DIARY FOR OCTOBER.

6. SUN... 16*th Sunday after Trinity.*
7. Mon.. County Court and Surrogate Court Term begins.
12. Sat. ... County Court and Surrogate Court Term ends.
13. SUN... 17*th Sunday after Trinity.*
15. Tues... Law of England introduced into Upper Canada, 1792.
18. Friday *St. Luke.*
20. SUN... 18*th Sunday after Trinity.*
27. SUN... 19*th Sunday after Trinity.*
28. Mon.. *St. Simon and St. Jude.*
30. Wed... Appeal from Chancery Chambers.
31. Thurs. All Hallow Eve.

The Local Courts'
AND
MUNICIPAL GAZETTE.

OCTOBER, 1867.

THE MARRIAGE LAWS.—No. II.

The law of marriage introduced into Upper Canada from England, and as modified by local legislation, indicated that the privilege of solemnizing that rite was to be limited to the clergy of the Church of England. But as other religious communities were formed and waxed strong, this was felt to be a hardship, and various enabling statutes were at different times passed—the dates of which serve to indicate the development of ecclesiastical prosperity and activity in the country. Thus by 38 Geo. III. cap. 4 (1798) members of the Church of Scotland, Lutherans and Calvinists could claim the right of being married by ministers of their own denominations, and by 11 Geo. IV. cap. 36 (1830) the same right was extended to Presbyterians, Congregationalists, Baptists, Independents, Methodists, Menonists and Tunkers or Moravians. Then the comprehensive statute 10 & 11 Vict. cap. 18 was passed, whereby was conceded to all clergymen or ministers of "any denomination of Christians whatever," the power of validly celebrating marriage between those who were adherents of their respective churches. The next and final step in progress was made, when ten years afterwards, by 20 Vic. cap. 66, the ministers of "every religious denomination in Upper Canada," were declared to have the right to solemnize matrimony according to the several rites, ceremonies and usages which obtained among them. And thus the law stands as consolidated: Con. Stat. U. C. cap. 72, sec. 1.

It is noticeable, however, that none of these or the other Provincial statutes relating to marriage in any manner touch in express terms upon the Roman Catholic population. If not otherwise provided for, they would of course be embraced under the wide language of 10 & 11 Vict. cap. 18; 20 Vict. cap. 16, and the Consolidated Act.

With regard to all Protestant clergy, the provisions of the statute law are clear that they shall not celebrate the ceremony of marriage, unless there has been either the usual proclamation of banns or the issue of a license authorizing such marriage. The first mention of marriage by *license*, in our statutes, is in 33 Geo. III. cap. 5, sec. 6, (an act applicable to those who were then in the position of Dissenters) which leaves it all uncertain as to the source of authority whence such dispensation issues. The next statute, however, 38 Geo. III. cap. 4, sec. 6 (likewise applicable to the then Dissenters) recognizes that the power to grant such license is vested in the Governor—a right which he exercises as representing the Sovereign and by virtue of the royal instructions: see *Reg.* v. *Roblin*, 21 U. C. Q. B. 357. The regulation in Lord Hardwicke's Act as to license is as follows:—"All marriages solemnized from and after the 25th March, 1754, * * * without publication of banns or *license of marriage from a person or persons having authority to grant the same*, first had and obtained, shall be null and void to all intents and purposes whatsoever." Under the English law at that time, licenses could be granted either by the Sovereign, or the Archbishop of Canterbury, or duly consecrated Bishops of the Church of England, by virtue of and within the territorial limits of their episcopal office, or by certain officers of the Spiritual Courts. But the Pope of Rome had no such power, nor had any ecclesiastical functionary belonging to, or claiming authority under the Church of Rome. See Chitty on the Prerog. pp. 51, 53; *Colt* v. *Bishop of Coventry*, Hob. 148; 25 Hen. VIII. cap. 21; 28 Hen. VIII. cap. 16; 1 Eliz. cap. 1, secs. 8, 10; and 4 Geo. IV. cap. 5. There can be no question that Lord Hardwicke's Act extended to Roman Catholics in England, at the time the English Marriage Law became the Upper Canadian Marriage Law, as appears by the I. S. 31 Geo. III. cap. 32, sec. 12.

By 26 Geo. III. cap. 84, and other statutes, the Archbishop of Canterbury was empowered to consecrate bishops for the colonies, and though we do not know that the question has

been mooted, yet it is very probable that duly consecrated colonial bishops of the English Episcopal Church had the privilege of granting dispensations from banns and directing the issue of marriage licenses, with respect to members of their own church and within the boundaries of their own dioceses, so long as Church and State were united in Upper Canada. But we apprehend that since the time our legislature declared in memorable words the desirableness of removing "all semblance of connection between Church and State" (18 Vic. cap. 2, 1854) and did in fact by that statute abolish such connection, the episcopal power to grant the marriage license reverted to the Governor as representative of the Crown. The Church of England in Upper Canada then became a mere voluntary association, and its bishops were shorn of any spiritual privileges or dispensing powers which otherwise they might have claimed. (See *Re Bishop of Natal*, 11 Jur. N. S. 353; *Murray* v. *Burgess*, L. R. 1 P. C. App. 362; *Lyster* v. *Kirkpatrick*, 26 U. C. Q. B. 225.) So that the conclusion is manifest, as to all Protestant bodies, that they come within the marriage act as consolidated, and their members can only properly contract marriage after publication of banns, or, without banns, by Governor's license.

Under Con. Stat. U. C. cap. 72, sec. 2, the celebration of marriage without banns or license, or under banns, where the names of either of the parties were incorrectly stated, would be no more perhaps, than an irregularity; but under Lord Hardwicke's Act, such marriage would be an absolute nullity, both as to the contracting parties and their issue. Neither lapse of time nor mutual consent however express, can validate what the statute directly avoids. Such a union would be not merely voidable, but void *ab initio;* it would be in the eye of the law, not a matrimonial, but a meretricious union, the issue whereof would be bastardized from their birth. (See *Elliott* v. *Gurr*, 2 Phil. p. 19; *Wright* v. *Elwood*, 1 Curt. p. 670; *Chinham* v. *Preston*, 1 W. Blac. 192; *King* v. *Inhabitants of Tibshelf*, 1 B. & Ad. 190; *Reg.* v. *Chadwick*, 11 Q. B. 173.) And this appears to be our marriage law in Ontario, so far as Protestants are concerned.

The inquiry now presents itself, upon what footing are Roman Catholics in this respect? Is their situation in this status as unsatisfactory as that of the Protestants, or can they claim privileges beyond those of any other religious body in this Province? The consideration of these questions will involve the necessity of going over some portions of the early history of Canada, when that country was passing from under the French to the English dominion.

Another letter on the important, and, to many of our readers, very interesting subject of Division Court fees, will be found under "Correspondence." The letter supports the view taken by the gentleman who communicated the article in the July number of the *Local Courts' Gazette*. Mr. Agar, in a very well written letter, put the case of the officers of Division Courts very strongly. We are glad to see the subject so well discussed as it has been in the letters above mentioned, and by "Novice," in the August number.

SELECTIONS.

AN ESSAY

ON THE IMPORTANCE OF THE PRESERVATION AND AMENDMENT OF TRIAL BY JURY.

THE institution of trial by jury has been ascribed by different authors to various persons and nations. Sir William Blackstone is of opinion that it originated with the Saxon and other northern nations.

"Some authors," writes Sir William, "have endeavoured to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is, that they were in use among the earliest Saxon Colonies, their institution being ascribed by Bishop Nicholson to Woden himself, their great legislator and captain. Hence it is that we may find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France, and Italy; who had all of them a tribunal composed of twelve good men and true, *boni homines*, usually the vassals or tenants of the lord, being the equals or peers of the parties litigant; and, as the lord's vassals judged each other in the lord's courts, so the king's vassals, or the lords themselves, judged each other in the king's court. In England we find actual mention of them so early as the laws of King Ethelred, and that not as a new invention. Stiernhook ascribes the invention of the jury, which in the Teutonic language is denominated *nembda*, to Regner, king of Sweden and Denmark, who was contemporary with our King Egbert. Just as we are apt to impute the invention of this and some other pieces of juridical polity to the superior genius of Alfred the Great; to whom, on account of his having done much, it is usual to attribute everything; and as the

tradition of ancient Greece placed to the account of their own Hercules, whatever achievement was performed superior to the ordinary prowess of mankind. Whereas the truth seems to be, that this tribunal was universally established among all the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other."

This opinion has been controverted with much learning and ingenuity by Dr Pettingal in his inquiry into the "Use and Practice of Juries among the Greeks and Romans." Dr. Pettingal deduces the origin of juries from these ancient nations.

