DIARY FOR JULY.

1. Mon.. *Dominion Day.* Long Vacation begins. County Court Term begins. Heir and Devisee Sittings commence. Last day for County Council to equalize assessment rolls. Last day for County Treasurer to certify taxes due on occupied lands.
6. Sat... County Court Term ends.
7. SUN.. *6th Sunday after Trinity.*
14. SUN.. *7th Sunday after Trinity.*
15. Mon.. *Swithin.*
16. Tues.. Heir and Devisee Sittings end.
21. SUN. *8th Sunday after Trinity.*
24. Wed.. *St. James.*
28. SUN.. *9th Sunday after Trinity.*

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The Local Courts' AND MUNICIPAL GAZETTE.

JULY, 1872.

The oft asked question as to who is a trader was recently discussed in the Court of Common Pleas, on an appeal from the judgment of a County Court Judge, who held that an innkeeper was not a trader within the Insolvent Act of 1869.

The Act is defective in not defining the meaning of the word "Trader;" and, in the absence of any statutory definition, the Court held that it had no power to give the Act a more extended meaning than its language would bear in ordinary acceptation. It was therefore decided that innkeepers do not come within the provisions of the Act of 1869, so far as taking any benefit therefrom as insolvents is concerned.

We clip from the English *Law Journal* a paragraph relating to *Nisi Prius* references, every word of which is applicable to our system, in the hope that some of our many legal members of Parliament may frame some fitting legislative remedy:

"There is nothing incident to the proceedings of a court of law more unsatisfactory than the process of referring a cause to arbitration at *Nisi Prius.* The witnesses have come from a distance, the attorneys are in attendance, the counsel have had their fees paid. Gradually, however, as the leading counsel for the plaintiff opens his case to the jury, the newspaper rises higher and higher before the judge's face, till at last his Lordship is entirely hidden from view—a sure sign that the case will ultimately be referred, and the parties have to begin over again. Judges are in the habit of saying that they are justices of a Superior Court, and not public accountants, and therefore they will not try certain cases. But as the law now stands, if both parties to an action desire it to be tried in the ordinary way, a judge and jury often stand very much in the position of accountants. Moreover, the evil is not simply the almost entire waste of the costly proceedings previous to the day of trial. The arbitrator appointed is probably a man with a hundred other things to do, who gives the reference a day in one week and a couple of hours in the next, till, as the case

drags on, the unfortunate litigant thinks the arbitrator, who delays his case, rather more vexatious than the judge who refused to try it. Such a state of things surely calls for an amendment of the law."

Here is the way Yankee juries treat a recalcitrant juryman. In Rockland County, N.Y., during the Supreme Court Circuit, a jury went out to determine upon a verdict. After wrangling a whole day and failing to agree, they were discharged by the Court. Subsequently the following prayer for relief, signed by ten members of the jury, was solemnly preferred to the Court: "We the jurors in the above trial, hereby petition this honourable Court to order the name of —— out of the jury-box for the following reasons: In our opinion he is the most stubborn and contrary man that the Almighty ever made, and is not fit to sit as a juror in any case. He was never known to agree to any question of law with either judge or juror."—We have no doubt this persecuted citizen went home after the trial and told his wife that he had been struggling all day against eleven mule-headed men who would not listen to reason.

COURTS OF APPEAL.

The subject of appellate jurisdiction is one which is now attracting much attention, not only in England, but in the most important of her colonies. We print in another place the report of the Commissioners of Victoria, concerning the establishment of a Court of Appeal for Australasia. As to the Dominion, we gave our readers some time ago the draft of the Supreme Court Bill; but difficulties have arisen in the establishment of the Court from the fact that Quebec pursues a system of law different from that of the other Provinces. This is precisely the same difficulty in kind, though less in degree, which has long prevented the establishment in the mother country of a more satisfactory Court for colonial and other appeals than the Privy Council.

The Judicial Committee of the Privy Council as a Court of ultimate appeal has long occupied a very anomalous position. Its decisions, final and of supreme authority as regards the colonies, are yet not considered binding upon the superior courts of Great Britain and Ireland. Unlike the decisions of the House of Lords, as a Court of Appeal, which are authoritative declarations of the law to be followed in all Courts, not to be over-ruled by the House itself in subsequent appeals, not to be gotten rid of save by legislative interference; those of the Privy Council, while no doubt determining the particular case under appeal, are not necessarily to be followed in other cases involving the same point for adjudication.

That these observations may not seem exaggerated, let a few cases be noted as confirmatory of what has been advanced. Upon the construction of an Imperial Act of Parliament passed in 1861, giving the Admiralty jurisdiction in case of damage done to a ship, it was was held by the Privy Council that the term "damage" in the Act extended to a case of personal injury: The Beta, L. R. 2, P. C. 447. The Court of Queen's Bench declined to follow this decision, and have held upon demurrer to a declaration in prohibition that the term did not include injury of such a a character: *Smith* v. *Brown*. L. R. 6 Q. B. 729. So, on an earlier occasion, in *The General Steam Navigation Company* v. *The British and Colonial Navigation Company*, L. R. 3, *Exch.* 330, the majority of the Barons thought themselves not bound to follow a prior decision of the Privy Council on a question of pilotage as reported in The Stettin : Brow and Lush, 199, 203; 31 L. J., P. D., and Ad. 208 From this view Kelly, C. B., dissented, on the ground that he did not feel himself at liberty to depart from the law laid down "by the overruling authority of the Judicial Committee of the Privy Council, which, being a decision of a Court of last resort," should be taken to govern. Again: when upon the highly important question, as to whether Colonial Legislative Assemblies had inherent power to punish by imprisonment for a contempt committed outside the House, the Privy Council at first, in 1836, affirmed the doctrine that there was such a power: *Beaumont* v. *Barrett*, 1 *Moo.*, P. C. C. 59. But when, in 1842, another appeal came up, presenting the same matter for adjudication, the same Court delivering judgment through the same Judge, Parke, B., disaffirmed the existence of any such constitutional power as a legal incident in Colonial Houses of Assembly: *Kielly* v. *Carson*, 4 Moo., P. C. C. 63. This later opinion was adhered to when, for a third and last time, in 1858, the same question arose in *Fenton* v. *Hamilton*, 11 Moo., P. C. C. 347.

With this fluctuation of decision contrast the judicial position of the House of Lords as set forth in the language of Lord Campbell: "By the constitution of the United Kingdom, the House of Lords is the Court of appeal in the last resort, and its decisions are authoritative and conclusive declarations of the existing state of the law, and are binding upon itself when sitting judicially, as much as upon all inferior tribunals." *The Attorney General* v. *The Dean and Canons of Windsor*, 8 Ho. of L., C. 391. See also the language of Lord Eldon in *Fletcher* v. *Lord Sondes*, 1 Bligh, N. R. 144, 249, on the same point, and per James, V. C., in *Topham* v. *Portland*, 38 L. J. N. S., Ch. 513.

The *Solicitors' Journal* maintains that there are six points which are essential to the existence of a satisfactory Supreme Court of Appeal: It should be (1) single; (2) Imperial; (3) constant; (4) of weight corresponding to its authority; (5) reasonably rapid in action; and (6) not prohibitory in point of expense. Without commenting upon all these points, we may say, as to the first, there is no doubt it is extremely desirable to do away with the distinctions which we have shown to exist between the decisions of the two present Courts of ultimate appeal. The law as laid down by the one highest Court should be of validity for all purposes, in all Courts, and at all times, till changed by statute. In no other way can certainty in the law be reached. By the second requisite is meant that the members of the Court should be drawn not only from the English, but from the Scotch, Irish, and Colonial bench. In other words, that it should be in truth a representative court, where at least one of the judiciary body should be practically acquainted with each of the different systems of law which obtain over the wide-spread dominions of England. Only in this way, it seems to us, can the fourth requisite be secured; so that in learning and judicial experience, colonists may regard this tribunal as superior, not only in name, but in fact, to their own Provincial Courts. When Mr. Knapp first began, some thirty years ago, to report the decisions of the Privy Council, Sir John Leach, in his usual imperious style, refused to lend an ear to the new reports, at the same time acutely remarking that decisions regarding systems of jurisprudence of which the Court knew little or nothing, could never acquire authority; and that it was a useless exposure of inevitable and incurable judicial incapacity to publish their judgments. These strictures are to a considerable extent well founded. The surest way to obviate them and others of a like kind, is to constitute the appellate court in manner as indicated; thereby its moral weight shall be decisively greater than the Colonial and other Courts whose decisions it reviews. Apart from this great advantage, there is another which we need hardly elaborate. That is, the very strong bond of union which would be thus formed between the mother country and her colonies. It would be, we conceive, constitutionally impossible, as well as highly undesirable to do away with the right of appeal from the colonies to the Privy Council. Practically but few appeals go there from this Province, so strong, and, in many respects, so well constituted is our own Provincial Court of Appeal. According to statistics laid before the Dominion Parliament, there were, between the years 1869 and 1872, but two appeals from Ontario to the Privy Council. From the other Provinces the figures stood thus: Nova Scotia, one; New Brunswick, two; Quebec, twenty-one. Yet though we of this Province are seldom before the Privy Council, we should not relish being deprived of the right to go there. While our confidence is great in the present constitution of the Judicial Committee, yet a reformation such as has been mooted, and the infusion of a Colonial element into the appellate system, would afford us the highest satisfaction. In no more grateful way could our Colonial *status* be recognized than in the establishment of one great Imperial Court of pre-eminent jurisdiction and paramount authority, elevation to the bench of which should be the highest goal of colonial forensic ambition.

