DIARY FOR MARCH.

1. Wed. *St. David.* Last day for County Clerk to transmit to Chief Superintendent audited school account.
5. SUN. *2nd Sunday in Lent.*
7. Tues. *Shrove Tuesday.* Last day for notice of Trial for County Court, York.
12. SUN. *3rd Sunday in Lent.*
14. Tues. General Sessions and County Court Sittings in York.
17. Frid. *St. Patrick's Day.*
19. SUN. *4th Sunday in Lent.*
25. Sat. *Annunciation.*
26. SUN. *5th Sunday in Lent.*
31. Frid. Last day for Local Superintendent of Common Schools to complete first half-yearly visits to schools.

The Local Courts'

AND

MUNICIPAL GAZETTE.

MARCH, 1871.

PAYMENT OF EXECUTORS.

FIRST PAPER.

On the 1st September, 1858, the law came into force touching compensation to executors and others, which is now embodied in the Consolidated Statutes of Upper Canada, cap. 16, sec. 66. This section provides that the judge of any Surrogate Court may allow to the executor, or trustee, or administrator acting under will or letters of administration, a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the executorship, trusteeship, or administration of the estate and effects vested in him under any will or letters of administration, and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate, and therefor may make an order or orders from time to time, and the same shall be allowed to an executor, trustee or administrator in passing his accounts.

Prior to this enactment the English rule obtained in this Province, that in all matters of trust, or in the nature of a trust, whether testamentary or otherwise, the trustee was not entitled to any remuneration whatsoever for his pains, trouble and personal services. There are some English cases to be found pointing in an opposite direction, such as *Marshall* v. *Holloway*, 2 Swanst. 452; *Ex. p. Fermor*, Jac. 404; *Newport* v. *Bury*, 23 Beav. 30. These have been usually considered as cases of special exception, but may perhaps be viewed as instances wherein the rule has been properly relaxed, on the ground that compensation had been intended.

The English Courts, however, did not consider the rule in question applicable to their Colonial possessions. In many cases touching both East and West Indian estates, a commission of five per cent. has been allowed to the Indian executor, upon passing his accounts in the English Courts: *Chetham* v. *Audley*, 4 Ves. 72, in which five per cent. was allowed upon the payments made on account of the estate: *Cockerell* v. *Barber*, 1 Sim. 23 *S. C. in appeal*, 2 Rus. 585, in which five per cent. was allowed on all assets *collected* by the executor in East India, including assets retained by him for a legacy to himself, not given to him as executor,

In *Matthews* v. *Bagshaw*, 14 Beav. 123, five per cent. was allowed on the gross receipts of the East Indian assets. There the Master of the Rolls laid it down, that by the custom of India, which the law of England will follow, Indian executors are entitled to five per cent. on the gross sum received by them. (A note to this case shews that this custom was abolished in 1849.) See also *Campbell* v. *Campbell*, 13 Sim. 168; and 2 *Y. & C.* 607. Similar allowances have been sanctioned as to West Indian estates on the ground among others that such was the constant course of practice in those colonies—a practice indeed in some of the islands which was recognized and regulated by the acts of colonial legislatures. See *Denton* v. *Davey*, 1 Moo. P. C. 15; *Chambers* v. *Goldwin*, 9 Ves. 254, 267. In this case it is said that the commission is the reward of personal care and attention, and if that care and attention are not administered, the unquestionable principle of the Court is that not being within the case, upon which the commission can be claimed, the executor is in the situation of a person entitled only to the commission actually paid to those who really managed the estate: *Forrest* v. *Elwes*, 2 Mer. 68.

The like principle of compensation to executors has been declared by the Legislatures of many of the States in the American Union. Thus for instance in New York State an Act was passed in 1817, declaring that in settling the accounts of guardians, executors and administrators, the Court of Chancery should make a reasonable allowance to them for their services over and above their expenses, to be

fixed by a general rule of the Court in that behalf. Upon this the Chancellor passed a general order providing a scale of per-centages by way of commission, as follows:—For receiving and paying out money, five per cent. on all sums not exceeding $1,000; two and a half per cent. upon all sums between $1,000 and $5,000; and one per cent. for all above $5,000. The mode adopted of computing the allowance was to reckon two and a half, one and a quarter, or a half per cent., according to circumstances on the aggregate amount received; and the same in respect of the aggregate amount expended. Thus if $10,000 had been collected, the per centage on $1,000 would be $25, on 4,000 would be $50, and on $5,000 would be $25; total amount allowed, $100, and the same scale of allowances on the amount paid out. These regulations were afterwards changed upon legislative interference, and the rules in New York are now settled by the revised statutes of 1852, in which it is provided that "on the settlement of the account of an executor or administrator the Surrogate shall allow to him for his services, and if their be more than one, shall apportion among them, according to the services rendered by them respectively, over and above his or their expenses:—

"1. For receiving and paying out all sums of money not exceeding one thousand dollars at the rate of five dollars per cent.

