing the same that more than half an hour had elapsed without any vote having been offered, although before so closing he was informed, as the fact was, that several duly qualified voters were then coming for the purpose of voting, and was requested not to close the poll, in order to give them an opportunity to vote.

It further appeared that on the poll-book was endorsed a certificate, as follows: "We, the undersigned, do hereby certify that one hundred and eleven voted yea, and fifty-nine nay, at a meeting called on the 9th and 10th days of January, 1865, to pass the Temperance by-law.

"(Signed) { Chairman.
{ Robert Grandy, Tp. Clerk."

This rule was served on the township clerk and on the reeve of the township. Copies of the affidavits on which the rule was granted, and a notice that they were such copies, were also served on the clerk. The rule was enlarged until this term, and was then moved absolute.

No one appeared to oppose its being made absolute.

DRAPER, C. J., delivered the judgment of the court.

In matters of ordinary proceeding in a cause, we should probably make a rule absolute which having been duly granted and regularly served, was not opposed by the party called upon to shew cause. In the present case, however, looking at the tenor and spirit of "*The Temperance Act of* 1864," we deem it our duty to see that the objections raised are sustained in fact by the affidavits, and if so, that they are sufficiently in accordance with the statute to call for the by-law being quashed; for considering that the 37th section of the act declares that no by-law passed under its authority shall be set aside for any defect of procedure or form whatever; and that no by-law adopted by the electors of a municipality under the 4th and 5th sections of the act shall be set aside for any defect whatever, whether of form or substance, affecting the requisition therefor, the authenticity or number of the signatures thereto, the qualification of the signers thereof, or any matter, thing or procedure antecedent to the first publication of the notice given for the poll taken, unless the same be authorized by the act; we can scarce doubt that the legislature desired to sustain all such by-laws unless there were very clear and very substantial grounds for setting them aside. This by-law was adopted under the 4th and 5th sections of the statue.

When the rule was moved absolute, I was doubtful whether we might not treat the provision of the 3rd sub-section of section 5, in respect to the person who should preside at the meeting for taking the poll, as directory only, and that provided some person did preside it would be sufficient. My attention was not called to the statement in the affidavit of Thomas Stephenson, that "the said township clerk took the poll, and conducted all the proceedings of the said meeting without any person presiding thereat." Now under sertion 97 of the Municipal Institutions Act, sub-sec. 7, it is the returning officer who is to close the poll, as well as adjourn it, when an adjournment is required. This duty is to be performed by the person who presides, and he is also, under sub-sec. 8 of sec. 5 of the Temperance Act, to count the yeas and nays, and to ascertain and certify on the face of the poll-book the number of votes given for and against the by-law, and the certificate is to be countersigned by the poll clerk, who would usually be the township clerk; and by section 6 every by-law *so* passed is to be communicated by delivery of a copy certified by the township clerk to the collector of inland revenue.

The first objection is certainly sustained in fact, and the more I consider it the more substantial it appears to me. It cannot be mere matter of procedure or form that there should be no person presiding at the meeting, in whom is vested the authority for conducting the election and for maintaining peace and order, to whom the legislature has entrusted the counting the votes and certifying the result. In the absence of any such person I do not see how a poll can be taken, under the statute, or the

result legally ascertained. The township clerk has, to a great extent, assumed an authority not conferred upon him, and (without questioning his motives) he has shewn more zeal than discretion in this matter.

We cannot hesitate in deciding that on this objection the rule to quash the by-law must be made absolute, with costs. If the statute gave the authority, we should be disposed to add, to be paid by the township clerk, but the corporation must bear the loss caused through the officiousness of their officer.

Rule absolute.

IN THE MATTER OF APPEAL BETWEEN ARTHUR STEWART, APPELLANT, AND JAMES BLACKBURN, RESPONDENT.

Conviction—Appeal to Quarter Sessions—Certiorari.

Where a defendant having been convicted on the information of a toll-gate keeper of evading toll, appealed to the Quarter Sessions, where he was tried before a jury and acquitted, this court refused a writ of *certiorari* to remove the proceedings, the effect of which would be to put him a second time on his trial.

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

On the 6th February, 1865, on the information and complaint of James Blackburn, a gate keeper on the Rond Eau and St Clair Gravel and Plank Road, Arthur Stewart was convicted before a justice of the peace of the county of Kent of passing a check gate on the said road without paying toll.

He appealed to the Quarter Sessions, and demanded a jury, before whom the case was tried, and a verdict rendered in his favour, at the sittings in March, 1865.

In Easter term *J. H. Cameron*,, Q. C , moved for a writ of *certiorari*, to bring before this court all the proceedings of the Quarter Sessions on such appeal.

The court expressed doubts whether, after an acquittal, such process should be ordered, at all events at the instance of a private prosecutor; but they granted a rule *nisi*, which was accordingly issued, calling upon the chairman of the Quarter Sessions and the clerk of the peace.

During this term *McBride* moved the rule absolute. No one appeared to shew cause.

The court, however, after taking time to consider, refused to grant the writ, saying that if the Quarter Sessions had deemed it advisable they might have reserved any questions of law arising for the opinion of this court, under Consol. Stat. U. C. ch. 112; and that the effect of granting this application would be to put the appellant again upon his trial, for which no authority had been cited. The circumstances of the case, they remarked, were not such as to call for any extraordinary interference, and the question as to the right to charge the toll could easily be raised in another form.