Some interesting questions on criminal law will be found discussed in the case of *Regina* v. *Mason*, on page 107, *post*. The notorious character who figures as the prisoner fortunately "took nothing by his motion."

SELECTIONS.

POWERS OF PROVINCIAL LEGISLATURES

"The British North America Act, 1867," by s. 92, provides that "In each Province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say"—and then enumerates sixteen classes, amongst which are—

"8. Municipal institutions in the Province.

"14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.

"15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

"16. Generally all matters of a merely local or private nature in the Province."

By s. 91 it provides that "It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (*notwithstanding anything in this Act*), the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say"—and then enumerates twenty-nine classes of subjects, amongst which is—

"27. The Criminal Law, except the constitution of courts of Criminal Jurisdiction, but including the procedure in criminal matters."

And the section closes in the following words: "And any matter coming within any of the classes of subjects enumerated in this section, shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

A vast difference between the powers granted to the Federal Parliament and those bestowed on the Provincial Legislatures, is apparent to any one carefully studying the sections in question.

To the Federal Parliament belongs the right of making laws, not only upon all classes of subjects enumerated in s. 91, but also upon all classes of subjects not enumerated in s. 92. To the Provincial Legislatures is allotted the right of making laws in relation to matters coming within the classes of subjects enumerated in s. 92 alone. But that right is further restricted by s. 91, which in effect provides that if there be any clashing, or conflict, between the classes of subjects allotted to the Federal Parliament and those allotted to the Provincial Legislatures, the matter, with respect to which such clashing or conflict arises, shall be deemed to come exclusively within the Jurisdiction of the Federal Parliament.

The authority, then, of the Federal Parliament, so far as the Provincial Legislatures are concerned, is supreme, save with respect to the classes of subjects enumerated in s. 92, over which the Provincial Legislatures have, to a certain extent, exclusive powers to legislate. But when a matter is presented for legislation which falls within a class of subjects enumerated in s. 91, and at the same time comes within a class of subjects enumerated in s. 92, such matter belongs exclusively to the Jurisdiction of the Federal Parliament.

The powers of the Provincial Legislatures are sharply defined by the Act creating the constitutions of the Province.

The powers of the Federal Parliament on the contrary, are general, embracing all subjects save those specially confided to the Provincial Legislatures; so that all powers of Government granted by the B. N. A. Act, 1867, save those exclusively allotted to the Provincial Legislatures, which do not clash with those specially granted by s. 91, vest in the Parliament of Canada.

One of the consequences resulting from the distribution of legislative powers between the Federal Parliament and the Provincial Legislatures is, that all persons occupying judicial positions throughout the Dominion, may, at any moment, in suits or proceedings before them, be obliged to pronounce upon the constitutionality of Federal or Provincial Statutes. In such case the duty of such persons is clear; if a Federal Statute is unconstitutional, to disregard it; and to act in like manner where a Provincial Act is *ultra vires*. A Supreme Court vested with authority to pass in review all Acts whether Federal or Local, and to declare an Act of Parliament or of a Legislature constitutional or unconstitutional, as the case may be, is an absolute necessity of a Federation such as the Dominion of Canada. Its non-creation vests in Justices of the Peace and Commissioners for the trial of small causes, the powers which should alone be vested in such Supreme Court, and confides to the most ignorant, powers which should be entrusted solely to the most erudite of Judicial officers. If this state of things is allowed to continue, the greatest confusion will prevail, and it is the duty of the imperial Parliament immediately to provide for the constitution, maintenance, and organization of a Court possessing the power of deciding in favour of or against the constitutionality of Acts of Parliament and of Provincial Legislatures.

A constitutional question, fraught with grave consequences to municipal corporations, was lately raised in the Province of Quebec, under the following circumstances:

The Legislature of the Province of Quebec, by 32 Vic. c. 70, s. 17, provided as follows: "In addition to the powers already accorded to the Council of the City of Montreal, in and by its Acts of incorporation, and the several acts of amendment thereof, to enforce the observance of the by-laws of the said Council, made under and by virtue of the Acts for the purposes in the said acts expressed, it shall be lawful for the said Council to impose in and by such by-laws a fine not exceeding twenty dollars and costs of prosecution, to be forthwith leviable on the goods and chattels of the defendant, or to enact that in default of immediate payment of the said fine and costs, the defendant may be imprisoned in the common gaol for a period not exceeding two months, the said imprisonment to cease upon payment of the said fine and costs, or to impose the said fine and costs in addition to the said imprisonment."

Sec. 19 of the same Act provides that "the five preceding sections, and section fourteen and fifteen of the thirty-first Victoria, chapter thirty-seven, shall not be deemed to apply to any matter of criminal procedure before the said Recorder's Court."

Previous to the passing of the 32 Vic. c. 70 (Quebec) the City Council of Montreal had passed a by-law, chap. 17 (Glackmeyer, p. 306), whereof s. 8 was in the following words: "Every description of gaming and all playing of cards, dice, or other games of chance, with betting, and all cock fighting and dog fighting, are hereby prohibited and forbidden in any hotel, restaurant, inn or shop, either licensed or unlicensed, in this said city; and any person found guilty of gaming or playing at cards or any other game of chance, with betting, in any hotel, restaurant, inn or shop, either licensed or unlicensed, in this said City, shall be subject to the penalty hereinafter provided."

S. 9 of the same by-law provided that "any person who shall offend against any of the provisions of this by-law shall, for each offence incur a penalty not exceeding twenty dollars, and be liable to an imprisonment not exceeding thirty days, and a like fine and imprisonment for every forty-eight hours that such person shall continue in violation of this by-law."

So far as the provisions of the said by-law against gaming were concerned, the City Council derived its authority from 23 Vic., c. 72, s. 10, § 1, which provided as follows: "it shall be lawful for the said Council at any meeting or meetings of the said Council composed of not less than two-thirds of the members thereof, to make by-laws which shall be binding on all persons for" (amongst others) "the following purposes . . . to restrain and prohibit all descriptions of gaming in the said city, and all playing of cards, dice, or other games of chance, with or without betting, in any hotel restaurant, tavern, inn or shop, either licensed or unlicensed, in the said city;" and by the 13th section of the last mentioned Act, it was provided: "And by any such by-law, for any of the purposes aforesaid the said Council may impose such fines, not exceeding twenty dollars, or such imprisonment, not exceeding thirty days, or both, as they may deem necessary for enforcing the same."

On the 18th March, 1870, the City Council of Montreal, acting as was supposed under the authority of 32 Vict., c. 70, s. 17, re-enacts all the sections of by-law chap. 17, with the exception of s. 9, in lieu of which it was provided as follows: "Any person offending against any of the provisions of this by-law shall be liable to a fine not exceeding twenty dollars and cost of prosecution, and to an imprisonment not exceeding two months for each offence." (By-law 36, Glackmeyer, App. p. 138.)

Under by-law 36, a person was convicted of playing cards with betting in an hotel in the city of Montreal, and was condemned to pay $20 fine and costs, and to be imprisoned in the common gaol for two months.

The by-law and conviction was referred to solely as illustrations of the working of 32 Vic. c. 30 s. 17, and it is proposed to inquire whether the said section is not *ultra vires* of the Legislature of Quebec.

The arguments made use of in favour of the constitutionality of the section in question are to the following effect:

Under the British North America Act, 1867, s. 92, the Provincial Legislatures have the exclusive right of making laws in relation to matters coming within certain classes of subjects therein enumerated, amongst which classes figure "8. Municipal Institutions in the Province." Consequently the Quebec Legislature had a right to legislate in relation to all matters relating, or essential, to the corporation of Montreal. Having the power to legislate in relation to municipal institutions exclusively, it necessarly follows that the Provincial Legislature have the power of granting to such municipal institutions the right of making by-laws, and as without the power of enforcing obedience to their provisions such by-laws would be but waste paper, it must be taken for granted that the power, formerly exercised by the Province of Canada, of delegating a right to municipal institutions of passing by-laws and of enforcing obedience to such by-laws, by therein imposing punishment on offenders against their provisions, is under s. 92, § 8, vested in the Provincial Legislature of Quebec. Further that there really is no conflict with the exclusive power possessed by the Federal Parliament over the Criminal Law and Procedure in Criminal matters, as the offence charged, to wit, playing cards with betting, is not an offence under the Criminal Law, but is merely an act prohibited under what may be called police regulations, which form no part or portion of the Criminal Law of the Dominion.