"He begins with determining the meaning of the word δικασαι in the Greek, and *judices* in the Roman writers. "The common acceptation of these words (says he), and the idea generally annexed to them, is that of *presidents of courts*, or, as we call them, *judges;* as such they are understood by commentators, and rendered by critics. Dr. Middleton, in his life of Cicero, expressly calls the *judices, judges of the bench;* and Archbishop Potter, and in short all modern writers upon the Greek or Roman orators, or authors in general, express δικασαι and *judices* by such terms as convey the idea of *presidents in courts of justice.* The propriety of this is doubted of, and has given occasion for this enquiry; in which is shown, from the best Greek and Roman authorities, that neither the δικασαι of the Greeks, nor the *judices* of the Romans, ever signified *presidents in courts of judicature*, or judges of the bench; but, on the contrary, they were distinguished from each other, and the difference of their duty and function was carefully and clearly pointed out by the orators in their pleadings, who were the best authorities in those cases in which the question related to forms of law and methods of proceeding in judicial affairs and criminal process.

"The presidents of courts in criminal trials at Athens were the nine archons, or chief magistrates, of which whoever presided was called ηγεμων δικασηρις president of the court. These nine presided in different causes peculiar to each jurisdiction. The archon, properly so called, had belonging to his department all pupillary and heritable cases; the βασιλευς had charge of the public worship, and the conduct of criminal processes; exercised authority over strangers and sojourners, and attended to various other matters; and the *thesmothetai*, the six junior archons, judged causes assigned to no special court, &c. (See *Liddell & Scott.*)

"Wherever then the ανδρες δικασαι, or judicial men, are addressed by the Greek orators in their speeches, they are not to be understood to be the presiding magistrates, but another class of men, who were to inquire into the state of the cause before them, by witnesses heard, to report their opinion and, after inquiry made and witnesses heard, to report their opinion and verdict to the president, who was to declare it.

"The several steps and circumstances attending this judicial proceeding are so similar to the forms observed by our jury, that the reader cannot doubt but that the nature, intent, and proceedings of the δικασηριον among the Greeks were the same with the English jury; namely, for the protection of the lower people from the power and oppression of the great, by administering equal law and justice to all ranks; and therefore when the Greek orators directed their speeches to the ανδρες δικασαι, as we see in Demosthenes, Æschines, and Lysias, we are to understand it in the same sense as when our lawyers at the Bar say, *Gentlemen of the Jury.*

"So likewise among the Romans, the *judices* in their pleadings at the Bar, never signified judges of the bench, or presidents of the court, but a body or order of men, whose office in the courts of judicature was distinct from that of the prætor or judex questionis, which answered to our judge of the bench, and was the same with the archon, or ηγεμων δικασηρις of the Greek; whereas the duty of the judices consisted in being empannelled, as we call it, challenged, and sworn to try uprightly the case before them; and when they had agreed upon their opinion or verdict, to deliver it to the president who was to pronounce it. This kind of judicial process was first introduced into the Athenian polity by Solon, and thence copied into the Roman republic, as probable means of procuring just judgment, and protecting the lower people from the oppression or arbitrary decisions of their superiors.

"When the Romans were settled in Britain as a province, they carried with them their *jura* and *instituta*, their laws and customs, which was a practice essential to all colonies; hence the Britons, and other countries of Germany and Gaul, learned from them the Roman laws and customs, and upon the irruption of the northern nations into the southern kingdoms of Europe, the laws and institutions of the of the Romans remained, when the power that introduced them was withdrawn; and Montesquieu tells us, that under the first race of kings in France about the fifth century, the Romans that remained, and the Burgundians their new masters, lived together under the same Roman laws and police, and particularly the same forms of judicature. How reasonable then is it to conclude, that in the Roman courts of judicature continued among the Burgundians, the form of a jury remained in the same state as it was used at Rome. It is certain, Montesquieu, speaking of those times, mentions the *paires*, or *hommes de fief*, homagers or peers, which in the same chapter he calls *juges, judges*, or jurymen: so that we hence see how at that time the *hommes de fief*, or 'men of the fief,' were called *peers*, and those peers were *juges* or jurymen. These were the same as are called in the laws of the Confessor, *pers de la tenure*' the 'peers of the tenure, or homagers' out of whom the jury of peers were chosen, to try a matter in dispute between the lord and his tenant, or any other point of controversy in

the manor. So likewise, in all other parts of Europe, where the Roman colonies had been, the Goths succeeding them, continued to make use of the same laws and institutions, which they found to be established there by the first conquerors. This is a much more natural way of accounting for the origin of a jury in Europe, than having recourse to the fabulous story of Woden and his savage Scythian companions, as the first introducers of so humane and beneficent an institution."

Such are the opinions of eminent writers, but, as will be seen, we do not entirely agree with them.

Without pretending to decide this question, which has been keenly debated by various authors, we shall merely observe that in our opinion, no particular nation, people, or individual can exlusively claim the merit of having originated the general principle of "trial by jury." We suspect that no one would go the length of affirming that the system of mere trial itself, (setting aside the consideration of the particular form of trial by jury) was invented by a certain nation or person. Who originated trials, according to law or to some custom? It is evident that the idea of deciding certain questions affecting life or death, and to some extent other matters occurred to various peoples that had little or no communication with each other. There is no proof that they borrowed the idea of settling any disputed question by trial, any more than there is proof that they borrowed the idea of settling their quarrels by fighting. It is reasonable to suppose that certain ideas are common property among mankind, and are derived from our common ancestors, the patriarchs. In proof of our assertion we need only mention the custom of some, if not of all the tribes of the North American Indians, to try certain questions of life and death, as well as some other matters, by a tribe in council, in reality, we may say, by a jury.

Describing the trial of a young American Indian warrior by his tribe for the crime of cowardice, an American author writes:—The more aged chiefs in the centre communed with each other in short and broken sentences. Not a word was uttered that did not convey the meaning of the speaker in the simplest and most energetic form. Again, a long and deeply solemn pause took place. It was known by all present to be the grave precursor of a weighty and important judgment."

It is true that this is but a rude and imperfect form of trial by jury, since the accused does not seem to be allowed to speak for himself, and the witnesses are not subjected to regular cross-examination, but still the fate of the prisoner is decided by a jury of his own tribe; in a word, by his peers, and not by any single chief who acts as a judge. How, then, can it be alleged that Woden, the Saxons, the Scandinavians, the Greeks, the Romans, or any other particular people or tribe originated the system of trial by jury, since traces of the custom are to be found among savages in North America? They had not borrowed the form of trial by jury from Europe. We suspect that the germ of the system existed, during the early ages, among many races of mankind, and that it grew into a better regulated and more systematic law among those that made in times past advances in Christianity and its accompanying enlightenment.

Of the judicatures for hearing civil causes among the Athenians, the court called Heliæa was the greatest. All the Athenians who were free citizens were allowed by law to sit in this court; but before they took their seats, were sworn by Apollo Patris, Ceres, and Jupiter, the king, that they would decide all things righteously and according to law, where there was any law to guide them, and by the rules of natural equity, where there was none. This court consisted at least of fifty, but its usual number was five hundred judges. When causes of very great consequence were to be tried, one thousand sat therein; and now and then the judges were increased to fifteen hundred, and even to two thousand. It will be perceived that these courts were in reality composed of jurymen, every free citizen being allowed to sit in them.

A popular form of trial was not unknowm among the Jews. Moses set up two courts in all the cities; one consisting of priests and Levites to determine points concerning the law and religion, the other consisting of *heads* of families to decide civil matters.

After having thus alluded to the probable origin of trial by jury, we must now briefly state what a jury is.

A jury consists of a certain number of men sworn to inquire into and try a matter of fact, and to declare the truth upon such evidence as shall appear before them. Juries are in Great Britain, &c., (Scotland, in some degree excepted) the supreme judges in all courts, and in all causes in which the life and, and in some cases, in which the property or the reputation of any man is concerned.* This is the distinguishing privilege of every Briton, and one of the most glorious advantages of our constitution; for, as every one is tried by his peers (or equals), the meanest subject is as safe and as free as the greatest.

A juror or jurymen, in a legal sense, is one of those twenty-four or twelve men who are sworn to deliver truth upon such evidence as shall be given them touching any matter in question.

The punishment for perjury or fraud committed by a jury for bringing a false verdict was called an "attaint,"—a writ that lay after judgment against a jury of twelve men that had given a false verdict in any court of record, in an action real or personal in which the debt or damages amounted to above forty shillings. The jury that had to try this false verdict consisted of twenty-four, and was called the grand jury. The practice of setting aside verdicts upon motion and of granting new trials, has

* County and other courts now limit the extent of the remarks made on ths subject by various writers.

so superseded the use of "attaints" that there is scarcely an instance of an attaint later than the sixteenth century.