The CHIEF JUSTICE, having been absent when the rule was moved absolute, took no part in the judgment.

Rule discharged.

COMMON PLEAS.

(*Reported by* S. J. VANKOUGHNET, Esq., M.A., *Barrister-at-Law, Reporter to the Court.*)

DAVIDSON ET AL v. REYNOLDS ET AL.

Exemption Act (23 *Vic. c.* 25 *s.* 4, *sub-sec.* 6)—*Horse ordinarily used in debtor's occupation.*

A horse ordinarily used in the debtor's occupation, not exceeding in value $60, is a "chattel" within the meaning of the Exemption Act, 23 Vic. cap. 25, sec. 4, sub-sec. 6, and is therefore not liable to seizure for debt.

[C.P., M.T., 1866].

This was an action against the defendant Reynolds, sheriff of the county of Ontario, and his sureties, on their covenant under the statute.

Two breaches were assigned; 1st. That on an execution sued out of the County Court against the goods and chattels of Donald McMillan *et al.*, endorsed to levy $144 72 damages, and $26 for costs and writs, delivered to him in December, 1864, when they had goods, &c., out of which he might have made the money, he did not nor would not levy the money, but made default; 2nd. That on the same writ he did levy the money, but falsely returned that he had levied $5 91, and that the defendants had no more goods and chattels, whereof he could levy the residue or any part thereof.

The cause was tried at the last assizes for the city of Toronto.

The plaintiff's proved that, among other things, the sheriff's bailiff had seized a pair of horses, harness and sleigh, which the defendants in the execution had been using on their farm; that the bailiff had allowed McMillan to drive away the horses on the pretence of finding security, and that he had sold them: the sheriff was unable to produce them. The other goods and chattels brought enough to pay the sheriff's charges and leave $5 91 over.

There were two points in dispute at the trial; 1st. Whether McMillan took the horses away by leave of the plaintiffs or sheriff's bailiff; and, 2nd. Whether one of the horses could not have been selected by the debtors as exempt from seizure, its value with the harness and sleigh not exceeding $60.

The learned judge being of opinion that it was exempt, directed the jury to say, whether it was by plaintiff's leave or by leave of the sheriff that the horses were taken away, and to find the value of the better horse as the damages of the plaintiffs, and also to find the value of the other horse, sleigh and harness. The jury found that it was with the leave of the sheriff's bailiff the horses were driven away, and they assessed damages for the plaintiffs at $75, the value of the best horse, and the value of the other horse, harness and sleigh at $50.

McMichael had leave reserved to move to increase the damages by $50, if the court were of opinion that the horse, not exceeding in value, $60, was not exempt from seizure.

In Miehaelmas term a rule *nisi* was accordingly obtained to shew cause why the verdict should not be increased by adding $50 pursuant to leave, on the ground that the articles so valued by the jury were not exempt under the statute.

During the term *Robt. A. Harrison* shewed cause, and contended that a horse was such a

chattel as might be exempt from seizure, if ordinarily used in the debtor's occupation, as the evidence fairly shewed this was.

McMichael contended that animals are not within the exemption of the sixth sub-section of the fourth clause of the statute.

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

We are called upon to determine whether this horse was exempt from seizure by the 6th sub-section of section 4 of the 23 Vic. cap. 25. The words are, "Tools and implements of, or chattels ordinarily used in the debtor's occupation to the value of sixty dollars."

We take the word "tool" to mean an instrument of manual operation, particularly those used by farmers and mechanics. We think the word "implement" has a more extensive meaning, including, with tools, utensils of domestic use, instruments of trade and husbandry; but both words, we think, exclude the idea of animals. The word "chattel" has a legal, well-defined meaning, and is more comprehensive than the other two, and includes animals as well as goods movable and immovable, except such as have the nature of freehold. "Chattels personal are horses and other beasts, household stuff," &c.: Co. Lit. 118 b.; Off. Ex. 79, 81.

A horse, ordinarily used in a debtor's occupation, of the value of $60 or under, could properly, we think, have been selected by him out of any larger number as exempt from seizure under this sub-section. The jury have found that the horse, sleigh and harness were of the value of $50, and in regard to amount were within the exemption.

We are of opinion that a horse, ordinarily used in a debtor's occupation, of the value of $60 or less, as this horse was, is a chattel which he might select out of a larger number seized as exempt under this clause of the statute.

The debtor has taken the horse, and so we think he may be held to have selected it, as he had the right to do.

The rule will be discharged. Rule discharged.

COMMON LAW CHAMBERS.

(*Reported by* ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*)

ROBINSON v. SHIELDS.

Set-off of judgments—One in Superior Court and the other in a Division Court—Allowed.

Held, that a judgment in a Division Court may be set off and allowed against the judgment of a Superior Court of Record.

[Chambers, July 19, 1865.]

C. McMichael obtained a summons calling on the plaintiff, his attorney or agent, to shew cause why satisfaction should not be entered on the roll in this action to the amount of $108.97, being the amount of certain judgment for $100 damages, and $8.97 costs, recovered in the Eleventh Division Court for the United Counties of York and Peel against the said plaintiff Robinson by the said defendant Shields, the above defendant entering satisfaction or giving receipt therefore upon grounds disclosed in papers and affidavit filed.