Apparently there is a good deal of force in the line of argument adopted in defence of the

section of the statute attacked, but it is not the less true that its validity rests entirely upon the meaning to be attached to, and the extent of the words "The Criminal Law, except the constitution of Courts of Criminal jurisdiction, but including the Procedure in criminal matters," occurring in s. 91, § 27 of The British North American Act, 1867.

It becomes necessary, therefore, in the first place to establish the meaning of the words "The Criminal Law," and "The Procedure in criminal matters."

No difficulty can be experienced in arriving at the conclusion that the Criminal Law is that portion of the law relating to crimes. Consequently the investigation becomes narrowed down into an inquiry as to what is a crime?

It would almost seem as if the Legislature of Quebec were of opinion that the Criminal Law does not apply to any minor non-indictable offence—that in fact all offences punishable solely on summary conviction do not fall within the domain of Criminal Law, and are not recognized as crimes.

According to the definition of Blackstone, "A crime or misdemeanor is an act committed or omitted, in violation of public law. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are merely synonymous terms; though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of misdemeanors only."*

Mr. Sergeant Stephens in his Commentaries gives the following definition: "A crime is the violation of a right, when considered in reference to the evil tendency of such violation as regards the community at large."†

Mr. Justice Littledale in *Mann* v. *Owen*, 9 B. & C. 602, thus expressed himself: "The proper definition of the word 'crime' is an offence for which the law awards punishment."

In the case of *Hearne* v. *Garton*, 2 E. & E. 64, it was held that the provision of the Great Western Railway Act, 5 & 6 W. 4 c. 107, enacting "that every person who shall send or cause to be sent by the said railway any vitriol, or other goods of a dangerous quality, shall distinctly mark or state the nature of such goods on the outside of the package, or give notice in writing to the servant of the Company with whom the same are left, at the time of sending, on pain of forfeiting £10 for every default, or being imprisoned," made such sending of dangerous goods without notice a criminal offence—and Mr. Justice Crompton there said (p. 76): "I do not think that the act is merely for the protection of the railway; it is also for the protection of the public; and it makes the sending a crime, not merely in form, but in reality, by affixing a punishment to it."

* Bl. Com. p. 5, (ed. 1769.)
† Stephen's Com. p. 77.

In the case of *Attorney General* v. *Radloff*, 10 Ex. 84, which was an information in the Exchequer to recover penalties for smuggling tobacco, the whole question turned upon the point whether such information was a criminal proceeding, and the Court, composed of Pollock, C.B., Parke, Platt and Martin, BB., was equally divided. Pollock, C.B., and Parke, B., being of opinion that it was a criminal proceeding, and Platt and Martin, BB. considering it a civil matter. Parke, B. made use of the following expressions: "Next, is this a criminal proceeding by which the defendant is charged with the commission of an offence punishable by summary conviction? As to its being a criminal proceeding: an information by the Attorney General for an offence against the revenue laws is a criminal proceeding—it is a proceeding instituted by the Crown for the punishment of a crime—for it is a crime and an injury to the public to disobey statute revenue law; and accordingly the old form of proclamation, made before the trial of information for such offences, styles these offences misdemeanors."

Pollock, C.B. said: "In the first place I am of opinion that the proceeding in this Court to recover penalties on an information filed by him on behalf of the Crown, is a criminal proceeding. . . . . The only remaining question then is—is it a criminal offence? I should be sorry if I could bring myself to entertain any doubt about it. I think it is a very grave offence against the public. I cannot distinguish, either in morals or law, between cheating the state and cheating a private individual. . . . . I am of opinion, therefore, that it is a criminal offence. It is very true that it is not punishable in the ordinary way by indictment; but it is punishable by fine, and the fine may be imposed on summary conviction. Therefore, this being, in my judgment, an offence punishable on summary conviction, and the question arising in a criminal proceeding, I am of opinion that the defendant was not a competent witness, and was properly rejected."

Platt, B., though of opinion that the proceeding by information in the Exchequer was not a criminal proceeding, put the following question: "What then is a 'civil proceeding' as contradistinguished from a 'criminal proceeding?' It seems to me that the true test is this, if the subject matter be of a personal character, that is, if either money or goods are sought to be recovered by means of the proceeding—that is a civil proceeding; but, if the proceeding is one which may affect the defendant at once, by the imprisonment of his body in the event of a verdict of guilty, so that he is liable as a public offender—that I consider a criminal information.

In the case of *Bancroft* v. *Mitchell*, L. 2 R. Q. B. 549, a bankrupt who had obtained an order of protection under s. 112 of 12 & 13 Vict. c. 106, was arrested on a warrant of commitment for not obeying an order made on him under 43 Eliz. c. 2, s. 6, for payment

of a weekly sum to the guardians of a union for the support of his mother:—and it was held that the process under which the plaintiff was arrested was of a criminal nature and not for a debt; and that he was, therefore, not protected from arrest under s. 113 of 12 and 13 Vic., c. 106.

Blackburn J. (at p. 555 of the report), said: "The question remains, what is the nature of the process under which the plaintiff was arrested? What is it that the plaintiff has done or omitted to do? He is the son of a woman who is chargeable to the parish, and he is of sufficient ability to support her. By statute 43 Eliz., c. 2, s. 7, it is enacted that the children of every poor person not being able to work, being of sufficient ability, shall, at their own charge, relieve and maintain every such poor person, in that manner and according to that rate, as by the justices shall be assessed, upon pain that every one of them shall forfeit 20s. for every month which they shall fail therein. It was as a *punishment* for the disobedience of an order made under this section that the plaintiff was arrested. . . . The statute makes what was a duty of imperfect obligation a positive duty. . . . . The offence here is that the plaintiff being of ability would not support his impotent relative—that is a duty the neglect of which though only morally wrong before the statute, is made a *crime* by the statute."

In the same case (at p. 556) Mr. Justice Mellor said: "But I have come to the conclusion that the duty of a son to support his mother, having been originally moral only, was made a positive duty by the statute which requires that in the event of the son neglecting that duty, he shall pay such sum as the justices shall order, and then the ultimate enforcement of that duty is carried by fixing a penalty, and in the event of the non payment of that penalty, a punishment of not more than three months' imprisonment is imposed. That is in the nature of a punishment for a criminal offence."

In *Ex parte Graves in re Prince*, L. R. 3 Ch. Ap. 642, where a debtor was convicted under the 6th section of the Copyright Act (25 & 26 Vic. c. 68), for violations of copyright in engravings, and sentenced to pay a fine *to the proprietor of the copyright*, and in default was imprisoned, and after his conviction executed a deed of composition with his creditors, it was held by the present Lord Chancellor, Lord Hatherley, then Sir W. Page Wood, L.J., and Sir C. J. Selwyn, L.J., that the process under which the debtor was arrested was of a criminal nature, and not for a debt, and that he was not entitled to a discharge. Lord Hatherley (at pp. 644, 645) said: "The case of *Bancroft* v. *Mitchell* has thrown great light on the construction of the provisions of the sections referred to. The *Copyright Act* clearly makes that which the debtor has done an offence against the law. . . . . The scope of the statute throughout is to make the act done an offence; the penalty is to be paid to the person injured, but it is not to be the measure of the damages which he may recover, for he may bring his action and recover damages independently of the penalty. . . . . I think, therefore, that the arguments that the debtor escapes by paying money, and therefore the imprisonment is only a process to enforce a payment of money, is answered by Mr. Justice Blackburn's judgment."

Sir C. J. Selwyn, L.J. (at page 645) said, after referring with approval to Mr. Justice Mellor's opinion in *Bancroft* v. *Mitchell*, "Whether we take the letter or the spirit of the Act, the result is the same. If we look at the letter, the words used are "penalty" and "conviction," all pointing to a criminal offence. If we look to the spirit of the Act, we find certain acts prohibited and treated as offences and certain penalties imposed, and in addition to the penalty, the prosecutor may recover damages by action."

In the 5th edition of Paley's Law and Practice of Summary Convictions, edited by H. T. J. Macnamara, Esq., Recorder of Reading, at pp. 112, 113, the question of what is a "criminal proceeding" is treated in the following manner: "The question, therefore, what is a 'criminal proceeding' as the subject of summary conviction, depends on the manner in which the legislature have treated the cause of complaint, and for this purpose the scope and object of the statute, as well as the language of its particular enactments, should be considered. It may be, as a general rule, that every proceeding before a magistrate, where he has power to convict in contradistinction to his power of making an order, is a criminal proceeding, whether the magistrate be authorized, in the first instance, to direct payment of a sum of money as a penalty, or at once to adjudge the defendant to be imprisoned; and it must be borne in mind that where a statute orders, enjoins, or prohibits an Act, every disobedience is punishable at common law by indictment; in such cases the addition of a penalty, to be recovered by summary conviction, can hardly prevent the proceeding in respect of the offence from being a criminal one."

T. W. Saunders, Esq., Recorder of Dartmouth, in his work on the Practice of Magistrates' Courts, p. 58, (2nd ed.) thus expresses himself: "Except, therefore, in criminal proceedings, which include an *offence* punishable on summary conviction, the parties and their husbands or wives (as the case may be) are eligible as witnesses on either side, and even in criminal cases the disqualification only applies to the defendant."