The duty of a jury is to decide the facts of a cause tried by them. The duty of a judge is to decide what is the law respecting these facts. It has been truly said: "If it be demanded, what is the fact? the judge cannot answer it; if it be asked what is law? the jury cannot answer it. * * * * * The fact is to be tried, that is, as it is intended, by the verdict of twelve men. That is called in law a *trial*."

"The principal of trial by jury is," says a learned and eloquent writer on "Trial by Jury," "that questions of fact, involving the rights of the people, shall be determined by the people themselves, in contradistinction to the decision of those facts by fixed and salaried judges, appointed by and dependant upon the sovereign power in the state." *

The assembling of a jury to try a cause is so managed that protection is afforded to both sides in an action, in order that fair play shall be observed. When a jury is demanded to try a cause, it is asked, "And this the said A. prays may be enquired of by the country;" or, "And of this he puts himself upon the country, and the said B. does the like." The court then commands the sheriff, "that he cause to come here, on such a day, twelve free and lawful men, of the body of his country, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A nor the aforesaid B, to recognize the truth of the issue between the said parties." The sheriff returns the names of the jurors in a panel (a little pane or oblong piece of parchment) annexed to the writ. After a certain delay and some forms have been gone through, the jury is assembled to hear the cause.

"Let us observe (with Sir Matthew Hale) in these first preparatory stages of the trial, how admirably this constitution is adapted and framed for the investigation of truth beyond any other method of trial in the world. For, first, the person returning the jurors is a man of some fortune and consequence; so that he may be not only the less tempted to commit wilful errors, but likewise be responsible for the faults either of himself or his officers; and he is also bound by the obligation of an oath faithfully to execute his duty. Next as to the time of their return; the panel is returned to the court upon the original *venire*, and the jurors are to be summoned and brought in many weeks afterwards to the trial, whereby the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connections, and relations, so that they may be challenged upon just cause; while, at the same time, by means of the compulsory process (of *distringas* or *habeas corpora*) the cause is not likely to be retarded through defect of jurors. Thirdly, as to the place of their appearance there is a provision most excellently calculated for the saving of expense to the parties. The troublesome and most expensive attendance is that of jurors and witnesses at the trial; which therefore is brought home to them, in the county where most of them inhabit. Fourthly, the persons before whom they are to appear, and before whom the trial is to be held, are the judges, persons whose learning and dignity secure their jurisdiction from contempt. The very point of their being strangers in the county is of infinite service in preventing those factions and parties which would intrude in every cause of moment, were it tried only before persons resident on the spot, as justices of the peace, and the like.

"The jurors contained in the panel alluded to before, are either special or common jurors. Special juries were originally introduced in trials at Bar, when the causes were of too great a nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him."—*Blackstone.*

In the present day, juries in civil causes procure refreshments when the judge takes his, but the custom of the jury being kept without meat, drink, fire, or candle, unless by permission of the judge, till they are unanimously agreed, is a method of accelerating unanimity which was not unknown in other constitutions of Europe, and in matters of greater concern. For by the golden bull of the empire, if, after the congress was opened, the electors delayed the election of a king of the Romans for thirty days, they were fed only with bread and water till the same was accomplished. In England, it has been said, that if the jurors do not agree in their verdict before the judges are about to leave the town, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. The modern custom seems to be for the judge to discharge the jury; and a recent case, (that of a woman who was tried for murder, and who, after the jury had been discharged by the judge because they could not agree in their verdict, contended that the judge had acted illegally,) appears to have determined the question that a judge has the power.

The necessity for unanimity in the verdict of a jury, seems to be almost peculiar to the English constitution; at least, in the *nembda* or jury of the ancient Goths, there was required (even in criminal cases) only the consent of the major part, and in case of equality, the defendant was held to be acquitted.

In Scotland, the ordinary jury, consisting of fifteen, give their verdict by a majority. Trial by jury, in civil causes, is only partially adopted. It was not, until lately, added to the jurisdiction of the supreme civil tribunal, denominated the Court of Session. Trial by jury in Scotland is limited to certain descriptions of cases, and is not popular; in this respect there is a great difference between English and Scotch law.

* Trial by Jury, the Birthright of the People of England. p. 14. London; Hardwicke, 192, Piccadilly. One Shilling.

In England and Ireland, where the principle of the criminal law requires the injured party or his representative to prosecute, he can only do so by permission of a jury of accusation, called the grand jury, which consists, ordinarily, of twenty-four men. To find a bill, there must, at least, twelve of the jury agree. Another jury, which consists in England and Ireland of twelve men (the petty jury), sits for the purpose of deciding if the evidence against the accused (if he plead not guilty) has established his guilt.

A coroner's jury inquires into the facts of a case, when any person is slain, or dies suddenly, or in prison, or under suspicious circumstances. In Scotland there is no coroner's jury or inquest. The state of the Scotch law in this respect seems to be very unsatisfactory.

The limits of this essay do not permit us to mention other descriptions of juries, but they are all founded upon the grand principle of the trial of facts by the country, or in other words, by the people themselves.

As we have stated, the common law of England is involved in deep obscurity. The reader must understand that the reason why so much value is attached to the common law is, because trial by jury is one of its principles. In the time of Alfred the Great, the local customs of the several provinces of the kingdom had grown so various, that he found it expedient to compile his dome-book, or *liber judicialis*, for the general use of the whole kingdom. This book is said to have been extant so late as the reign of Edward IV., but is now unfortunately lost.

The irruption and establishment of the Danes in England, introduced new customs. The code of Alfred the Great fell into disuse or was mixed with other laws in many provinces, so that about the beginning of the 11th century there were three principal systems of laws prevailing in different districts. Out of these three laws, King Edward the Confessor, it is said, extracted one uniform law, or digest of laws, to be observed throughout the whole kingdom, and it seems to have been no more than a new edition, or fresh promulgation of Alfred's code or dome-book, with such editions and improvements as the experience of a century and a half had suggested. It is recorded in history that Edward framed equitable laws; for we find that when the people complained of the oppression of the Norman Kings, they demanded "the good old laws of Edward the Confessor."

It would be difficult to determine even from these codes of the laws of the Anglo-Saxons, whether trial by jury entirely originated in England from these laws. "It is a point of curious inquiry, not yet, so far as we know, fully discussed," observes a writer, "to ascertain how far the Saxons, on their invasion of the island, moulded, or adapted their political institutions to those which they found existing in Roman-Britain. The Saxons, we know, ultimately possessed themselves of all the Roman walled cities, of which they formed their boroughs; and it is hardly conceivable that a comparatively small body of invaders would completely overturn all those municipal institutions, which, though less free than their own, would present them, so far as administration was concerned, with useful means for securing and consolidating their acquisitions. The principal Saxon boroughs existing at the period of the Norman conquest, were the towns girt by the walls and towers erected under the Roman regime."

The laws of Edward the Confessor were those which our ancestors struggled so hardly to maintain under the first princes of the Norman line, and which princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by emergencies or domestic discontents. In England, the progress of liberty has been in a great measure attributed to the division of interests in the country. The great nobility had an interest in checking the power of the Crown, and the Crown had an interest in checking the nobles. Each party in turn courted the aid, both personal and pecuniary, of the commons. Hence the active part which the people, especially of London and of the large towns, took with the barons in enforcing the solemn settlement of the limits of the royal prerogative, which was embodied in "the Great Charter, or Magna Charta" conceded by King John on 15th June, 1215, wherein it is distinctly expressed that all cities, boroughs, and ports shall have "their liberties and free customs." The famous clause which has attracted chief interest, is that which enacts that no freeman shall be affected in his person or property, save by the legal judgment of his peers, or by the law of the land. The judgment by his peers, is held to refer to trial by jury. Legal writers have found a stately tree of liberty growing out of the seed planted by this simple sentence. They see in it the origin of judicial strictness, which has kept the English judges so closely to the rules laid down for them in the books and decisions of their predecessors. There was a furthur leaning on the part of the barons to the popular system of the common law, from the circumstance that attempts were made to introduce the doctrines of the civil (Roman) and canon laws, which are inimical to trial by jury. The Great Charter has always been a great object of veneration with the English nation, and Sir Edward Coke reckons thirty different occasions on which it was ratified.