The only affidavit filed was that of the defendant, in which he swore that he did, on the 18th day of May last past, recover against the above named plaintiff a judgment for the sum of $100, and costs of suit, which said costs amount to $8.97 cents, in the Eleventh Division Court for the United Counties of York and Peel; that on the said 18th day of May a writ of execution upon the said judgment was duly issued out of the said Division Court by the clerk thereof, which said writ was directed to Robert Broddy, a bailiff of said court, and commanded him to levy the sum of $108.97, damages and costs, of the goods and chattels of the said defendant; that on the 19th day of the said month of May, the said bailiff returned the said writ of execution *nulla bona*; that the above named plaintiff in this cause recovered a judgment of this Honorable Court on the 3rd day of July, 1865, against deponent for the sum of $468.49, damages and costs; that deponent was desirous of setting off against the plaintiff's judgment in this cause the said judgment recovered by deponent in the Division Court; that if not allowed to set off the said judgment against the plaintiff's judgment herein, that he, deponent, would lose the whole amount of said judgment; that no part of said judgment and costs recovered in said Division Court had been paid.

Robert A. Harrison showed cause and contended that as Division Courts are not Courts of Record, a judgment in a Division Court cannot be set off against a judgment in a Superior Court of Record.

D. McMichael supported the summons, and argued that the right invoked is an equitable one, and ought to be allowed without reference to the question whether or not the judgments proposed to be set off were judgments of Courts of Record. He referred to *Harrison* v. *Bainbridge*, 2 B. & C. 800.

RICHARDS, C. J.—I am told there is no precedent for this application, still I think it must be granted. The right to set off judgments is an application to the equitable jurisdiction of the Court, and in a case like the present ought to be admitted. No question arises here as to the attorney's lien. The summons, therefore, will be absolute.

Summons absolute.

ELECTION CASE.

(*Reported by* R. A. HARRISON, Esq., *Barrister-at-Law.*)

THE QUEEN EX REL. MCMANUS v. FERGUSON.

Election of warden—Proper description of warden—Sufficiency of certificates of reeves and deputy reeves—Duty of clerks—Nature and effect of certificates—New election—Costs.

(Continued from p. 14.)

Unless the certificate comply with the statute, the person presenting it is not entitled to his seat Con. Stat. U. C. cap. 54; *The Queen* v. *Mayor of Bridgnorth*, 10 A. & E. 67; *The Queen* v. *Humphery*, ib. 835; and all the certificates objected to were defective under the statute.

RICHARDS, C.J.—As to the point raised for the defendant that he is called upon in the sum m to show by what authority he exercises the o of "Warden of the County Council of the Co of Simcoe," whereas it should have been " den of the Corporation of the County of Sim According to sec. 65 that would seem to b

proper designation; but sec. 148 speaks of "the Warden of a County." There is no particular name specified in the statute. The defendant cannot be misled in any way by the description in the summons. If the words "of the County Council" be rejected, it would correspond with the name in the 148th section. He has appeared and the 18th Rule of Court applicable to proceed, ing in *quo warranto* is against holding any proceedings irregular or void which do not interfere with the just trial of the matter on its merits. The cases referred to, of *Hawkins* v. *Huron and Bruce*, 2 U. C. C. P. 72, and *Barclay* v. *Municipality of Darlington*, 11 U. C. Q. B. 470, are authorities to shew that a slight difference from the true name of a corporation, will not invalidate proceedings. I am of opinion that the objection referred to cannot be sustained.

Then as to the merits, the first question to be considered is, whether, under the 67th sec. of Con. Stat., cap. 54 (U. C. Municipal Institutions Act), a reeve of a township, who was duly elected, and had made and subscribed the declarations of office and qualification, had a right to take his seat in the County Council, when the certificate of the Township Clerk did not state that he had made *and* subscribed the declarations of office *and* qualification, but that "he had taken or made the declaration of office."

I am of opinion that the reeve furnishing the certificate mentioned had not the right to take his seat; and that the Clerk of the County Council, if considered as acting in relation to this certificate alone, was right in refusing to allow Mr. Mathewson, the reeve of Sunnidale, to take his seat in the County Council of Simcoe, at its first meeting this year, as such reeve, on account of the certificate produced by him being defective in the manner above stated.

The section of the statute is positive, and seems to be reasonable, as requiring the person claiming the seat to furnish evidence that he was entitled to it. The statute expressly requires that the declarations should be made and subscribed. According to the certificate, this may have been made, but not *subscribed* at all. It is not unreasonable to require the person making the declaration to *subscribe* it as a means of indentification and of binding the party making it to the matters therein stated; I do not consider the omission to subscribe the declaration would be a mere matter of form. Whether he defect be considered as a matter of form or substance, the certificate not being according to the statute, as a general rule, would well justify the Clerk in declining to permit the bearer of it to take his seat in the Council.

It is alleged, and is no doubt true, that there were other reeves who were allowed to take their seats in the County Council, whose certificates were as faulty, if not more so, than that of the reeve of Sunnidale.

The next question is, assuming these reeves to be in other respects well qualified, and to have taken their seats in the County Council, can their votes therein be challenged for such defective certificates, and any by-law or other proceeding of the Council be set aside because carried or passed by the votes of reeves who have been allowed to take their seats on such defective certificates? I think not. The 67th section of the statute does not declare that the votes of any reeve taking his seat without such certificate shall be void, nor say that the proceedings supported and carried by such votes shall not be binding. I think this section may properly be considered directory, and so construed.

The fifth sub-section of section 66 enacts that the County Council of every county shall consist of the reeves and deputy-reeves of the townships and villages within the county; and the 175th and subsequent sections, under the head of OFFICIAL DECLARATIONS, seems to provide that every person elected or appointed to office under the Act shall, before entering on the duties of his office, make the proper declaration of qualification of office required by the Act.