J. F. Stephen, Esq., Recorder of Newark on Trent, in his work entitled "A General View of the Criminal law of England," says: "A law is a command enjoining a course of conduct; a command is an intimation from a stronger to a weaker rational being that if the weaker does or forbears to do some specified

thing, the stronger will injure or hurt him. A crime is an act of disobedience to a law, forbidden under pain of punishment" (p. 8). "The definition of crimes may therefore be conveniently restricted to acts forbidden by the law under pain of punishment. This definition, however, requires further explanation; for what, it may be asked, is a punishment? Every command involves a sanction, and thus every law forbids every act which it forbids at all, under pain of punishment. This makes it necessary to give a definition of punishments as distinguished from sanctions.

"The sanctions of all laws of every kind will be found to fall under two great heads; those who disobey them may forced to indemnify a third person either by damages or by specific performance, or they may themselves be subjected to some sufferings. In each case the legislator enforces his commands by sanctions, but in the first case the sanction is imposed entirely for the sake of the injured party. Its enforcement is in his discretion and for his advantage. In the second, the sanction consists in suffering imposed on the person disobeying. It is imposed for public purposes, and has no direct reference to the interests of the person injured by the act punished. Punishments are thus sanctions, they are sanctions imposed for the public, and at the discretion and by the direction of those who represent the public (p. 4). . . . . The result of the cases appears to be that the infliction of punishment in the sense of the word just given is the true test by which criminal are distinguished from civil proceedings, and that the *moral nature* of the act has nothing to do with the question" (p. 5). It is sufficient in this place to observe that they illustrate the general proposition that the province of criminal law must not be supposed to be restricted to those acts which popular language would describe as crimes, but that it extends to every act, no matter what its moral quality may be, which the law has forbidden, and to which it has affixed a punishment" (p. 7).

It may, perhaps, be as well here to give an extract from Le Sellyer's *Traite de la Criminalité*, showing what constitutes in France the "crime" of the English Law. "La criminalité c'est la qualité de certains actes les rendant passibles de l'application d'une loi pénale. Ces actes sont compris sous l'expression generale d'*infractions*. . . . Nous donnerons de l'infraction, la définition que donnait du délit le code de brumaire en ajoutant copendant un caractère oublié par ce code, à savoir qu'il n'y a de délit où d'infraction que dans less actes ou omissions *punis* par la loi. . . . Nous dirons donc que l'infraction est toute action toute omission contraire aux lois qui ont pour objet le maintien de l'ordre social et la tranquillité publique et qui est punie par la loi."* (Nos. 2 and 3.)

To define is always difficult, and it is easy to perceive that the answer to the question, what is a crime? is necessarily a definition.

From the foregoing citations, however, it is submitted that the definition of a crime as "an act or omission forbidden by the law under pain of punishment," is strictly correct; but in order thoroughly to understand it, the word "punishment" must also be defined.

The task in this case is hardly less difficult than in that of "crime," but "punishment," it is submitted, may be declared to be "suffering in property or person imposed by the law (in the interests and name of society), on those who violate the law.

The imposition of punishment, then, appears to be the true test by which criminal are distinguished from civil proceedings, and punishment stamps the act or omission, to which it is affixed as a crime.

But it has already been shewn that the Criminal Law is that portion of the law relating to crimes; therefore that portion of the law relating to acts or omissions forbidden under pain of punishment, forms part of the Criminal Law, and all laws regulating proceedings to be adopted to apply such punishments to offenders are laws regulating procedure in criminal matters, and also form part of the Criminal Law.

It is clear, therefore, that by the 32 Vict. c. 70 s. 17, the Legislature of Quebec usurped authority over the Criminal Law (not within the limits granted to them by s. 92 of "The B N. A. Act, 1867") and its authorization of the Council of the City of Montreal to pass by-laws inflicting punishment on certain offenders against the provisions of those by-laws, was invalid null and of no effect.

Moreover, a Provincial Legislature has but the right of imposing punishment by fine, penalty *or* imprisonment for enforcing any law of the Province, made in relation to any matter coming within any of the classes of subjects enumerated in s. 92. It cannot, therefore, impose punishment for any offence which is not an infraction of some of its own laws, made in relation to some matter coming within a class of subjects enumerated in s. 92. It cannot impose punishment by fine *and* imprisonment for the same offence. It cannot regulate the proceedings by which such punishment shall be applied to offenders (otherwise called the Procedure).

The Parliament of the Province of Canada possessed full power over the Criminal Law and had also full power over Municipal Institutions, so that the grant to the Corporation of Montreal of a limited power to award punishment for violation of its By-laws, was strictly within the powers of that Parliament, and such delegation was valid. But how can it be pretended that Provincial Legislatures have the right of delegating to Municipal Institutions greater legislative powers than they possess themselves? How can it be pretended that when Provincial Legislatures have but the right of punishing infractions of *their own laws* by fine, penalty or imprisonment, they

* See also *Parker* v. *Green*, 2 B. & S. 299; *Cattell* v. *Ireson*, E. B. & E. 91; 2 Austin (ed. 1869) 1101.

have power to vest in municipal institutions the right of punishing infractions of *their* by-laws by fine, penalty *and* imprisonment?

The true rule to follow, it is submitted, with respect to the legislative jurisdiction of Provincial Legislatures, is to confine it strictly to the subjects expressly allotted to them, and in all cases where there is the slightest conflict between the local and federal legislative jurisdiction as to the right to legislate upon any matter, to place it amongst the subjects falling within the powers of the Dominion Parliament.

So far as Procedure in criminal matters is concerned, Provincial Parliaments have no right to legislate, even upon the procedure to be followed in order to secure the punishment of persons guilty of infraction of their own laws. It is perfectly true that Provincial Legislatures have the right of creating certain crimes under s. 92, § 15, by imposing punishment for enforcing observance of their laws; but having so created the crime, their powers with respect to it, save in one particular, appear to end; it then becomes a portion of the Criminal Law, over which the Federal Parliament has jurisdiction, and the Federal law of criminal procedure governs all the proceedings to be taken against the offender, the Provincial Legislature having, however, the exclusive right of repealing the Act by which such crime was created, and thereby removing it from the calendar of crimes.

It may be here remarked that it is exceedingly doubtful if Provincial Legislatures can appoint the mode in which a person accused of a crime created by a local Act can be tried. It would seem as if in the Federal Parliament alone was vested the power of providing that certain offenders should be tried summarily. consequently, as the law of procedure exists at the present moment, all persons charged with offences created by Provincial Legislatures must be tried before a jury. The only mode in which this inconvenience can be remedied is by Act of the Federal Parliament, providing that in all cases, wherein the punishment for an offence imposed by any Act does not exceed a certain sum, or a specified term of imprisonment, the offender shall be tried summarily.

In conclusion, it is submitted that by "The British North America Act, 1867," it was intended to place the Criminal Law and the administration of justice in criminal matters amongst the exclusive powers of the Federal Parliament—that but two exceptions to the general rule therein laid down are made, one by s. 91, sec. 27 and s. 92, sec 14, by which the constitution, maintenance, and organization of Provincial Courts of criminal jurisdiction are placed amongst the exclusive powers of Provincial Legislatures; the other by s. 92, sec. 15, by which in each Province the Legislature may exclusively make laws imposing punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in s. 92.

Evidently the intention of the British Parliament was to provide for the uniformity of the Criminal Law throughout the Dominion—to avoid the inconvenience of having one system of procedure governing Federal crimes, and another system governing Provincial crimes.

The delicious *pot pourri* which might be expected if Provincial Legislatures had unlimited power to meddle with Criminal Procedure is apparent from 34 Vic. c. 2, s. 171 (Quebec), which is in the following words:

"In prosecutions for the sale or barter of intoxicating liquor of any kind, without the license therefor by law required, or contrary to the true intent and meaning of the law in that behalf, it shall not be necessary that any witness should depose directly to the precise description of the liquor sold or bartered, or the precise consideration therefor, or to the fact of the sale or barter having taken place with his participation, or to his personal and certain knowledge, but the justices trying the same, so soon as it may appear to them that the circumstances in evidence sufficiently establish the infraction of the law complained of, shall put the defendant on his defence, and in default of his rebuttal of such evidence, shall convict him accordingly."

It is to be remembered that penalties to a very large amount may be inflicted under 34 Vic. c. 2, and that in default of immediate payment, it is therein provided that, at the option of the prosecutor, the defendant may be imprisoned for a period of not less than two, and not exceeding six months, so that there can be no doubt that all acts therein prohibited under pain of punishment, are crimes, created by the legislature of Quebec under and by virtue of s. 92, § 15 of "The British North America Act, 1867." But whence did the Quebec Legislature draw authority to *amend* and alter the law of procedure in criminal matters as is attempted by 34 Vic. c. 2, ss. 148—199?