On the other hand, the kings of England frequently sought to obtain the co-operation of the people to limit the power of the nobles. The Crusaders were the means of promoting the establishment of the common law, and consequently of trial by jury, upon a firmer basis. The absence of so many barons, during the time of the Crusades, was a means of enabling the common people, that had hitherto lived in feudal subjection to the nobility, to raise themselves in public standing and estimation; while the possessions of many of these barons by sales, or by the deaths of their owners, without heirs reverted to the sove-

reigns. In this way the power of the people and of the Crown advanced together, and both at the expense of the class of nobility. The people were not unwilling to exchange the mastery of the barons, for that of the monarch, and the kings on their part looked on this rising power of the people with satisfaction, as it created a class of men that might protect them from the ambition and supremacy of the nobles. In these circumstances, boroughs began to resume their ancient importance, such as they had enjoyed in the times of the Saxons. Men who had hitherto lived on the land belonging to the lords of the castles, and had sacrificed many of their liberties for bread and protection from the warlike barons, for whom they had been called upon to fight, now found that by union among themselves in the boroughs, they might secure bread by industry, and protection and liberty by mutual aid. Multitudes, therefore, forsook their feudal subservience to enjoy almost independent citizenship. *Villeins*, (bondmen) joyfully escaped to take their place on a footing of equality with freemen, and in the reign of Henry II., if a bondman or servant remained in a borough a year and a day he was by this residence made a free man.* It must be borne in mind that among our Saxon and Norman ancestors, places which were called boroughs at this period, were fenced or fortified. It is evident that the increase of popular liberty and social progress in these boroughs must have been favourable to the developing of the fundamental principle of trial by jury, and that the determination of questions of fact by the people themselves, could be more impartially and thoroughly carried out, in places where the people were protected from the violence of the powerful barons, who lorded it over the country districts. Then again, trial by jury, by the security it afforded against wrong, promoted in its turn the growth of freedom and wealth in the boroughs, and from them a civilizing influence continued to spread over the country. The minds of men becoming more enlightened, the truth of a reasonable method of deciding legal questions was enabled to triumph over barbarous customs among the people themselves. The several methods of trial and conviction of offenders, established by the laws of England, were formerly more numerous than at present, through the superstitions of our ancestors, who, therefore, invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of false witnesses. They had a notion that God would always interpose miraculously to vindicate the guiltless. 1. By ordeal; 2. by corsend; 3. by battle. Now-a-days, people may laugh at the idea of suitors, for instance, fighting in a mortal combat sanctioned by law; but one of the laws of William the Conqueror forbid the clergy to fight in judicial combats, without the previous permission of their bishop. To show how deeply rooted the law was at one time in England, it was not, although it had fallen into disuetude, repealed until about 1818. In 1817, a young woman, Mary Ashford, was believed to have been ill-used and murdered by Abraham Thornton, who, in an appeal, claimed his right by his wager of battle, which the court allowed; but the appellant (the brother of the girl) refused the challenge, and the accused escaped, being ordered "to go without day" 16 April, 1818. If such events took place in 1818, what does the reader suppose must have been the state of things in the Middle Ages. To remedy the evil of suitors fighting out their lawsuits, the trial by the grand assize is said to have been devised by Chief Justice Glanville, in the reign of Henry II., and it was a great improvement upon the trial by judicial combat. Instead of being left to the senseless and barbarous determination by battle, which had previously been the only mode of deciding a writ of right, the alternative of a trial by jury was offered. But the *present* judges of assize and *nisi prius* for administering civil and criminal justice are more immediately derived from the statute of Westminster, in the reign of Edward I.* These came instead of the ancient justices in Eyre, *justiciarii in itinere*, that had been regularly appointed in 1176 by Henry II. to make their circuits once in seven years for the purpose of trying causes. The establishing of the assize, began a new era in the legal history of England. From this date commenced the real permanent foundation of trial by *judge and jury* throughout the country —the judge to decide the law, the jury the facts. The record of the struggle of the system against its foes would fill a volume The institution triumphed in the end. In an interesting summary of this subject, a recent writer observes :—

"In the time of the Anglo-Saxons a man who sued in the King's Court for lands, refused to be bound by the sentence until his 'peers' had decided his right, and summary justice was visited on those in authority who tried cases contrary to the 'custom,' even then *ancient*. In the days of William the Conqueror, even a bondman, when he claimed freedom, was entitled to a trial by the 'country,' and its refusal to a suppliant implied that he was under the ban of 'outlawry.' Trial by jury was secured to every heir-at-law by Henry II., and extended to every person, without distinction, shortly afterwards. In every suit touching inheritance between Crown and subject, it has always been an imperative right, and the attempt to render its attainment difficult, by delay, denial, or sale,' led to the most emphatic passages in Magna Charta. In the days of Edward IV., when a subject had been deprived of a jury by Act of Parliament, the very statute was repealed and the judgment pronounced under it declared void; this being effected under the express provisions of those Acts which 'confirm to the people of England the great Charter of their liberties for evermore,' and which ordain that 'every judgment and every statute contrary thereto, shall be holden for nought.' In the reign of Henry VII., the Acts which gave certain judges

* Chambers.

* Statute, West, 2, 13, Edw. I., c. 30.

statutory permission to try causes without juries, 'at their discretion,' were set aside—'a warning to all future Parliaments, judges, and others, that they deprive no man of the precious trial by writ of right, or the verdict of twelve men.' In 1620, the *judges themselves* when called on to plead before a tribunal where disputed facts would have been decided without a jury, refused to appear, claiming 'the benefit of Magna Charta, as free Englishmen.' When the Star Chamber tried to overrule and stultify the verdicts of juries, the attempt led to the Petition of Right—that second Magna Charta; and the blow aimed at trial by jury in arbitrary imprisonment and confiscation of property and of civil rights, without that mode of trial, led to revolutions which shook the kingdom to its centre, while all the cruel acts of Jeffreys and other corrupt judges, were followed by reversal of their decrees and the rehabiliation of the families of those whom they had judicially murdered. When the verdicts of juries were perverted, so as to carry consequences which the jurors did not intend, the legislature at length stepped in and placed the law beyond the possibility of future cavil and misconstruction."—*Trial by Jury, the Birthright of the People, &c.*, p. 163.

The reader will thus perceive that the common law is grounded on the general customs of the realm. "Indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom, which carries with it this internal evidence of freedom," writes Blackstone, "that it was introduced by the consent of the people, and has been jealously preserved by them." The common law is the result of long study, observation, and experience; and it has been refined by learned men in all ages. It overrides the canon law, and the civil law, where they go beyond it, or are inconsistent with it. The principle of trial by jury, without alluding to previous compacts, was confirmed by the Act of Settlement (1 William & Mary, c. 2), and declared to be the birthright of the people of England.*

(To be continued.)

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW

NOTES OF NEW DECISIONS AND LEADING CASES.

HIGHWAY — SHUTTING UP — SOIL IN WHOM VESTED—C. S. U. C. CH. 54, SEC. 336.—A highway, of which the origin was not clear, had been travelled for forty years across the plaintiff's lot, the patent for which was issued in 1836. The municipality in 1866 passed a by-law shutting up this road, but no conveyance was ever made to the plaintiff. They afterwards threw down a fence with which he had enclosed the old road, and took away gravel from it. The plaintiff having brought trespass—

Held, that he could not recover, for the user for thirty years after the patent would be conclusive evidence of a dedication as against the owner, and such dedication was equivalent to a *laying out* by him, so that the road, under C. S. U. C., ch. 54, sec. 336, was vested in the municipality.—*Mytton* v. *Duck et al*, 26 U. C. Q. B. 61.

HIGHWAY—RIGHT TO DEVIATE FROM.—Trespass *quare clausum fregit*. *Plea*, that at the time when, &c., there was a highway adjoining the plaintiff's said land, which said highway was in certain places impassable and out of repair, wherefore defendant, for the purpose of using such highway, necessarily deviated a little there from on to the plaintiff's said land, going no further from said highway than was necessary, and returning thereto as soon as practicable, and doing no unnecessary damage in that behalf —which are the alleged trespasses.

Held, on demurrer, a good plea.—*Carrick* v. *Johnston*, 26 U. C. Q. B. 69.

SURVEY—DISCREPANCY BETWEEN WORK ON THE GROUND AND PLAN—HIGHWAY—FIELD NOTES—COSTS.—The question in an action of trespass being whether there was a highway between lots 20 and 21 in a township, which the plaintiff denied, it appeared that the practice of surveyors in laying out a road allowance was to plant a post on each side of it, marked on the side nearest the road with the letter R., and on the opposite side with the number of the lot, and to plant a third post in the centre of the road, marked R. on two or on all four sides. Stakes thus marked were found between 19 and 20, but none between 20 and 21, and it was sworn that an original post had been seen there 24 years ago, and until within 3 or 4 years, marked 20 and 21, thus far shewing that there was no road allowance between those lots.

On the other hand, the registered map of the township, the map in the Crown Lands Department, and the field notes of the surveyor who made the original survey, shewed such allowance. The plaintiff and defendant both claimed under grants from the Crown of separate parts of lot 21, described as commencing on the northern limit of such allowance, and without it the defendant would have no access to his land.

The jury were told that the work on the ground must govern, but that under C. S. U. C. ch. 54, sec. 313, the fact of the government surveyor having laid out this road in his plan of the original survey, would make it a highway, unless there was evidence of his work on the ground clearly inconsistent with such plan. The jury having found for defendant—

Held, that the direction was right, but that the verdict was contrary to evidence, and a new trial was granted on payment of costs.