The 67th section does not require that the reeves or deputy-reeves should make and subscribe the declarations of qualification and of office,—that is provided for by other sections of the Act. The certificate is only evidence that what is contained in it has been done. If it has not been done, or the reeve or deputy-reeve had not been duly elected, that certificate would not give the party holding it the right to sit and vote in the Council. That right comes from his being the reeve or deputy-reeve and having made the required declarations. If the certificate were the essence of his qualification and not merely the evidence of it, then it might be held that the acts done by the reeve who did not possess it, or only possessed a defective one, were void; but merely being evidence of his qualification, if it turns out that he is duly qualified, then I think it cannot be properly held that his acts, as a member of the County Council, are void; nor can they in any way be impugned on account of the imperfect certificate.

It is admitted, as I understsnd, that the reeves and deputy-reeves, whose certificates are attacked on either side as informal, were really duly elected as Reeves; and had made the proper declarations of office and qualification at the time of the first meeting of the Council, and before the election of Warden had been proceeded with.

In the view I take of the statute on this point, it will not be necessary to go over the certificates of the different reeves and deputy reeves to see if they correspond in word and letter with the section of the statute. Though the county clerk might well have declared that some of them ought not to have taken their seats; and if he refused to allow the reeve of Sunnidale to take his seat, as a matter of consistency, to say the least, he was bound to reject some others, whose certificates were quite as defective as his; yet these reeves and deputy reeves having *taken their seats*, and not being disqualified, save in the point in dispute, I cannot question their right to vote as members of the County Council.

It is urged, on behalf of the relator, that inasmuch as the vote of the reeve of Sunnidale would have elected him as warden, and his certificate is not as defective as the certificates of several of those who voted for the defendant, I ought to declare the relator duly elected, as Mr. Mathewson was unfairly excluded from his seat; and he states by his affidavit that he would have voted for the relator if he had been allowed to vote.

I do not see my way clear in acting on this suggestion—the reeve of Sunnidale did not, in fact, tender his vote for any one. If he had of-

fered to vote for relator, and his vote had been rejected, then in the event of my deciding that he was entitled to vote, I could have put his vote down for the relator; but as it now appears, I can only say that he intended to vote for relator; but did not at the time disclose his intention. I do not feel at liberty to say that his vote can properly be considered as cast for the relator, even if I am satisfied that that he ought to have been allowed to vote. Under the circumstances, if I hold that he is entitled to vote, then this result follows:—That he was a person properly qualified to vote; that he has been wrongfully deprived of his right to vote; and that his vote *might* have influenced the result; and from what is before me, it is probable, would have influenced the result. In this view, I should feel bound to set aside the election, and order a new election to remedy the injustice that has been done.

The facts necessary to be referred to, seem to me to be as follows:—

On the 25th January last, the reeves and deputy reeves forming the County Council for the county of Simcoe, met at Barrie. R. T. Banting, Esq, the county clerk, examined the certificates of the different reeves and deputy reeves, and pronounced them regular, until he came to the reeve of Sunnidale, Duncan Mathewson, Esq., and the reeve of Bradford, Anson Warburton, Esq., when he objected to their certificates of election and qualification, and finally directed them to leave the Council, which they did without voting. The relator states that these persons, both before and since the election, stated that they had intended to vote for him as warden.

There seems to be very little said about Mr. Warburton's certificate being defective; but when Mr. Mathewson's was brought up, a good deal of discussion followed; some of the members of the Council contended that his certificate was as good as those of some others, which had been pronounced sufficient by the clerk, and the clerk took the opinion of a professional gentleman before finally deciding. It was also stated that it was suggested that the other certificates should be looked into; but the clerk declined doing so, and decided that all the certificates filed, except those of Mathewson and Warburton, were correct and sufficient. That particular attention was called to the defect in the certificate of John Hogg, reeve of Collingwood, but the clerk, nevertheless, ruled it was sufficient, and allowed him to vote as such reeve.

The votes stood, 13 for relator, and 13 for defendant. The clerk of the Council then requested defendant, as reeve of the municipality having the highest number of names on its last revised assessment roll, to give the casting vote, which he did, in his own favor, and was then declared duly elected warden. Relator protested against the election.

That portion of the statute necessary to be transcribed in order to understand the objections urged to the certificate of the reeves of Sunnidale and Collingwood, reads as follows:—

Sec. 67.—That no reeve *shall take his seat* in the County Council, until he has filed with the clerk of the County Council, *a certificate* under the hand and seal of the township or town clerk, that such *reeve was duly elected, and made and subscribed the declarations of office and qualification as such reeve.*

The certificate of the town clerk of Sunnidale, so far as is necessary to be considered, reads as follows:—

"I hereby certify that Duncan Mathewson, Esquire, was duly elected as councillor for this township, and that he has made and subscribed the declarations of office and qualifications of office as such; and that he has also been appointed reeve of said township, and has taken or made the declaration of office of reeve for the said township of Sunnidale."

The certificate varies from the statute in stating he was *appointed* instead of *elected reeve;* that he had taken or *made* the *declaration of office* of reeve, instead of "*made and subscribed the declarations of office, and qualification as such reeve.*"

That part of the certificate of the town clerk of Collingwood, necessary to be transcribed, is as follows:—

"I, Joseph Hill Lawrence, clerk of the Municipal Council of the town of Collingwood, do hereby certify that John Hogg, Esquire, has been duly elected reeve of the corporation of the said town of Collingwood, and that he hath made the declarations of qualification and of office prescribed by law as such."