It is submitted that all the sections of that Act, having reference to procedure are null, void, and of no effect, having been passed in violation of the provisions of "The British North America Act, 1867."—Wm. H. Kerr. —*La Revue Critique.*

Deceased Wife's Sister Bill. — In reply to Mr. Eykyn, Mr. Gladstone said that the Government could hold out no expectation that they would make themselves responsible for the passing of this Bill during the present session. It was true that the larger number of the members of the Government had given to the Bill all the support in their power, but there was a considerable division of opinion with respect to it, which did not at all run in accordance with the divisions of parties in the House, and the Bill had never been treated as a Government Bill.—*Law Times.*

MAGISTRATES, MUNICIPAL, INSOLVENCY & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

MORTGAGE OF TOLLS.

A Harbour and Road Joint Stock Company, by its charter (16 Vic. ch. 141), had power to levy tolls on goods landed or shipped within certain prescribed limits; and the harbour, roads, wharves, and all the real estate, were to be vested in the company and their successors for ever. The company, finding it necessary to mortgage the harbour, tolls, &c., did so under authority of their charter, and the mortgagee foreclosed the security, entered into possession, and leased to plaintiff, who sued defendant, owner of a wharf within the statutable limits of the harbour, for tolls on goods shipped or landed on defendants' wharf: *Held*, That plaintiff could sue only in the corporate name, and a non-suit was therefore directed.—*Whiteside* v. *Bellchamber*, 12 C. P. 241.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

13TH ELIZABETH.

A conveyance executed by a debtor in satisfaction of or security for a debt, if intended to operate between the parties, is valid, though obtained in order to gain priority to an expected claim of the Crown under a recognizance.

A debtor conveyed lands to his father and brother-in-law respectively, which they claimed to be *bona fide*, and for a valuable consideration; on a bill by a creditor the Court was not entirely satisfied with the account which was given of the transaction with the father, and had serious doubts in regard to the transaction with the son; but being of opinion that the evidence was insufficient to prove the account of the transactions on the defendants' part to be false, sustained both conveyances.—*Attorney-General* v. *Harmer*, 16 Chan. Rep. 533.

DOMICILE.

1. A French subject took up his sole place of abode and business in England, where he lived thirty years, making occasional visits to France. He married and intended to end his days there, but refused to be naturalized, as he was a Frenchman, and might return to reside in France. *Held*, that his domicile was English.—*Brunel* v. *Brunel*, L. R. 12 Eq. 298.

2. To effect a change of domicile it is sufficient that there is intention of settling in the new locality, and of making a principal or sole and permanent home there, and no intention to change civil *status* is necessary.—*Douglas* v. *Douglas*, L. R. 12 Eq. 617.

EASEMENT.

Under 2 and 3 Will. 4, c. 71, a landlord gains no easement or right whatever until twenty years of adverse possession have elapsed. Therefore a tenant of a house which has enjoyed access of light and air over adjoining land, for fourteen years, may take such land, and thereby uniting possession, prevent his landlord gaining an easement. A tenant in possession may refuse to allow his landlord to arrest the growing right of a neighbor to an easement. If enjoyment of light and air continue as above for fourteen years, and then is suspended by unity of possession of the dominant and servient estates, and after such unity is severed the enjoyment is continued six years more, an easement is gained.—*Ladyman* v. *Grave*, L. R. 6 Ch. 763,

EVIDENCE.

A testator appointed his son, Forster Charter, as his executor. He had two sons, William Forster Charter and Charles Charter: *Held*, that inasmuch as if a man has several Christian names they are together but one name, the testator had not sufficiently described either of his sons, and evidence showing the testator intended to appoint his son Charles was admissible.—*Charter* v. *Charter*, L. R. 2 P. & D. 315.

EXECUTORS AND ADMINISTRATORS.

A testator appointed his wife executrix, "and in default of her" two other persons to be executors. Probate was granted to the wife, who died, leaving the estate partly unadministered: *Held*, that probate should be granted to the said two persons as substituted executors.—*In the goods of Foster*, L. R. 2 P. & D. 304.

FRAUDS, STATUTE OF.

A. entered into a contract with B. for the purchase of wool, and signed and handed to B. a memorandum of the terms of sale. B. subsequently wrote to A., "It is now twenty-eight days since you and I had a deal for my wool. . . . I shall consider the deal off as you have not completed your part of the contract. yours, B." And on A. asking for a copy of said memorandum, B. wrote, "I beg to enclose a copy of your letter," enclosing a copy of the memorandum. *Held*, that there was sufficient memorandum of the contract signed by B. to satisfy the statute of frauds.—*Buxton* v. *Rust*, L. R. 7 Ex. 1.

ILLEGITIMATE CHILDREN.

A testator cannot by his will appoint a guardian for his illegitimate children.—*Sleeman* v. *Wilson*, L. R. 13 Eq. 36.

LIBEL.

The plaintiff was a manufacturer of a bag he called the "Bag of Bags." The defendant published the following concerning said bag: "As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar; and which has been forced upon the public *ad nauseam*." *Held* (LUSH, J, dissenting), that a question was presented for the jury as to whether the above words were intended to disparage the plaintiff in the conduct of his business. Demurrer to declaration on said words overruled.—*Jenner* v. *A'Beckett*, L. R. 7 Q. B., 11.

LIEN.

1. By articles of association a bank was to have a lien on shares for money due from the shareholder. The bank was wound up, and its property sold to a second bank. Shareholders not subscribing to the second bank were paid £2 per share. *Held*, that the bank's lien extended to such sum, as representing a share.—*In re General Exchange Bank*, L. R. 6 Ch. 818.

2. Goods were carried by railway for a company on a credit account, a condition being that the railway was to have a general lien on such goods for all moneys due. Coke was put in trucks belonging to the company on the railway line, and there detained by the latter. *Held*, that a lien being a right to hold goods that had been carried in respect of such carriage, or, if so agreed, in respect of debts of the same character contracted in respect of other goods, to stop said coke before it had been carried, and hold the same for a debt, was contrary to the nature of a lien.—*Wiltshire Iron Co.* v. *Great Western Railway Co.*, L. R. 6 Q. B. (Ex. Ch.) 776; s. c. *ib.* 101.

NEGLIGENCE.

1. The defendants owned a railway bridge over a highway, supported by an iron girder resting upon brick piers, from which a brick fell on the plaintiff, shortly after the passage of a train. The bridge had been used three years at the time of the accident. *Held*, that the defendants were bound to use due care in providing for the safety of the public, and that the question of negligence was rightly left with the jury.—*Kearney* v. *London and Brighton Railway Co.*, L. R. 6 Q. B. (Ex. Ch.) 759; s. c. L. R. 5 Q. B. 511; 5 Am. Law Rev. 298.

2. Declaration that the defendant was possessed of yew-trees, the clippings of which he knew to be poisonous, whereby it became the duty of the defendant to prevent the clippings being placed on others' land, yet the defendant took so little care of the clippings that they were placed on land not the defendant's, where the plaintiff's horses lawfully being, eat of the same and were poisoned. *Held*, on demurrer that the facts alleged did not cast the alleged duty on the defendant.—*Wilson* v. *Newberry*, L. R. 7 Q. B. 31.

WARRANTY.

H. bought a horse warranted in a certain respect, to be returned before a certain day if not answering to its description. H. was told by a groom that the horse did not answer to the warranty, but took it home, where it met with an accident, whereupon H. returned it before the said day. *Held*, that neither the taking away the horse, nor its subsequent injury, deprived H. of his right to return it.—*Head* v. *Tattersall*, L. R. 7 Ex. 7.

CANADA REPORTS.

ONTARIO.

COMMON PLEAS.

REGINA V. MASON.

Criminal law—Larceny of Police Court information—Maliciously destroying same—Patent defect in indictment—Arrest of judgment after verdict—Reversal in Error—Police Court a Court of Justice within 32 & 33 Vic. ch. 21 sec. 18—Reservation of this question at Nisi Prius—C. S. U. C. ch. 112 sec. 1—Count for felony with allegations of previous convictions for misdemeanour—Misjoinder of counts.

Held, that the Police Court of the city of Toronto is a Court of Justice within 32 & 33 Vic. ch. 21 sec. 18, and that the prisoner was properly convicted of stealing an information laid in that Court.

Held, also, that maliciouly destroying an information or record of the said Court is felony within the same Act.

Held, also, that the Court will not arrest judgment after verdict, or reverse judgment in Error, for any defect patent on the face of the indictment, as by 32 & 33 Vic. ch. 29 sec. 32, objection to such defect must be taken by demurrer, or by motion to quash the indictment.

Whether the Police Court is a Court of Justice within 32 & 33 Vic. ch. 21 sec. 18, or not, is a question of law which may be reserved by the Judge at the trial, under Consol. Stat. U. C., ch. 112 sec. 1, and where it does not appear by the record in Error that the Judge refused to reserve such question it cannot be considered upon a writ of Error.

Where an indictment contains one count for larceny, and allegations in the nature of counts for previous convictions for misdemeanors, and the prisoner, being arraigned on the whole indictment, pleads "not guilty," and is tried at a subsequent assize, when the count for larceny only is read to the jury, *Held*, no error, as the prisoner was only given in charge on the larceny count.