A certified copy of *part* of the field notes of the original survey is admissible in evidence.

The defendant's counsel told the jury that a verdict in favor of the plaintiff for any sum would carry costs. *Quære*, as to the right to make such statement; but *semble*, that the objections to a verdict for the plaintiff founded upon it, would apply equally to a verdict for defendant. — *Carrick* v. *Johnston*, 26 U. C. Q. B. 69.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

LETTERS PATENT — INVENTION — NOVELTY.— The plaintiff obtained a patent for a platform pump, constructed upon the principle and for the purpose of raising water for animals to drink from wells by their own weight and act, the specification claiming such principle as his invention. He sued for the infringement of this patent.

It appeared that an inclined platform working upon a fulcrum led up to the trough, and that being depressed by the weight of the animal when near the trough, it forced down the piston rod and plunger, with which it was connected, thus driving the water up a pipe into the trough. There was nothing new either in the different parts or in the principle on which they produced their effect, but the novelty, if any, was in the combination.

Held, that the patent, not being for such combination, but for the principle, could not be sustained.

Semble, that the utilizing the instinct of the animal to seek water was the only novelty, and that this could not be the subject of a patent.

The infringement complained of was a pump for which defendant had obtained a patent, and it was objected that this patent was an answer to the action until set aside; but *semble*, clearly not.—*Merrill* v. *Cousins*, 26 U. C. Q. B. 49.

SLANDER OF PERSON AS TO DISCHARGE OF HIS DUTIES.—The declaration alleged that it would have been a great breach of the prosecutor's duties, as a warrener and game-keeper, to kill foxes; that he was employed on the understanding that he would not do so, and that the defendant falsely and maliciously spoke of him, as such warrener, that he had destroyed foxes. The declaration then averred special damage.

Held, that the declaration disclosed a good cause of action, independently of special damage, as it set forth that it was the duty of the plaintiff in his employment not to do that with which he was charged, and alleged actual pecuniary damage to the defendant in his business or employment.

The Court will not take judicial notice that it is the duty of a gamekeeper not to kill foxes; but the rule as to words spoken of a man in his office or trade is not necessarily confined to those offices or trades, of the duties of which the Court can take judicial notice.—*Foulger* v. *Newcombe*, 15 W. R. 1181.

SLANDER—PRIVILEGED COMMUNICATION.—Defendant, a Government detective, knowing that one M. was in partnership with the plaintiff, informed him that the plaintiff was connected with a gang of burglars which defendant had been the means of breaking up, and put him upon his guard. *Held*, that the communication was privileged, and, there being no evidence of malice, that the plaintiff was properly nonsuited.—*Smith* v. *Armstrong*, 26 U. C. Q. B. 57.

DISCHARGE OF MORTGAGE—DEFECTIVE AFFIDAVIT—REGISTRY, C. S. U. C., CH. 89, SEC. 59.— The Registrar having recorded a certificate of discharge, upon an affidavit which did not state the place of execution, as required by the statute, —*Held*, that though he should properly have refused to register it, yet, being registered, it was effectual as a reconveyance of the legal estate to the mortgagor —*Magrath* v. *Todd*, 26 U. C. Q. B. 87.

BEQUEST FOR ILLEGAL PURPOSE AND FOR A LEGAL PURPOSE—BEQUEST TO A NAMED CHARITY. —A testatrix bequeathed £1,000 £3 per cents. to a rector and churchwardens upon trust out of the dividends to keep a certain grave in repair, and to apply the residue for the benefit of the poor.

Held, that the rector and churchwardens were entitled to take the whole for the relief of the poor, freed from the obligation of keeping the grave in repair.

Chapman v. *Brown*, 6 Ves. 404, commented on.

A bequest to a named charity which is dissolved before the testator's death lapses, and the sum bequeathed will not be applied, *cy près*.— *Fisk* v. *The Attorney-General*, 15 W. R. 1200.

EVIDENCE — ENTRY AGAINST INTEREST — AN account written by a deceased person credited

him with various items for work done. At the opposite side was the words "*contra*," followed by several items with which he charged himself, reducing the amount due to him to a balance which was struck and carried down.

Held (WHITESIDE, C.J., and PIGOT, C.B., dissentients), that the discharging items were not so incorporated or connected with the charging entries as to render the former admissible as part of a statement against interest.—*Whaley* v. *Carlisle*, 15 W. R., 1133.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE — MISREPRESENTATION.—Where a misrepresentation has been made by a vendor, the Court applies the rule *ceveat emptor* with great caution.

Where a purchaser agreed to buy an estate upon a statement that it lay upon coal, which coal afterwards proved to have been mostly worked out, and subsequently the purchaser entered into an agreement with a third party to sell the colliery at a price implying the existence of a considerable quantity of coal, and then afterwards discovered the exhaustion of the coal.

Held, that the transaction between the purchaser did not invalidate his defence of misrepresentation to a bill by the vendor for specific performance, though

Semble.—It might have been an answer to a claim by a purchaser for an abatement of the purchase money.—*Colby* v. *Gadsden*, 15 W. R., 1185.

NUISANCE—INJUNCTION—PROSPECTIVE INJURY.—Where the defendant had commenced burning a clamp of bricks 480 yards from the plaintiff's mansion, 400 yards from the lawn, conservatories, &c., and a 140 yards from a cottage on the margin of a lake on the plaintiff's grounds, inhabited by an employè of the plaintiff.

Held, under the circumstances, that there was not a sufficient case to warrant the Court in granting a prospective injunction.

Observations on the considerations by which the Court is influenced in granting prospective injunctions against nusiances.

Bamford v. *Turnley*, 3 Best & Smith, is not an authority binding the Court judicially to conclude that a clamp at 180 yards must necessarily prove a nuisance.

Observations on the question whether or no, wherever there has been a verdict of law, the Court of Equity should grant on injunction as of course.—*Luscombe* v. *Steer*, 15 W. R., 1191.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

THE QUEEN v. PATRICK BRADY.

False Pretences—Consol. Stat. C., ch. 92, sec. 71.

An indictment for obtaining from A. $1200 by false pretences, is not supported by proof of obtaining A.'s promissory note for that sum, which A. afterwards paid before maturity.

The term "valuable security," used in Consol. Stat. C., ch. 92, sec. 72, means a valuable security to the person who parts with it on the false pretence; and the inducing a person to execute a mortgage on his property is therefore not obtaining from him a valuable security within the act.

[Q. B., T. T., 1866.]

The indictment against the defendant contained three counts. 1. For that he unlawfully, fraudulently, and knowingly, by false pretences did obtain from one Finlay McGregor $1200, the money of the said Finlay McGregor, with intent to defraud.

2. That he unlawfully, fraudulently and knowingly, by false pretences, did obtain from the said Finlay McGregor a certain valuable security, to wit, a certain mortgage on real estate securing the payment of $2400, and made by the said F. McG. and his wife to the said defendant, the property of the said F. McG., with intent to defraud.

3. That he unlawfully did obtain from the said F. McG. a certain sum of money, to the amount of $1200, the property of the said F. McG., with intent to defraud.

The trial took place at Sandwich, in April, 1866, before *Morrison*, J., when it appeared, in substance, that the prisoner having agreed to lend $5000 to the prosecutor, Finlay McGregor, gave him certain drafts purporting to be drawn by the Clyde Exchange Bank of Ohio on the Fourth National Bank of New York, and received from McGregor as part of the security a mortgage on his farm for $2400, and a note for $1200, which note he paid within four or five days, and before it came due. The prisoner represented that these drafts were good, and would be paid, and that the money was in New York, but it turned out that the Clyde Bank was a swindle and the bills worthless.

It was objected that there was no evidence of getting money from McGregor to support the first count: and as to the second, that the mortgage was not a valuable security within the statute; that what the prisoner did obtain was only a signature to a note or mortgage; that both these objections applied to the third count, and that Consol. Stat. ch. 92, sec. 73, applies to property only, not moneys.

The learned judge directed a verdict for the defendant on the third count, and as to the other counts, he left it to the jury to say on the evidence whether the prisoner did impose upon McGregor when the latter received the drafts, by the false statements that they were genuine, and upon the faith of such false representations induced McGregor to give the $1200 and the mortgage.

The jury found the prisoner guilty.

Albert Prince, Q C., obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection, on the same grounds as those taken at the trial. He cited *Regina* v. *Kay*, 1 D. & B. 232; *Rex* v. *Wavell*, 1 Moo. C. C. 224; *Regina* v. *Crosby*, 1 Cox C. C. 10; *Regina* v. *Bryan*, 2 F. & F. 567; *Rex* v. *Yates*, 1 Moo. C. C. 170; *Rex* v. *Douglass*, 1 Camp. 212; *Noble* v. *Adams*, 7 Taunt. 59.