This varies from the statute, in stating that he had made the declarations of qualification, instead of saying "made and *subscribed* the declaraions, &c."

The certificate produced by the reeve of Sunnidale uses the words of the statute in relation to the declarations made for the office of councillor of the township; but the latter and more important part, relating to the office of reeve, is erroneous; and the most important error is common to both the certificates of Sunnidale and of Collingwood, viz.: the omission to certify that they had *subscribed* the declarations.

It certainly does seem singular that the clerk should have held one of these certificates regular and declare the other bad. My attention has been particularly directed to the certificate allowed, and considered regular by the clerk, as produced by the reeve of Barrie. The part of that necessary to transcribe, is as follows:—

"This certifies that at the first meeting of the Municipal Council of the corporation of the Town of Barrie, held on the 16th January instant, Wm. D. Ardagh, Esq., was unanimously elected reeve of said corporation for the current year, A.D., 1865."

There has not been any suggestion offered how this certificate, far more defective than either of the other two, should have been received as regular, whilst that of the reeve of Sunnidale was pronounced bad.

This view was presented on the argument that the clerk having declared the certificates all regular until he came to those of Sunnidale and Bradford; and no objection having been made by any one up to that time, he could not recall his decision as to the prior ones, though they might be more defective than those he was rejecting; and the reeves and deputy reeves in the certificates allowed having *taken their seats*, he could not afterwards direct them to leave the council.

It certainly seems strange that he should not have been alive to the irregularities until the certificates of but two persons remained to be disposed of; and the votes of either of these two

it now appears, would have decided who was to be warden for the year, and he rejected both of these.

I can not say, under the circumstances, that it is at all surprising that he should have been charged at the time with partiality in relation to these matters,

If this election is allowed to stand, this result will follow, that at any time a county clerk may, according to his own caprice or preferences of any kind, decide in favor of and allow certain persons with defective certificates to take their seats and vote in the council, whilst as to others whose certificates are quite as good, and in some cases even less defective, he may reject them and refuse to allow them to vote without any reasonable ground being assigned for such inconsistent decisions. I do not think it is desirable that any judicial decision should be arrived at that would furnish an excuse for such a course of conduct, and I shall therefore set aside the election of the defendant to the office of warden.

The question of costs is somewhat embarrassing.

There is nothing to show any direct interference with the decision of the County Clerk, on the part of the defendant, and he appears to have been called upon by that officer to give his casting vote, when the election was had. It is true he accepted the office, and was sworn in. There is nothing to show that he was aware of the defects in the certificates of the reeves who were allowed to vote by the clerk; and the plaintiff claimed on this application that he ought to be declared warden, which I do not think, on the facts disclosed, he was entitled to; so to that extent the defendant was justified in opposing this application. I do not therefore think I can properly direct the defendant to pay the costs. The learned judge who granted the summons in this matter did not think proper to direct the County Clerk to be made a party to these proceedings. If the County Clerk had been called upon, he might have been able to explain satisfactorily the seeming inconsistencies in his conduct in relation to the election; if he had not done so he would probably have been directed to pay the cost of this proceeding. As, however, he is not now before me, I cannot assume that he would not have been able, if he had been called upon, to show sufficient grounds to excuse him from the payment of costs.

Under these circumstances I must decline giving costs to any of the parties.

A writ will go to remove the defendant from the office of warden, and to hold a new election.

The relator may, if he deem it necessary, amend the style of the office, by omitting the words "of the County Council," after the word "Warden," and before the words "of the County of Simcoe," in the writs he may issue in pursuance of this judgment.

Judgment accordingly.

UNITED STATES REPORTS.

THE COMMONWEALTH v. ALBERT C. CASSIDY.

The publication of an advertisement calculated to alarm the public mind unnecessarily, is a public nuisance, and is indictable as such. [Quarter Sessions.]

Motion to quash the indictment.

Opinion by ALLISON, J.

This motion is based on several grounds, first that the facts laid in the bill do not constitute an indictable offence. In this we do not agree with the defendant. To do any act which is calculated to spread terror and alarm through the community, unless such act is right and proper in itself considered, or becomes necessary under the special circumstances surrounding the commission of that which is complained of as constituting an offence, renders the person so offending liable to indictment at common law.

For illustration, to circulate a report of an invasion, or the breaking out of an infectious or contagious disease, if the report be false, would be indictable, because such reports are calculated to excite unnecessary fear and terror in the minds of the people; whilst if the facts correspond with the report, no indictment would lie, because it would under ordinary circumstances be eminently proper that such information should be given to the public.

The general principle is that whatever is injurious to a large class of the community is a nuisance at common law. *Lansing W. Smith* v. *Cowen*, 146. The carrying on of a trade, which is in itself lawful, if it is injurious to the comfort of the community generally, or the immediate neighborhood, constitutes a nuisance. *People* v. *Cunningham*, 1 Denio, 524. Upon this principle, indictments have frequently been sustained in this court for maintaining a bone boiling or lampblack establishment. So also a swine yard in a city or thickly populated neighborhood is a nuisance. *Commonwealth* v. *Vansickle*, *Brightly*, *R.* 69.