It is not a misjoinder of counts to add allegations of a previous conviction for misdemeanor, as counts, to a count for larceny, and the question, at all events, can only be raised by demurrer, on motion to quash the indictment under 32 & 33 Vic. ch. 29 sec. 32; and where there has been a demurrer to such allegations, as insufficient in law, and judgment in favour of the prisoner, but he is convicted on the felony count, the Court of Error will not re-open the matter on the suggestion that there is misjoinder of counts.

An indictment describing an offence within 32 & 33 Vic. ch. 21 sec. 18, as feloniously stealing an information taken in a Police Court, is sufficient after verdict.

[22 C. P. 246.]

Error upon two judgments, entered upon convictions found at the Court of Oyer and Terminer

and General Gaol Delivery, held at Toronto in January last.

The prisoner was tried before the Chief Justice of this Court under one indictment, which had been preferred at a previous assize, charging him with having stolen an information laid by one Julia Minor, before the Police Magistrate of the city of Toronto, against one Vincent. The indictment also contained several other presentments of previous convictions for misdemeanor.

The venire for the jury was to enquire "upon their oaths whether the said George Albert Mason be guilty of the larceny above specified or not.

The prisoner, who was undefended by counsel, upon the indictment being read, pleaded not guilty.

The jury rendered a verdict of guilty, which was recorded thus, that "the said George Albert Mason is guilty of the premises aforesaid in the first count of the indictment on him above charged."

The prisoner then urged, in arrest of judgment, that the Police Court was not a Court of Record, nor alleged so to be, and that the information and depositions mentioned in the indictment were not records or orginal documents within the statute. To this the Attorney-General answered, that the prisoner should not be allowed to urge such objections, because the information and deposition were original documents, and also because by 32 Vic. ch. 29, every objection to any indictment, for any defect apparent on the face thereof, should be taken by demurrer, or on motion to quash, before defendant had pleaded, and not afterwards, and that no motion in arrest of judgment should be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under said Act. The prisoner replied that the answer of the Attorney-General was insufficient in law, but the Court considered it sufficient, and sentenced the prisoner to two years imprisonment in the penitentiary.

The assignment of errors, in substance, was: 1st, That notwithstanding the statute, the prisoner had the right to urge these matters in arrest of judgment; 2nd, That no offence was disclosed; 3rd, That the Police Court was not a Court within the statute, and the information was not a record of any such Court; 4th, That the indictment showed no offence committed after a previous conviction, &c., for which a greater punishment was given, so as to make proper the allegations of previous convictions; 5th, That the substance and effect of the indictable misdemeanors were not stated; 6th, That the information was not such a proceeding as was named in the statute, nor was it stated to be an original document.

The Crown joined in error.

Besides the errors assigned, *Harrison*, Q. C., urged another ground, that the prisoner was arraigned and afterwards given in charge on the whole indictment; in effect, that the statement of the previous convictions was improperly read to the jury.

The second indictment contained two counts, the first charging the prisoner with having feloniously stolen an information and deposition, the same being a record of the Police Court of the city of Toronto; and the second, with feloniously, unlawfully, and maliciously destroying the same information and deposition, before then feloniously stolen, contrary to the form of the statute in that behalf, viz, 32 & 33 Vic. ch. 21 sec. 18.

Besides these two counts, the indictment contained statements of previous convictions, as in the first indictment.

The prisoner pleaded not guilty.

The trial took place before Wilson, J., when the prisoner was convicted on the second count, but acquitted on the first. The prisoner, by his counsel, then demurred to the remainder of the indictment, as insufficient in law, and after argument, judgment was given in his favour.

On his being brought up for sentence, the same grounds were urged in arrest of judgment as in the first case, and with the same result. The assignments of error were also the same.

Harrison, Q C., for the prisoner, cited *Bage* v. *Bromwell*, 3 Lev. 99; *Nash* v. *The Queen*, 4 B. & S. 935; *Regina* v. *Summers*, 19 L. T. N. S. 799; *Regina* v. *Garland*, 11 Cox. 225; *Regina* v. *Cox*, 10 Cox 502; *Regina* v. *Cleworth*, 9 L. T. N. S. 682.

K. McKenzie, Q.C., contra, cited *Regina* v. *Ferguson*, 1 Dears. C. C. 427; *Burns*' Justice, III., 107.

HAGARTY, C. J., (speaking of the first indictment)—Even if it be open to counsel to raise the question raised for the first time by Mr. Harrison on the argument, I am of opinion that it cannot avail. Reliance was placed on a case in Ireland, *Regina* v. *Fox*, (10 Cox 502). But there it appeared that prisoner was given in charge to the jury to enquire "whether she be guilty of the premises in said indictment, or any part thereof." In our case, the prisoner was given in charge, "whether he be guilty of the larceny, in the indictment specified, or not."

If we could gather from the writ of error before us that, although correctly given in charge to the jury, yet that on previous arraignment the prisoner had been required to answer the whole indictment, we should long pause before giving effect to such an objection, when he was rightly given in charge to the jury of trial. In the present case it would be especially improper to give way to the objection, as the indictment was found, and the prisoner arraigned and pleaded, at a previous Court of Assize, and could not in any way have been prejudiced by any mistake in his arraignment.

It is also objected that there is a misjoinder of counts. This is based, I presume, on the idea that this indictment contained more than one count. It is wrong, we think, to apply the term "count" to these allegations of previous convictions. As is said by Blackburn, J., in *Latham* v. *The Queen*, (5 B. & S. 643), "each count is in fact and theory a separate indictment; and if there be no express finding on any one, it would seem there may be a *venire de novo* thereon.

In the case before us, there was no evidence offered, and no finding on anything in the indictment except the first count for larceny. If we treat the allegations of the previous convictions as counts, it is clear, on the express authority of the last case cited, and also on a case ten years earlier, of *Regina* v. *Ferguson* (1 Dearsly 427), that the objection is untenable.

We consider it unnecessary to discuss the propriety of their appearance in the record, as we find the prisoner was not given in charge or tried upon them, and no finding in respect thereof.

The main point of objection is the alleged insufficiency of the indictment. Our statute seems express that, in a case like the present, where the objection (if any) is patent on the face of the indictment, the prisoner must demur or move to quash: "No motion in arrest of judge shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act." These words are added to those used in the Imperial Act. We therefore consider the learned Judge rightly held the answer of the Crown sufficient on the motion to arrest judgment.

If there be any meaning in the language used by the Legislature, we must hold that parties must demur to, or move to quash the indictment for any patent defect; and if not demurred to, such objection shall not be available in arrest of judgment. If the Court overrule the demurrer, the judgment is not conclusive, but can of course be carried further. The object seems to be to prevent waste of time and labour in criminal trials, and to compel a legal defence to be resorted to at the earliest possible stage.

The same statute (sec. 80) declares that "no writ of error shall be allowed in any criminal case, unless it be founded on some question of law which could not have been reserved, or which the Judge presiding at the trial refused to reserve for the consideration of the Court having jurisdiction in such cases" The right to reserve a case is under Consol. Stat. U. C., ch. 112, whereby the Judge may in his discretion reserve "any question of law which arose on the trial."

I am at present under the impression that at the trial of this case, if a question arose whether the "Police Court" was a Court, or the "information" mentioned in the indictment a document, within the meaning of the statute, the presiding Judge could have reserved the question under the statute. It does not appear that he was asked, or refused so to do. If the objection had been suggested that it was necessary to describe such a paper as an original document belonging to said Police Court, I think the Court could, on the evidence that it really was such a document, order the indictment to be amended by inserting such words.

If this view be correct, all alleged errors could have been either cured at the trial or would come up before the Court on demurrer; and in such a view the writ of error should not be allowed.

If the objections be properly before us, we could, I think, have no hesitation in deciding against the plaintiff in error. Our statute (sec. 18) makes it felony in any one who "steals, or for any fradulent purpose takes from its place of deposit for the time being, or from any person having the custody thereof, &c., any record, writ, return, panel, process, interrogatory, deposition, rule, order, or warrant of attorney, or any original document, whatsoever, of, or belonging to any Court of Record or other Court of Justice, or relating to any matter civil or criminal, begun, depending, or terminated in any such Court, or any bill, &c., in equity, &c., or of any original document in any wise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any Court of Justice, or in any Government or public office."

We are asked to confine this to the documents of Courts of Record. We are satisfied that we have no right so to do. The words used are very comprehensive, and include in terms all Courts of Justice The Police Court, established by statute, must fall within this description. This seems too clear for argument.

The indictment charges the stealing "a certain information made and subscribed by one J. M., against one J. V., at the Police Court of the said city, such Court being a Court of Justice in the Province of Ontario, from one J. N., clerk of the said Court, then having the lawful custody of the same." We think these words, at all events after verdict, sufficiently charge the stealing of an original document belonging to the Court.