Robert A. Harrison, for the Crown, shewed cause, and cited *Regina* v. *Huppel*, 21 U. C. R. 281; *Regina* v. *Lee*, 23 U. C. R. 340; *Regina* v. *Davis*, 18 U. C. R. 180; *Regina* v. *Evans*, 8 Cox C. C. 257, 5 Jur. N. S. 1361; *Regina* v. *Jessop*, 1 D. & B. 442, 4 Jur. N. S. 123; *Regina* v. *Danger*, 1 D. & B. 307, 3 Jur. N. S. 1011; *Regina* v. *Gardner*, 1 D. & B. 40, 2 Jur. N. S. 598.

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

As to the false pretence, it was, we think, sufficiently proved to be that certain drafts, in return for which the prisoner obtained from the prosecutor, Finlay McGregor, a mortgage and a promissory note, were good and would be paid, whereas it appeared that these drafts were worthless from first to last, and were merely fictitious.

The question, then, on the first count, is whether the prisoner obtained $1200 from the prosecutor on this pretence, and we are of opinion that the evidence did not sustain the allegation. The prosecutor, according to his own statement, gave a promissory note for this amount at the time he got the drafts—an engagement or promise to pay money at a future date. It is true he afterwards paid the money, but though remotely that payment arose from the false pretence, yet immediately and directly it was made because the prosecutor desired to retire his note, and did so before it became due. We do not think that this establishes an obtaining of money by the defendant by the false pretences, which, though it may be said they were continuing, were not, according to the evidence, made or renewed when the money was paid. Suppose the note was drawn at ninety days, and not paid till it matured, it could not be deemed that the money was obtained by the false pretence, though but for such pretence it would not have been given; and it makes no difference that we can see that it was paid before it fell due.

Upon the second count the case of *The Queen* v. *Danger* (3 Jur. N. S. 1011), seems to us adverse to the conviction. Can it be said that the mortgage was a valuable security in the hands of the prosecutor, and so his property? Until signed, sealed and delivered by him to the prisoner, it was no security at all, and it does not even appear that the paper on which it was drawn belonged to the prosecutor. We think that the term "valuable security," as used in the statute, means a valuable security to the person who parts with it on the false pretence.

We think the rule should be made absolute.

Rule absolute.

POMEROY, APPELLANT, AND WILSON, RESPONDENT.

Quarter Sessions—Right to reserve a case—C. S. U. C. ch. 112.

The appellant having been convicted before Justices of having pretended to be a physician, contrary to 29 Vic., ch. 34, appealed to Quarter Sessions, and was found guilty. *Held*, that the Sessions had no power to reserve a case for the opinion of this court under Consol. Stat. U. C., ch. 112, the appellant not being a person "convicted of treason, felony or misdemeanor."

Semble, that if the 29 Vic. had in terms declared the act charged unlawful it would have been an indictable misdemeanor.

[Q. B, T. T., 1866.]

This was a case reserved for the opinion of this court by the Quarter Sessions of the county of Hastings.

The appellant, on the 9th July, 1866, was convicted before three justices of the peace of the county, of having wilfully and falsely pretended to be a physician and general practitioner, contrary to the provisions of 29 Vic. ch. 34, and adjudged to pay $25, with $11 25 costs, and in default of payment within ten days to be imprisoned until both sums should be paid.

He appealed to the next General Quarter Sessions of the Peace, where he was found guilty by a jury; and the chairman reserved certain questions for the opinion of this court,

Jellett, for the appellant, referred to *In re Stewart and Blackburn*, 25 U. C. R 16.

Holden, contra.

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

By ch. 112, Consol. Stat. U. C., when a person is convicted of treason, felony or misdemeanor before certain courts, including Quarter Sessions, the court may reserve any questions of law arising on the trial for one of the superior courts.

By sec. 3 the superior court may reverse, affirm or amend any judgment given on the indictment or inquisition on the trial whereof the question arose.

Ch. 114 Consol. Stat. U. C provides for appeals to Quarter Sessions. Sec. 1 declares that the court shall hear and determine the matter of the appeal, and make such order therein, with or without costs, as to the court seems meet; and in case of the dismissal of the appeal or affirmance of the order, decision or conviction, the court shall order the order or conviction to be enforced. Sec. 3 allows a jury to be empannelled to try the matter of the complaint, and the court on the finding may give judgment, not exceeding the amount that might have been imposed by any law giving cognizance to the justices, &c.

29–30 Vic. ch. 50 directs the Quarter Sessions to which the appeal is made to hear the complaint on which the conviction is had upon the merits, notwithstanding any defect of form or otherwise in the conviction; and if the person charged be found guilty, the conviction shall be affirmed, and the court shall amend the same, if necessary, and any conviction so affirmed or affirmed and amended shall be enforced in the same manner as convictions affirmed in appeal are now enforced.

If this case be unaffected by previous decisions, we should be strongly of opinion that there was no right to reserve questions of law for the consideration of the Superior Court by the Court of Quarter Sessions hearing an appeal from a justice's conviction. We do not think the

appellant in this case falls within the description of "a person convicted of treason, felony or misdemeanor" before a court of Quarter Sessions, nor could the Superior Court "reverse, affirm or amend any judgment given on the indictment or inquisition on the trial." The whole scope of the act and the schedule attached seems to point to a different class of cases.

We do not understand that the affirmance of a justice's conviction at Quarter Sessions, and the consequent order, thereon that the conviction be enforced, brings the appellant within the statutable description of a person "convicted of a misdemeanor," nor that the affirmance of an appeal will fall within the 3rd section of ch. 112, already cited, of a "judgment given on the indictment or inquisition, on the trial whereof" the question reserved arose.

Sec. 4 directs that the judgment of the Superior Court shall be certified as directed to the clerk of the peace "who shall enter the same on the original record in proper form." This is where judgment has been given. Where it has not been given, the court below shall be directed to give judgment.

We think all the provisions and the whole language of the act tend to shew that appeals from justice's convictions do not fall within chapter 112.

Sec. 5 of ch. 114, already noticed, declares that appeals shall lie in Quarter Sessions from all convictions for offences against municipal by-laws. In the absence of express enactment it is not easy to see how every person charged or convicted of breaking some trifling market regulation can be held to fall within the description of "a person convicted of treason, felony or misdemeanor," if the conviction against which he appeals be affirmed at Quarter Sessions.

For these reasons we think there was no power to reserve this case.

If the conviction and proceeeings, even when affirmed by the Quarter Sessions, are defective in law, shewing an absence of any legal offence, there is a remedy, as in *Hespeler*, appellant, v. *Shaw*, respondent (16 U. C. R. 104).

The act of last session gives full power to the Quarter Sessions to hear the complaint on its merits, and to amend the conviction if the appellant be found guilty. An adoption of this course would render it unnecessary to reserve any question as to the conviction being good or bad on its face.

The appellant in this case seems to have been rather hardly dealt with. It is not possible to read the evidence without some feeling of surprise that justices of the peace have convicted him, and a jury afterwards affirmed their proceeding.

We are not prepared to hold that the matter of the appeal constitutes what the law calls an "indictable misdemeanor."

If the medical act of 1864 in terms declared that it should not be lawful for any person to do what the appellant is charged with doing, then, according to the authorities, it seems the doing of it would be indictable, even if the act prescribe a summary remedy. See Russell on Crimes, vol. 1, p. 86, *et sequ.* (Ed. of 1865); *Rex* v. *Gregory* (5 B. & Ad. 555).

Now the medical act has no such prohibition in terms. Sec. 32 enacts that "any person who shall wilfully and falsely pretend to be, or take or use any name," &c., "implying that he is registered under this act, shall, upon prosecution and conviction in any court of competent jurisdiction, forfeit and pay a penalty not exceeding $100, and every such penalty shall form part of the funds of the council," &c. No method is pointed out for prosecuting this claim.

Sec. 34 seems to be that on which this conviction proceeded—that any person wilfully, &c., pretending to be, or take, or use, the name or title of a physician, doctor, &c., or any name or title, &c., implying that he is registered under this act, shall, upon a summary conviction before any justice of the peace, &c., pay a sum not exceeding $50, and in default to be committed to gaol till the same be paid.*

COMMON LAW CHAMBERS.

(*Reported by* HENRY O'BRIEN, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.*)

GLEASON v. GLEASON ET AL.

29 & 30 Vic. cap. 42, sec. 6—Several fi. fa. goods in sheriff's hands—Return of a subsequent before a prior writ.

A. and then B. placed writs of *fi. fa.* in the hands of a sheriff, against the goods of C. Notwithstanding that the goods were apparently exhausted, A. refused to withdraw his writ or take a return of *nulla bona*, whereby B. was prevented, by the operation of 29 & 30 Vic. cap. 42, sec. 6, from proceeding against lands; and the sheriff, feeling bound by that Act, declined to return the second writ as long as the first remained in his hands.