These kind and kindred cases rest on the ground of their causing discomfort merely to the public. If indictments will lie for cause like to those named, it does not require authority for the doctrine that whatever injuriously affects the health or the morals of a large class of the community, is indictable as a common nuisance —such as the letting off of fire works in a public street, or the keeping of a disorderly house.

This indictment charges the unlawful circulation of a false report by handbills posted on the corners of the public streets, and other public places in the city, calling on the citizens to look out for a child stealer, describing her as a woman about twenty-four years of age, etc. The hope is suggested that she may be discovered and brought before the public, where she may be observed by both heads of families and their children, etc.

That this publication, given to the public in the manner above stated, constitutes, in whatever light it may be viewed, a common nuisance, cannot, we think, be well questioned; that it is injurious to both the comfort and health of a large number of persons in the community in which the report has been put in circulation, is self evident, because its tendency is to fill the mind with anxiety, fear and alarm, to the absolute destruction of the comfort and happiness of many, and by this means is to a greater or less extent, injurious to the health of persons brought under such influence.

Mental anxiety, and an imagination excited by terror, are fruitful sources of bodily disease and loss of life, and upon none of the instincts and susceptibilities of our nature do these influ-

ences tell with greater power than when brought to bear upon the anxiety of parents for the safety of their offspring.

It is further objected to this indictment that it does not in its conclusion fulfil the requirements of a common law indictment.

In the case of *Graffen* v. *Commonwealth*, 3 Penna. R. 502, an indictment was quashed, because, it being a common law proceeding, it did not conclude to the common nuisance of the citizens of the Commodwealth of Pennsylvania. All the precedents to be found in Wharton, for maintaining that which constitutes a nuisance at common law, conclude as above set forth, or with the addition, then and there being or residing; or in the case of a nuisance upon the highway, passing over and along the same.

This indictment concludes to the great terror and alarm and common nuisance of all the good people of the said Commonwealth inhabiting and residing in the said city of Philadelphia; this, with the formal ending as against the peace and dignity, etc., would have been in strict conformity with established precedent, but there has been added the words, to the discomfort and disquiet of divers good citizens of this Commonwealth having infant children under their care, etc.—this, it is argued, vitiates the indictment.

We do not so regard it, and think it ought to be treated as mere surplusage. It is true it is stating that which is altogether unnecessary, for the conclusion was perfect without it, and it is only adding that which is included in the formal and strictly technical language which preceded it.

To charge that terror and alarm had been created to the common nuisance of all, is in no degree altered or varied in its strict legal effect by the uncalled for assertion that this terror and alarm has caused discomfort and disgust to divers citizens. Divers, according to Webster, means several, but not a great number.

The effect of terror and alarm is to cause disquiet and comfort, and this, it had already been pleaded, the defendant had occasioned to all the citizens Why then say that he had caused it to several or to more than one? But we think it ought to be treated as useless verbiage only, as marring somewhat the symmetry of the indictment, but not as so vitiating it that the court could not sustain a judgment on it in its present form.

The motion to quash is overruled.—*Legal Intelligencer, Dec.* 29, 1865.

CORRESPONDENCE.

Transcript of Judgments from one Division Court to another.

To the Editors of the Local Courts' Gazette.

Gentlemen,—I am glad to find that my communication in the December No. of the *Gazette* has called forth a response from two of your correspondents, inasmuch as discussion must lead to the correction of erroneous views on the subject discussed.

Permit me to offer some remarks in reply, and, first, as to "M." The statute, as I understand it, clearly draws a distinction between the case of a defendant *removing* from the county in which the judgment was obtained against him, to another county *after* the entering up of the judgment; and the case of a defendant *residing* in one county and judgment being obtained against him in another county. Section 137 of the Division Court Act is intended to meet the former, and section 139 the latter case. The provisions of the former section I regard as of little consequence, as long as clerks act in good faith one with another; but I can easily imagine a case wherein one clerk might lead another into serious difficulty unless the provisions of the act are *strictly carried out.*

I cannot imagine that the legislature ever intended that clerks should exercise powers deemed to be of sufficient importance to cause the insertion of a clause in the act, conferring that power on judges, and at the same time leaving its exercise discretionary with them. I am surprised that "M." should differ with me respecting the connection of the clerk with the suit ceasing upon his sending the transcript to another county. As yet I have not been able to find any statute, rule, or order making it the duty of one clerk to send a return to the other, and I am convinced that they are in no way bound to do so.

If the plaintiff, along with the transcript, sends an order to send the money when made to the clerk sending the transcript, then the case is clear. The law, under no circumstances, requires clerks to do anything without being first paid their legal fees; and as the clerk *sending* the transcript cannot legally demand any fees to which the clerk to whom it is sent is entitled, it seems to me that the latter's only protection is to do nothing more than enter the transcript in a book until he is paid his fees, and execution ordered out by the plaintiff. Were this rule strictly adhered to, county clerks would soon find it to their advantage, as city and town clerks take good care to get a sufficient deposit to cover all *their* costs, and in many cases much more; and at the same time do not hesitate to send transcripts to county clerks without any fees. Doing *all* the law requires and *nothing* more would soon teach plaintiffs to see that the proper fees were transmitted along with the transcript.

With respect to the communication of your correspondent "H.," as my letter is already

too long, I must be brief. He agrees with me as to the desirability of uniformity of practice, but I think his remedy is utterly impracticable, from the fact that whatever practice or convention might adopt, if it were not in accordance with *the law* it would be worse than useless.