The word "information" is not one of the words used specifically in the Act, which speaks of "depositions" and "affidavit," and then, "or any orginal document whatsoever, of, or belonging to any Court of Record or other Court of Justice, or relating to any matter, &c., depending in such Court."

We know, judicially, that the word "information" bears the meaning of a statement or deposition on oath, and, if so, that it imports that it is an original document, and that the proof would necessarily have failed if it shewed the the abstraction of any piece of paper not falling within the statutable definition. The addition of the words, "the same being an orginal document belonging to the said Court," would have removed all difficulty.

As is said by Blackburn, J., in *Nash* v. *The Queen* (4 B. & S. 940), "After a verdict of guilty rendered, we must take it that the jury found all necessary to establish the offence, one or more, charged in this count, and we must suppose that the Judge told them what parts of it were material and what not"

We are of opinion that judgment must be for the Crown.

GWYNNE, J.—Nothing can be more informal and imperfect than the manner in which the proceedings in these cases have been entered upon the record of those proceedings as furnished to us. When we extract, as best we can, the material part, and examined the alledged errors, which have been assigned, our judgment must be for the Crown.

[After stating the contents of the second indictment, the learned judge continued:]

These were the only counts in the indictment charging any substantive criminal offences to be tried; but the indictment contained *statements* of the prisoner having been previously convicted upon three several occasions of misdemeanours, which statements, if the prisoner should be found guilty of the substantive felonies charged, or of either of them, would have been matter proper to be inquired into, if the misdemeanors had been stated to have been within the 18th section of 32 and 33 Vic. ch. 21, namely, misdemeanors punishable under that Act. The substance of the indictment and convictions was not stated, as required by the 26th section of 32 and 33 Vic., ch. 29. If the non-compliance with the provi-

sions of this statute, as to the mode of *proceeding* upon an indictment for an offence committed after a previous conviction, could constitute error, I see no reason for presuming that, nor would we be justified in presuming that those provisions were not complied with; on the contrary, I think it sufficiently appears that they were complied with. Those provisions are, that the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he pleads not guilty, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only, and if they find him guilty, he shall then, and not before, be asked whether he was so previously convicted as alleged; but if he denies that he was so previously convicted, or stands mute, the jury shall then be charged to inquire concerning such previous conviction. Now with this latter inquiry the jury in this case were never charged, because it appears that, upon their rendering their verdict that the prisoner was guilty of the felony charged in the second count, but was not guilty of the felony charged in the first count, the prisoner, by his counsel, demurred in law, (as appears by the record thereof endorsed on the indictment) *to the remainder of the said indictment.*

Whether this proceeding by way of demurrer was at all necessary, and whether the prisoner could not have had the same benefit precisely, if, when asked if it be true he had been previously convicted as alleged in that behalf, he had without any formal demurrer pointed out that the statement did not allege or shew that the misdemeanors referred to, or any of them, had been for misdemeanors within 32 & 33 Vic ch. 21, is a matter now of no moment. But the course which was taken, whether necessary or unnecessary, and whether or not the strictly proper course to have been pursued, seems conclusively to shew that the provisions of the statute were strictly complied with, and that what the prisoner had pleaded not guilty unto were the *offences charged* in the indictment, and which alone were given in charge to the jury, and that, as to the statements of previous convictions, no reference was made to them until after the jury had rendered their verdict upon the offences charged, when the prisoner objected to any inquiry as to previous convictions, as above stated.

[Proceeding to consider the errors assigned, the learned Judge said:]

As to the second and third of these objections, we are all of opinion that the Police Court, in the second count mentioned, is a Court of Justice within the 18th section of the 32 & 33 Vic. ch. 21, and that an information or deposition made and used in that Court, is a document of or belonging to such Court, whether it be a record or not, the stealing or destruction of which is made felony within that section. The term deposition is expressly used in the statute and the indictment; and what is alleged in the first count to have been stolen, and in the second to have been destroyed, is one document, namely, "a certain information and deposition, which we take to be a sufficiently certain allegation that the document referred to was an information upon oath, that is, was a deposition within the meaning of the Act.

The fifth objection is an attempt to open again the matter already concluded by the judgment of the Court of Oyer and Terminer, and so concluded in the prisoner's favor, and which therefore he was not required to answer. and in respect of which the jury who tried him were never charged. Attributing to these statements of previous convictions the character of seperate counts (although we do not think, strictly speaking, they are counts, but merely statements appended to the counts which charge the criminal offences to be tried), it is no objection, which can be taken upon error, that a verdict has been rendered upon one count in an indictment charging felony, and no verdict taken or rendered on another. Nor is there error in such case, although that other be a count charging a misdemeanor; it is the same as if the indictment contained the single count upon which the conviction was made: *Regina* v. *Ferguson* (1 Dearsly, 427). But, treating the statements of previous convictions to be not counts, but merely statements made for the purpose of founding an inquiry to be entered into only in the event of the prisoner being found guilty of the *offence charged* in the indictment; when it appears that they were not enquired into at all, and that the jury was not charged with them, and that they were in substance so effectually removed from the indictment that the prisoner was in no way prejudiced by their insertion, I cannot understand upon what principle he can now be heard to contend that there was error in their insertion.

Then as to the fourth objection.

What is insisted upon is, that the alleging the previous convictions for misdemeanor at all, made the indictment bad; and in support of this contention we were referred to *Regina* v. *Summers* (19 L. T. N. S. 799, also reported in L. Rep. 1 C. Cas. Reserved, 182), *Regina* v. *Fox* (10 Cox, 502), and *Regina* v. *Garland* (11 Cox, 225, and 8 I C. L. 383). These were cases of indictments for misdemeanors, in which were either alleged previous convictions for felony, or, without being alleged, proof was offered of a previous conviction for felony under Imperial Act 27 & 28 Vic., ch. 47, sec. 2. These cases have no bearing upon the present case, for this is not the case of an indictment for misdemeanor, containing a statement of a previous conviction for felony, which in those cases it was said no statute authorized, but an indictment for felony under 32 & 33 Vic., ch. 21, containing statements of previous convictions for misdemeanors, which the Statute *does* authorize, if the previous convictions were for misdemeanors indictable under the same Act; and all that is wrong is that the previous convictions are not stated with the preciseness required by 32 & 33 Vic., ch. 29, sec. 26. Whether or not it be error, according to the law of England, in an indictment for misdemeanor, to state a previous conviction for felony, although the Statute 27 & 28 Vic., ch. 47, allows it to be proved, and when proved imposes for that reason a heavier punishment, is a point with which we need not at present concern ourselves, for not only is this case a wholly different case, but our law as to what may or may not be objected on error, essentially differs from that of England. By our Act 32 & 33 Vic.. ch. 29, sec. 32, it is enacted that "*every* objection to any indictment for *any defect* apparent on the face

thereof, must be taken by demurrer, or motion to quash the indictment before the defendant has pleaded, *and not afterwards;* and every Court, before which any such objection is taken, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the Court, or other person, and thereupon the trial shall proceed as if no such defect had appeared, *and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.*" And by section 80, it is enacted that no writ of error shall be allowed in any criminal case, unless it be founded on some question of law which could not have been reserved, or which the Judge presiding at the trial refused to reserve for the consideration of the Court having jurisdiction in such cases. Now the defective statement of the previous convictions for misdemeanor was not a matter which could have avoided the whole indictment; but if it could have had that effect the point could have been raised by demurrer. Upon the objection being made to the defective statement of these convictions, what was done was equivalent to erasing them from the indictment, and the conviction stands upon the counts whereof the prisoner was convicted, unaffected in any manner by the defective statements; and if it were for no other reason than that they were so in effect removed from the indictment, the prisoner could not insist that they are still upon the indictment for the purpose of error.

As to the objection which was moved in arrest of judgment, that was also a point which could have been, and therefore should have been, raised by demurrer, if there was thought to be any thing in it, and not having been so raised, cannot now be entertained. The intention of the Legislature was, we have no doubt, to prevent, after a trial upon the merits and a verdict of guilty, the cause of justice being delayed by such objections as have been raised in this case. But we are also of opinion that there is nothing in the point raised, even if it had been raised by demurrer instead of by motion in arrest of judgment, and that what is good as against a demurrer cannot be bad in arrest of judgment, or on error, if error lay, and we are of opinion it does not lie in this case. Judgment, therefore, will be for the Crown.

GALT, J., concurred.

Judgment for the Crown

COMMON LAW CHAMBERS.

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

LAWRIE ET AL. v. MCMAHON.

Insolvent Act, 1869, sec. 134.—Appeal.—Death of Insolvent.

When the insolvent who has appealed from the decision of a County Judge refusing to set aside an attachment against him, dies during the pendency of this appeal, and no personal representative has been appointed, the appeal fails.

[Chambers, February 28, 1872. *Galt, J.*]

This was an appeal from the judgment of the County Judge of the County of Lincoln refusing a petition of the defendant to set aside an attachment issued against him as an insolvent.

Since the decision of the learned Judge of the County Court was given, McMahon, the insolvent, died intestate, and no letters of administration had been granted to any person.