Under these circumstances an order was made on the application of B. directing the sheriff to return the second writ "*nulla bona.*"

Semble, that the first execution creditor should have notice of such an application.

Remarks upon the embarrassment resulting from the operation of the above statute.

[Chambers, June 1, 1867.]

A summons was obtained calling on the sheriff of the County of York to shew cause why an attachment should not issue against him for not returning the *fi. fa.* against goods in this cause.

It appeared that this writ was delivered to the sheriff on the 3rd of December last, at which time there was another *fi. fa.* against the goods of these defendants, at the suit of one Reed, in the sheriff's hands.

It was not a year since the first writ was given to the sheriff—both of these writs were therefore still in full force.

It was admitted that the defendants had no goods or chattels, and that Gleason, the second execution creditor, desired to have his writ returned "no goods," so that he might proceed by execution against the lands of the defendants.

The sheriff declined to return this second execution, because the 29 & 30 Vic. cap. 42, sec. 6, enacts that "No sheriff shall make any return of *nulla bona* either in whole or in part to any writ against goods, until the whole of the goods of the execution debtor in his county have been exhausted, and then such return shall be made only in the order of priority in which the writs have come into his hands"—and the first execution creditor refused to withdraw his writ from the sheriff's hands or to take a return of *nulla bona*, "as he believes by keeping it in force in the

* As the court held that the case had been improperly reserved, no judgment was given upon the questions raised. See *The Queen* v. *Clark*, L. R., 1 C. C. 54.

sheriff's hands, he will get the whole amount of the execution."

Leith shewed cause for the sheriff, referring to the section of the act above quoted, and (the learned judge having on the argument expressed an opinion that the first execution creditor should be a party to or have some notice of the application) he filed the refusal of the first execution creditor to withdraw his writ or to take a return of *nulla bona*.

Ferguson, contra.

ADAM WILSON, J.—This section of the act is calculated to give great embarrassment to sheriffs and to create great difficulty to execution creditors.

A first execution creditor determined to protect the debtor, might, under various pretexts, retain his writ by renewals in the sheriff's hands for years, and hamper all subsequent creditors in proceeding against lands, although it was notorious there were either no goods or but an insignificant amount of goods to be seized upon the first writ, and that none of the subsequent creditors would get a farthing from the personal estate of the debtor. Yet because the first creditor must have his writ first returned and so come in first upon the lands, all the others must wait just as long as he could contrive to baffle them, although it was also notorious that there were lands sufficient to satisfy all the creditors together.

It is an inconvenient method of securing to the creditor, first against goods, the like rank against lands to which he is plainly entitled, and from which rank he was so often excluded, because there happened to be some trifle of goods to apply on his writ and on his writ alone. In consequence of which, while his writ was prevented from being returned, all the writs after his were at once returned "no goods," and the subsequent creditors were enabled to issue writs against lands and displace the first creditor from his just priority.

A simpler way would have been to have authorised the *fi fa.* to issue against both goods and lands at once, with a stay of proceedings against lands till the goods were exhausted—in which case no difficulty of any kind would ever arise, and one execution would answer in every case instead of two.

In this instance, I think it appears that the goods of the debtor in the county of York have been exhausted, and therefore I think I should order the writ of this plaintiff to be returned, because, notwithstanding this exhaustion, the first execution creditor refuses to withdraw his writ or to take a return of *nulla bona*, and it is quite plain his conduct should not be allowed to delay this plaintiff.

I am inclined to think that though the sheriff may be prevented by this provision from returning, of his own mere motion, a second or subsequent writ, in cases within the act, until he returns the first writ, the court is not necessarily excluded from directing or controlling its own process, as in *Omealy* v. *Newell*, 8 East. 364, where it was held that though the plaintiffs were prohibited since the 12 Geo. I. cap. 29, from arresting defendants without an affidavit of debt first made, this did not prevent the court or judge from making an order to hold to bail, "without the affidavit and other requisites which are prescribed in respect to arrest by the mere act of the plaintiff himself."

This plaintiff has served a notice on the sheriff to return his writ, then a rule to return it, and now a summons calling upon him to shew cause why he should not be attached for not doing so, and he has been engaged in this business for the last four weeks; yet I am not able to give him costs, for I cannot say the sheriff is to blame in requiring the aid of the court or a judge to interpret this clause, nor can I say that he could have acted at all without the direct order of the court or judge to do so, nor can I give the sheriff his costs for appearing here and explaining the case, nor can I give them to the first execution creditor who has also been affected by this proceeding in which he may or may not take any concern.

I must also add I am not quite satisfied with my own part in this curious proceeding. But according to the best judgment I can form, I shall order the sheriff to return the writ in question, "no goods," (although Reed's writ is still in his hands, because the goods of the defendants have, as I think, been exhausted, and because Reed will not withdraw his writ nor take a return of "no goods" under these circumstances) and if such return be made, the summons will be discharged. But if the sheriff do not make such return in four days, the order will go for an attachment for his contempt in not returning the writ.

CORRESPONDENCE.

The Question of Costs in the Division Courts.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—In the September number of your Journal there appeared a long and well-written letter from a correspondent, T. A. Agar, Clerk of the 1st Division Court, Co. Peel, in answer to some remarks in your July number, on the subject of Division Court costs. The letter of Mr. Agar contains a few *ill-natured remarks* and expressions which had better not have been used, but is upon the whole so well written, and even witty, that one can well pass over its faults and admire its ability. From his point of view—that of an interested official—he argues well and plausibly.

I have the pleasure of knowing Mr. Agar very well, and know him to be a careful and efficient officer, and also one who does not omit to collect where he considers himself entitled to them, all fees that he thinks chargeable under the somewhat imperfect and uncertain Division Court tariff of fees; not that he is wrong in charging all legal fees. But he is not the "out County Clerk" who was alluded to in the article referred to, as taking illegal fees on an application for a new trial.

It seems those remarks hit another case somewhat similar to the one mentioned. If he had no more right to charge his $3 36 than the other "out County Clerk," who lives many miles west of him, his charges must be very erroneous. If I could see the particulars of the $3 36, I could tell whether they were legal or not. He says that part of the charge was for Judge's orders, "F. F.," 30 cents. It is in my opinion questionable whether there is any authority for a fee fund charge on a Division Court Judge's order of this kind; though I understand that some of our best judges think that there is.

Now Mr. Agar, in his long letter, has made a great many assertions about what certain Judges do, or have done, and about the smallness of Division Court fees. It is a poor excuse for any one to travel out of the legal tariff and set up a tariff of his own by implication, because he thinks it too low. The thief argues in the same way when he steals a rich man's goods. Every embezzler of other men's goods may justify himself by a parity of reasoning, when, because *his salary is small*, he filches from his master's till. When a man's office won't pay him, he has an easy remedy—*resignation*. When a wrong law exists, there is a true way of remedying it—*get it altered*. The Division Court tariff was made when such courts as that of Brampton had some 400 suits at each sitting, and when the Toronto, London, Hamilton, and many other courts, had ten times as many suits as they now have. There has been a "good time," a past harvest for clerks, when other people suffered. Cannot some of these officers remember these things, and take, like Job of Old, the good with the bad. I know Mr. Agar, in the quiet little village of Berwick, never had any large courts, but his predecessors had.

Mr. Agar says:—"I do not believe what your correspondent says about charging for Judge's certificates on executions." This is very plain talk and not very polite, as he cannot possibly *know* anything about it. The certificate is the one the Judge has to sign to prevent the operation of the exemption laws on debts contracted prior to 1860.

Mr. Agar says "fearlessly that no body of men in Canada have been worse paid, more unjustly used, &c.," than Division Court clerks. He then alludes again, ill-naturedly, to the remarks as to what "this clerk or that clerk" has done. Now it does not strike me that these remarks were meant to charge clerks as a body with doing what was wrong; on the contrary, I think the wrong-doers are exceptions.

Clerks on the whole are a respectable body of men; but it seems to me that if the legislature had appointed an *Inspector* of Division Court offices and bailiffs of Division Courts, instead of the useless office of Inspector of Registry Offices, the public would receive some real benefit.

Mr. Agar attacks the position that the charge of the bailiffs for a return "*nulla bona*" on execution in their hands, is illegal. He says the charge of a fee for the "*nulla bona*" returned is a legal and a proper one, and laughs at the idea of a bailiff being refused a fee of from .30c. to 75c., according to the amount, simply for returning an execution. Had he read the *U. C. Law Journal*, he would have seen that you had long since given the public to understand that you took the same view of such charges in the article referred to. He alludes to the practice of the late Judge Harrison, and to ruling of the learned Judge Gowan. I am perhaps as well acquainted as any person in Canada with what Judge Harrison held to be law on this subject, and know very well what the practice of Judge Gowan is in the matter. Mr. Agar knows well that the rule of his late Judge, Mr. Boyd, was not to allow his bailiffs to make such charges. Judge Gowan never allows it, and Judge Harrison has frequently told me that he only allowed it under peculiar and special circumstances, where plaintiffs had put the bailiff to *unnecessary* or *special trouble*, when upon *special application* to him by the bailiff he would allow the fee, or some fees, on executions returned "*nulla bona*."