If every Division Court Clerk would firmly adhere to the law as he understands it, we would soon have much greater uniformity of practice than now obtains, as the statutes are, in my opinion, easily understood, and if they were strictly adhered to no great diversity of practice could possibly exist.

February 5th, 1866. C.

Summary Conviction—Personal attendance of accused.

To the Editors of the Local Courts Gazette.

Sirs,—I find that some of my fellow magistrates are of the opinion that if a person is summoned before a magistrate on a charge over which the magistrate has summary powers, that the person so summoned can appear through counsel, and that to issue a warrant to bring up such person would be illegal. Now I dissent from this view entirely. I do not really see that anything can possibly be plainer put than that power. Cap. 102, secs. 15 and 27, Consolidated Statutes Canada, are in my opinion, too clear for cavil, that is, if a summons in any instance is disobeyed, the justice can issue a warrant; no just excuse being offered for the neglect or refusal to obey the summons. Of course in all cases of summary proceedings, parties are allowed the benefit of counsel; but I cannot see that a person appearing by counsel prevents a warrant from issuing to apprehend the party who disobeyed the summons. The justice, if he sees fit, can proceed *ex parte*.

Am I not correct.

Yours truly.

A Magistrate.

[The Consolidated Statutes of Canada, cap. 103, and not cap. 102, is the Act relating to summary convictions by magistrates; and we presume it is with reference to this and not to the act as to the duties of justices respecting indictable offences, that our correspondent alludes.

We agree with him in thinking that the mere fact of counsel appearing for the accused does not prevent the justice issuing a warrant for his enforced personal attendance. It is possible that his presence might not be insisted upon, for the justice can proceed *ex parte*, and the complaint be dismissed or a conviction had in his absence. But we do not think that his non appearance is excused by the attendance of counsel. The whole scope of both acts, in fact, seems to contemplate the personal attendance of the accused, and it is for the very purpose of *enforcing* his personal attendance that the provision for proceeding by warrant is inserted.—Eds. L. C. G.]

Alleged inefficiency and defects of Division Court system—Abrogation of—Suggestions as to collection of small debts—Credit system.

To the Editors of the Law Journal.

Lindsay, Jan. 30, 1866.

Gentlemen,—It appears that we are likely to have some legislation during the approaching session of Parliament, as to our Division Courts; and the tendency or inclination of those who have so far moved in the matter in the way of introducing bills, seems to be towards enlargement and extension of the jurisdiction of the *present* Division Court.

In reference to the above I have some suggestions which I should like to have brought before our law-makers, and take the liberty of asking you to give them a place in the columns of your Journal.

I quite agree with those who are agitating for a change of the law in respect to these courts, "that some alteration is required," but I strongly disapprove of the extending of their jurisdiction. One strong objection to these courts, as at present constituted, is, to my mind, that their jurisdiction is *too extended already*. If we are to have them continue, then it would be much better to have their jurisdiction reduced or that some proper mode of allowing appeals from decisions given or pronounced should be introduced.

My theory involves no less than their entire *abolishment*.

Let the Division Courts be entirely abolished. Give the County Courts jurisdiction in all matters above $40. There is now a remedy by which servants can in a summary manner recover before a magistrate their wages not exceeding $40. Give to magistrates a similar jurisdiction, to try and dispose of in a summary manner all matters of tort which can, under the present law be tried and dis-

posed of in the Division Court, subject to the same appeal as at present exists, in reference to their adjudication in matters of wages. This would provide us with a remedy for every class of debts and wrongs, except debts below $40 not being for wages; and as to them it appears to me that it would be a great advantage to the country that, so far as possible, the present system of small credits should be put an end to, and the *cash* system introduced. I think that even though a change in the law, somewhat as above, might not work out absolutely so great a reformation, yet it would most undoubtedly have a strong tendency in that direction. It may be said that it would be unjust to deprive the honest man of the means of getting goods which his necessities may require by any change such as that suggested. I think no such effect would of necessity be produced. He now gets goods on the strength of his credit to the extent of his small wants, which credit is often but fictitious and imaginary, then he would get them (if his circumstances were such that he could not possibly at the moment pay cash, but being known to be an honest man) on the pledge of his *character* alone, and this latter would be a much greater security than what the creditor now has. Of what value to the creditor, is the Division Court, who has a number of small debts due him? he sues, obtains judgment, incurs costs, which the fruits of those small debts which he succeeds in collecting are often times inadequate to cover! and then follow judgment summonses and so forth, creating further costs and dragging from his work the unfortunate debtor, most likely a man labouring from day to day at a few shillings per day, whereby he and his family are deprived of what to them is of great consequence—a whole day's labour! and no benefit whatever in most cases results to the judgment creditor.

Under our present Exemption Act, which has the effect (and I think may properly) of relieving *all* the property which this class of debtors possess from execution, what is the use of continuing Division Courts, if their continuance is only to enable *judgments* to be recovered for amounts under $40.

The procedure of the County Court as to cases which would thus be brought within it might be simplified and rendered less expensive, by allowing cases to be tried by the judge alone or by a jury, as is at present the case. A writ to be issued specially endorsed and if no appearance, judgment; if an appearance, then there need be no pleadings, the endorsement on the writ and the appearance being quite sufficient. These are mere matters of detail which at present do not require to be dwelt upon more at length. But before closing I should like to draw your attention to one other benefit, which would arise from an alteration such as the above, namely to our County Judges, who at present have far more labour thrown upon their hands than they should have. Their Division Court circuits would be ended, and further, they would thereby be relieved of what is by far the most harrassing and wearing portion of their labours, and there would be much less likelihood of their being made to bear the brunt of the dissatisfaction and odium of suitors which they so frequently find the only reward or acknowledgement of all the labour they spend in determining small causes under our present system.