Harrison, Q. C., contended that under sec. 134 of the Insolvent Act of 1869, this appeal could be prosecuted notwithstanding the death of the petitioner, and though no person had been authorised to administer to his estate.

T. Moss appeared for the creditors, and urged that under the circumstances no further steps could be taken in the matter.

GALT, J.—It is unnecessary to consider the grounds of appeal against the judgment if there is no person authorized to bring them forward. The 134th section, as it appears to me, expressly requires that any persons who wish, on behalf of the insolvent, to interfere in the proceedings in insolvency on behalf of the estate of the debtor must be clothed with authority to act as his legal representative, and as there is no person at present in that position I have no jurisdiction to entertain the matter.

UNITED STATES REPORTS.

SUPREME COURT OF ILLINOIS.

ILL CENTRAL R. R. CO v. JESSE L. ABELL.

If a railway passenger holding a ticket entitling him to alight at a particular station, is carried past such station without his consent and without being allowed a reasonable opportunity of leaving the train, he has an action against the company for whatever damages.

Verdict obtained by dividing by twelve.—That while jurors may resort to a process of this sort as a mere experiment, and for the purpose of ascertaining how nearly the result may suit the views of the different jurors, yet a preliminary agreement that each juror should privately write upon a slip of paper the amount of damages to which he thought the plaintiff entitled, and place the slip in a hat, that the amounts should be added together and their sum divided by twelve should be the verdict, will vitiate a verdict found under such an agreement.

[C. L. N., June 26, 1872.]

Opinion of the Court by Lawrence, C. J.

If a railway passenger holding a ticket entitling him to alight at a particular station, is carried past such station without his consent, and without being allowed a reasonable opportunity of leaving the train, he has an action against the company for whatever damages may have accrued to him for non-delivery at the place of his destination.

It is urged that the verdict is not sustained by the evidence, but we refrain from the consideration of that point as there is another upon which the case must be sent to another jury. It appears by the affidavit of the officer having in charge the jury, that, after agreeing to find for the plaintiff, they differed widely as to the damages, and it was then agreed that each juror should privately write upon a slip of paper the amount of damages to which he thought the plaintiff entitled, and place the slip in a hat; that the amounts should then be added together and their sum, divided by twelve, should be the verdict. This was done and a verdict rendered accordingly.

It is true a juror swears that there was considerable consultation after this was done, and that each juror agreed upon the result thus reached as his verdict. He does not however

deny that an agreement was made such as is stated in the officer's affidavit, and we cannot doubt it was that agreement which controlled the amount of the damages. The rule upon this matter is well setted It is, that while jurors may resort to a process of this sort as a mere experiment, and for the purpose of ascertaining how nearly the result may suit the views of the different jurors, yet a preliminary agreement that such a result shall be the verdict, will vitiate a verdict found under and by virtue of such an agreement. *Dunn* v. *Hall*, 8 Blackf, 32; *Dana* v. *Tucker*, 4 J. R., 487; *Harvey* v. *Rickett*, 15 J. R., 87.

This rule is so reasonable as to need no comment. As this verdict was evidently found under the pressure of such an agreement, the judgment must be reversed.

APPOINTMENTS TO OFFICE.

DEPUTY JUDGES.

JOHN WARISON, of the Town of Goderich, of Osgoode Hall, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of the County of Huron for and during the absence of six months' leave, from 1st of April inst., of Seeker Brough, Esquire, Judge of the County Court of the said County. (Gazetted June 22nd, 1872.)

JAMES ALEXANDER HENDERSON, of the City of Kingston, of Osgoode Hall, Barrister-at-Law, to be Deputy Judge of the County Court of the County of Frontenac. (Gazetted June 22nd, 1872.)

COUNTY ATTORNEY.

JOHN EDWIN FAREWELL, of Osgoode Hall, Esquire, Barrister-at-Law, to be County Attorney in and for the County of Ontario in the room and stead of Samuel H. Cochrane, Esquire, deceased. (Gazetted May 4th, 1872.)

REGISTRAR.

RODERICK McBAIN ROSE, of the City of Kingston, Esquire, to be Registrar of and for the County of Frontenac, in the room and stead of James Durand, deceased. (Gazetted May 25th, 1872.)

NOTARIES PUBLIC FOR ONTARIO.

WILLIAM McDOWELL, of the Village of Erin, Gentleman, Attorney-at-Law. (Gazetted April 27th, 1872.)

FREDERICK BURNHAM, of the Town of Peterborough, Esquire, Barrister-at-Law.

GEORGE S. HOLMSTED, of the City of Toronto, Esquire, Barrister-at-Law.

ADOLPHUS WILLIAM, of the Village of Welland, Gentleman, Attorney-at-Law. (Gazetted May 4, 1872.)

GEORGE A BOOMER, of the City of Toronto, Esquire, Barrister-at-Law.

ARTHUR GODFREY MOLSON SPRAGGE, of the City of Toronto, Gentleman, Attorney-at-Law. (Gazetted May 11th, 1872.)

WILLIAM G. McWILLIAMS, of the City of Toronto; and SUTHERLAND MALCOLMSON, of the Village of Clinton, Esquires, Barristers-at-Law, and WILLIAM McBRIDE, of the City of Toronto, Gentleman, Attorney-at-Law. (Gazetted May 25th, 1872.)

GEORGE WILLIAM HERBERT BALL, of the Town of Galt, Esquire, Barrister-at-Law.

JAY KETCHUM, of the Town of Lindsay, gentleman, Attorney-at-Law. (Gazetted June 1st, 1872.)

JOHN CRERAR, of the City of Hamilton, Esquire, Barrister-at-Law.

HENRY HATTON STRATHY, of the Town of Barrie; and EDWARD BURNS, of the Village of Elora, Esquires, Barristers-at-Law. (Gazetted June 8th, 1872.)

LINDSAY HALL, of the Village of Aurora, Esquire, Barrister-at-Law. (Gazetted June 8th, 1872.)

JOHN FRANCIS CAMPBELL HALDAN, of the Town of Dundas, Gentleman, Attorney-at-Law. (Gazetted June 22nd, 1872.)

ASSOCIATE CORONERS.

JAMES ACLAND DE LA HOOKE, Esquire, M.D., for the County of York.

PETER McDONALD, Esquire, M.D., for the County of Norfolk. (Gazetted April 6th, 1872.)

SYLVESTER LLOYD FREEL, Esquire, M.D., for the County of York. (Gazetted April 13th, 1872.)

SAMUEL BYTH SMALL, Esquire, M.D., for the County of Huron. (Gazetted April 20th, 1872.)

WILLIAM E. JOHNSTON, Esquire, for the United Counties of Northumberland and Durham.

GEORGE W. WOOD, Esquire, M.D., for the County of Norfolk.

HUGH M. McKAY, Esquire, M.D., for the County of Oxford.

WILLIAM NODEN, Esquire, M.D., for the United Counties of Northumberland and Durham. (Gazetted May 11th, 1872.)

THOMAS WYRE VARDON, and HENRY ULLYOT, Esquires, M.D., for the County of Waterloo. (Gazetted May 25th, 1872.)

AUTUMN ASSIZES.

EASTERN CIRCUIT.

(Hon. Mr. Justice Gwynne.)

Perth	Wednesday	11th Sept.
Pembroke	Tuesday	17th Sept.
L'Orignal	Monday	23rd Sept.
Cornwall	Friday	27th Sept.
Ottawa	Thursday	3rd October.
Brockville	Tuesday	15th October.
Kingston	Tuesday	22nd October.

MIDLAND CIRCUIT.

(The Hon. Mr. Justice Galt.)

Napanee	Monday	9th Sept.
Picton	Friday	13th Sept.
Belleville	Wednesday	18th Sept.
Lindsay	Monday	7th October.
Peterborough	Monday	14th October.
Coburg	Monday	21st October.
Whitby	Wednesday	30th October.

NIAGARA CIRCUIT.

(The Hon. Mr. Justice Wilson.)

Owen Sound	Tuesday	17th Sept.
Milton	Monday	23rd Sept.
Hamilton	Monday	30th Sept.
St. Catharines	Monday	21st October.
Welland	Monday	28th October.
Barrie	Monday	4th November

OXFORD CIRCUIT.

(The Hon. Justice Morrison.)

Cayuga	Thursday	12th Sept.
Berlin	Monday	16th Sept.
Brantford	Monday	23rd Sept.
Simcoe	Monday	14th October.
Woodstock	Monday	21st October.
Stratford	Monday	28th October.
Guelph	Monday	4th November

WESTERN CIRCUIT.

(The Hon. the Chief Justice of the Common Pleas.)

Walkerton	Monday	16th Sept.
Goderich	Monday	23rd Sept.
London	Tuesday	1st October.
Sarnia	Monday	14th October.
Sandwich	Friday	18th October.
Chatham	Monday	28th October.
St. Thomas	Tuesday	5th November.

HOME CIRCUIT.

(The Hon. the Chief Justice of Ontario.)

Brampton	Tuesday	24th Sept.
City of Toronto	Tuesday	1st October.