Mr. Agar contends that the charge is a legal one under ordinary circumstances. If so, why did any bailiff apply to Judge Harrison? I do not admit that Judge Harrison's practice, under special circumstances, was right; for that excellent man was occasionally somewhat lax in administering Division Court law. I know of no Judge in Canada West who ever held such charges legal. They may be taken by bailiffs, and silently submitted to, that is all. It is another to say that there *should* be a fee. But the law must be taken as it stands, and must be submitted to until altered.

The word used in the tariff of fees is "*enforcing.*" "To enforce an execution" is to levy it on goods. Receiving an execution, holding it a month in a bailiff's hands, entering it in a book, and returning it "*nulla bona,*" is not "*enforcing an execution.*" If the law is at fault—if the language is at fault—let the legislature remedy it. No court can legally order the payment of, much less a mere individual charge costs, when the law does not specifically name them. In construing tariffs of fees, as well as Acts of Parliament, we must give words or expressions their ordinary English meaning. We must not say "to enforce" means not to do so. Then, if bailiffs were to charge 75c. for returning an execution "*nulla bona*" on executions for $60, their fees would equal those of Superior Courts. The sheriff cannot charge that sum on his return to an execution of *nulla bona* for $400 in the County Court. He can charge for receiving and for returning only, in which his fees are ordinarily only 35c., at most 60c. In the Queen's Bench the fee would be, at most, $1 25, on an execution for thousands of pounds. If the law had intended bailiffs to make a charge of "*nulla bona*" fees, it would have said so, distinguishing the mere return of *nulla bona* from the actual enforcing.

Mr. Agar speaks of the great hardships of bailiffs travelling, without being paid, to try to enforce executions. All this I admit. The Barrie case alluded to in the communication referred to, tried before Judge Adam Wilson, supports my view of the law. There Judge Wilson laid down the doctrine that a bailiff could not legally charge for feeding cattle seized—could not charge for storing goods—could only charge what the tariff allowed.

Mr. Agar attacks the assertion "that the costs in Division Courts are larger proportionately than those in the County Courts." But it is even so. I can sue a note in the County Court of $400, and I pay for the summons 62c. I pay the sheriff, say $1 for service, and the lawyers' costs would be $6, if paid on service, at most. If I enter a $60 suit in the Division Court, I must pay a deposit at once of $4, and if the party lives out of the County I must pay more.

Mr. Agar questions the assertion that a $20 suit often causes $20 costs in these courts. My experience in Division Court matters leads me to think that this assertion is correct. I know, as he says, that there are many duties performed by clerks and bailiffs not paid at all, and others paid too niggardly; but we must submit to the law until altered. I believe that the tariff requires to be remodelled, and the divisions consolidated. I would reduce the number of Division Courts, and in many things increase and make plain the tariff.

A COMMUNICATOR.

October 8th, 1867.

Appeals from Magistrates' Decisions — By whom costs of appeal should be paid.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—Will you kindly answer the following for the information of our magistracy?

A. B. summons C. D. before a magistrate for breach of a municipal by-law. Magistrate finds C. D. guilty and fines him. C. D. appeals; conviction is quashed; who should pay the costs of appeal, A. B. or the magistrate? Observe, A. B. laid his information as a private individual, say for abusive language being used towards him; the notice of appeal is addressed to the magistrate, not to A. B.; in fact A. B. does not take the slightest notice of the appeal, and his name only appears incidentally in the course of the proceedings.

I presume, where a corporation, through their officer, prosecute for breach of one of their by-laws, and the mayor is the convicting magistrate, and the conviction is quashed on appeal, that the corporation would be required to pay the costs; but is there not a distinction between this and the other case I have put, where the name of the complainant does not appear on record?

I am, yours, &c.,

A SUBSCRIBER.

[The court is not bound to order costs to either party, but the costs must be paid as the court directs. We do not know of any authority to order magistrates to pay costs in such cases. In the latter case the corporation would probably be ordered to pay the costs. —EDS. L. C. G.]

REVIEWS.

THE SCIENTIFIC AMERICAN. A weekly journal of practical information, art, science, mechanics, chemistry, and manufactures. New York. $3 per annum.

It has been well said that "a man cannot be a great lawyer who is nothing else. Exclusive devotion to the study and practice of the law tends to acumen rather than breadth, to subtlety rather than strength .... Some other things are to be studied beside the reports and text books" (*American Law Review*, ii. p. 50), and that which is true as a general principle is true in particular as to the matters treated of in the periodical now before us, and especially so with reference to those of the profession whose lot is cast in the *nisi prius* arena.

We have all occasionally seen in Court the hopeless mess into which a counsel sometimes gets his case, from an utter inability to understand, much less to explain to others, a point arising in the course of a case involving some mechanical or chemical knowledge, and in his flounderings "making confusion more confounded." Now, though we do not prescribe a weekly perusal of the *Scientific American*, as a certain cure for this malady, we are quite sure that an occasional dip into its pages, by way of light reading, or as a change from the more abstruse studies of the profession, would be as pleasant as profitable. For ourselves, we admit a weakness for knowing what is transpiring in the scientific world, and so greet the weekly appearance of our interesting cotemporary with all the more pleasure.

To pretend to give a sketch of the contents of even one number would be beyond our limits. On the first page of Vol. XVII. we see visions of a new photographic apparatus, centrifugal guns, some remarks on the law of trade marks, and at the end of the last number to hand we have an account of the Mons Cenis summit railroad—so our readers will see that they can take their choice of a very considerable variety.

All the most valuable discoveries are delineated and described in its issues, so that, as respects inventions, it may be regarded as an illustrated Repertory, where the inventor may learn what has been done before him in the same field which he is exploring, and where he may bring to the world a knowledge of his own achievements.

The contributors to the *Scientific American* are among the most eminent scientific practical men of the times.

THE AMERICAN LAW REGISTER. Philadelphia: $4 per annum.

The leading articles in the October number of this valuable publication are: The Constitutionality of the Exemption clause of the Bankrupt Law, of peculiar interest to United States lawyers: and a very interesting letter from Dr. Francis Lieber to a member of the New York Constitutional Convention, revised, with additions by the author. We notice in a case of *Jackson Insurance Co.* v. *Stewart*, that it is held that statutes of limitation are suspended during a state of war, as to matters in controversy between citizens of the opposing belligerents—a doctrine which could not have helped the Lord Chancellor in the case of *Seagram* v. *Knight* (ante p. 266), in arriving at the opinion he there expresses as to the suspension of the operation of the statute.

We draw largely also from this publication, so that our readers can judge that we at least appreciate its contents, and we hope they do likewise.

THE BRITISH QUARTERLIES and BLACKWOOD. Leonard Scott publishing Co.: New York.

We need only say that these Reviews are as good as ever. The cleverest and deepest thinking heads in Great Britain contribute to the stores of learning, instruction and amusement to be found in their pages.

THE PHILADELPHIA INTELLIGENCER, THE PITTSBURGH LEGAL JOURNAL, THE NEW YORK DAILY TRANSCRIPT, duly received.

Though not aspiring to the position of the *American Law Review* or the *American Law Register*, they are well adapted for the purposes for which they are intended.

THE SCOTTISH LAW MAGAZINE AND SHERIFFS' COURT REPORTER. Glasgow.

Received regularly.

GODEY'S LADY'S BOOK.

The contents interesting as usual, to those who understand the (to our limited comprehensions in such matters) abstruse subjects there discussed.

Sir Thomas More himself was full of quiet humor, and endless good things uttered by him are in vogue. He conveyed this humor with him to the block. "Finding in the craziness of the scaffold a good pretext for leaning in friendly fashion on his jailor's arm, he extended his hand to Sir William Kingston, saying 'Master Lieut. I pray you see me safe up; for my coming down let me shift for myself!' Even to the headsman he gave a gentle pleasantry and a smile from the block itself, as he put aside his beard so that the keen blade should not touch it. "Wait, my good friend, till I have removed my beard,' he said, turning his eyes upward to the official, 'for it has never offended his highness!'"

Hatton once uttered a capital pun:—"In a case concerning the limits of certain land, the counsel on one side having remarked with explanatory emphasis, 'We lie on this side, my lord;' and the counsel on the other side having interposed with equal vehemence, 'We lie on this side, my lord,' the Lord Chancellor leaned backwards, and drily observed 'If you lie on both sides, whom am I to believe?'"