Yours truly,

DIKE.

Insolvent Act of 1864—*Where meetings to be held.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—In the last number of your valuable journal, you reported a judgment given in an insolvency case by his honor Judge Jones, of the County of Brant, in which he decided that all meetings subsequent to the first meeting of creditors must be held in the county town. Whether the learned Judge intended that his decision should be understood to apply to all cases, even of *voluntary* assignment, does not clearly appear; but I apprehend his remarks must have been made with reference to cases of *compulsory* liquidation only.

The whole scope of the Insolvent Act indicates, clearly, the intention of the Legislature to give to creditors and insolvents every facility in winding up the estates of the latter; and that such would not be the case if in every instance all parties must meet in the county town, is immediately apparent. Since the first meeting of creditors is permitted by section two of the said Act, to be called at the usual place of business of the insolvent, or, at his option, at any other place which may be more convenient for them; why may not the convenience of the creditors be consulted in all subsequent proceedings. It is presumed

that in the choice of an assignee by the creditor, due regard will be had as to the place intended for subsequent meetings.

Again, section eleven, the section which relates to procedure generally, requires all notices to be published in a newspaper published at or near the place where the proceedings are being carried on. Can it be that the Legislature intended meetings to be held in the county town only, and still thought it necessary to add—if such newspaper be published within ten miles of such place?—within ten miles of a county town! It will be observed that the term employed is not courts, or office, or town, but *place*. Was such general language used for the purpose of including the place where the first meeting might be held, as well as subsequent meetings in the county town?

Whatever may be the proper construction, the question is one that occurs daily; and it is to be hoped that its importanee will excite discussion among the profession, and at length elicit the true reading of the statute.

Yours truly,

LEX.

Millbrook, Jan. 30th, 1866.

[The above letters were received too late to permit of any thing but their mere insertion in this number.—EDS. L. J.]

The principle of English law, that every man is presumed to be innocent till found to be guilty, not unfrequently receives very curious treatment at the hands of our judges, and it cannot always be said that a prisoner against whom no sufficient evidence is offered "leaves the court without a stain on his character." But probably there had never arisen an instance in which a judge has harangued an acquitted prisoner upon the enormity of his crime; has, in effect, said to him "I agree that you are innocent of the charge, but it was a most disgraceful thing for you to do;" until Mr. Bodkin, the worthy assistant-judge at the Middlesex Sessions, delivered himself the other day of this startling specimen of inconsequence.

Henry Walton, aged 38, was indicted before him for indecently assaulting Elizabeth Johnstone, a child of tender years, and the jury, after a short consultation, returned a verdict of not guilty, whereupon the assistant-judge (addressing the prisoner) said—"The jury have found you not guilty, and I do not find fault with their verdict, but at the same time I must say that you leave the court one of the most debased and degraded human beings in associating yourself with children of such tender age."

It appeared that the prisoner had hitherto borne a most excellent and irreproachable character from several gentlemen in whose employment he had been, and we can hardly conceive a more cruel misuse of the vantage ground of the Bench than this illogical expression of opinion on the part of the judge. Henceforth let no one quote, as the climax of absurdity, the well-known verdict of the Sussex jury, "not guilty, but he must not do it again."

A NEGRO JURY.—The Philadelphia correspondent of the *Times* says:—"The first practical operation of the new laws permitting negroes to serve on juries is reported from Missouri. A jury of negroes in the interior of that state last week decided a suit between negroes. It was an assault and battery case, and, wishing to give a novel character to their first appearance, the negro jury found both plaintiff and defendant guilty, and fined them $21 each.

RESTITUTION.—An advocate of Colmar lately left a legacy of £4,000 to the lunatic asylum of that town. "I earned this money," his will states, "by the patronage of those who go to law; my present gifts is but a restitution."

APPOINTMENTS TO OFFICE.

COUNTY CROWN ATTORNEY.

MICHAEL HAYES, of Osgoode Hall, Esquire, Barrister-at-Law, to be County Crown Attorney for the County of Perth, in the room of Egerton Ryerson, Esquire, deceased. (Gazetted Jan. 6, 1866.)

POLICE MAGISTRATE.

JOHN CREIGHTON, Esquire, to be Police Magistrater of the City of Kingston, in the room of Thomas W. Robinson, resigned. (Gazetted, Jan. 27, 1866.)

NOTARIES PUBLIC.

HAMILTON DOUGLAS STEWART, of the Town of Barrie, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Jan. 13, 1866.)

WILLIAM H. McCLIVE, of St. Catharines, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted Jan, 13th, 1866.)

WILLIAM MAURICE COCHRANE, of Port Perry, Esq., Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Jan. 13, 1866.)

ALEXANDER ROBERTSON, of Belleville, Esquire, to be a Notary Public in Upper Canada. (Gazetted Jan. 27, 1866.)

CORONERS.

ERASTUS JACKSON, of Newmarket, Esquire, to be an Associate Coroner for the United Counties of York and Peel. (Gazetted Jan. 13, 1866.)

TO CORRESPONDENTS.

"C." — "A MAGISTRATE" — "DIKE" — "LEX" — under "Correspondence."