"2. For receiving and paying any sums exceeding one thousand dollars and not amounting to five thousand dollars, at the rate of two dollars and fifty cents per cent.

"3. For all sums above five thousand dollars at the rate of one dollar per cent.; and in all cases such allowance shall be made for their actual and necessary expenses as shall appear just and reasonable."—*Rev. St. N. Y., Tit* 3, *Part II., Cap. VI., Sec.* 64.

The manner of estimating the allowance is, and always has been the same in the New York Courts—that is to say, full per-centages are not reckoned both on the receipts and disbursements: one half commission is allowed on the amount received, and one half on the amount paid out. Their practice in ordinary cases is to reckon commission upon the aggregate amount of the receipts and expenditures for the whole period of accounting. Where however an account is taken with annual rests for the purpose of charging interest on the yearly balances, then the commission is computed upon the aggregate amount of receipts and disbursements during each year. —*Vanderheyden* v. *Vanderheyden*, 2 Paige, C. R. 287.

It may be noticed that these provisions and regulations of the New York law are objectionable in extending merely to the receipt and payment of money, and in not providing any allowances for care and trouble in the management of the estate. And apart from this consideration, many cases will occur in which the rate allowed may on the one hand prove inadequate, or on the other hand, exorbitant. It would seem the better course not to fix the remuneration by the terms of an inflexible tariff, which must be equally applied to all estates, however varied in their circumstances and however differing in the degrees of skill, care and responsibility, requisite on the part of the executors. In Canadian practice accordingly, the rate of compensation has been left to the judgment of the officer of the Court, who exercises his discretion upon a survey of all the special features of each case.

In our next paper we shall comment upon the scope of the Canadian Act, and collect the decisions thereupon.

ACTS OF LAST SESSION.

The Bills that were passed during the last Session of the Ontario Legislature received the Royal assent on the 15th Feburary last. The following are those of general interest to our readers with their numbers as they appear in the list published in the *Gazette*:—

8. *An Act* to make valid certain Commissions for taking affidavits issued by the Court of Queen's Bench.

This Act refers to some invalid commissions issued under an Act of Upper Canada in the second year of George IV., without the seal of the Court.

11. *An Act* to alter the names of the Superior Courts in Ontario.

This Act we publish in this number.

14. *An Act* to confirm the deed for the distribution and settlement of the estate of the Honourable George Jervis Goodhue, deceased.

We have incidentally referred to this, and to the Spragge Will Act, and to the Caverno Act, as measures of a most objectionable nature, and may refer to the subject hereafter at greater

length. One result of these Acts will be seen by looking at Act No. 95 *infra*.

17. *An Act* respecting Affidavits, Declarations and Affirmations, made out of the Province for use therein.

We publish this in another page of this number.

27. *An Act* to empower the trustees under the will of the late Joseph Bitterman Spragge to sell certain lands in the township of Blenheim and County of Oxford.

We have referred to this under No. 14.

33. *An Act* respecting Commissioners of Police.

The purport of this Act appears in the preamble, which recites that by 31 Vic., cap. 73rd, the Governor-General in Council is authorized to appoint one or more fit and proper persons to be and act as a Commissioner or Commissioners of Police within one or more of the Provinces of Canada; and it is desirable and expedient the better to enable such Commissioner or Commissioners of Police so appointed to execute the Criminal Laws of the Dominion, that they should have proper criminal jurisdiction granted to them within this Province, &c.

48. *An Act* to amend Chapter Eighty Five of the Consolidated Statutes for Upper Canada intituled. "An Act respecting the conveyance of Real Estate by Married Women," and the Act passed in the thirty second year of the reign of Her Majesty, chapter nine, intituled,, "An Act to amend the Registry Act, and to further provide as to the certificates of married women, touching their consent as to the execution of deeds of conveyance.

This Act will be found on another page.

71. *An Act* to enable Sullivan Caverno to convey certain Lands in the County of Welland.

This we have referred to under number 14.

78. *An Act* to amend the Assessment Law.

We publish this in another place.

80. *An Act* respecting the establishment of Registry Offices in Ridings, and to amend the Registration of Titles (Ontario) Act.

This Act was spoken of in our January issue (page 7). It gives power to the Lieut.-Governor in Council to establish a Registry Office in such city, junior county or riding, as he shall deem advisable, and he may order the removal of any Registry Office from one place in a county to another. We trust these powers will be very sparingly exercised, and that the safety of titles and the convenience of the bulk of the profession will not be made subservient to the exigencies of party politics. Section 50 of 31 Vic., cap. 20, is amended so as to read as follows:

"Every notarial copy of any instrument executed in Quebec, the original of which is filed in any notarial office according to the law of Quebec, and which cannot therefore be produced in Ontario and every prothonotarial copy of any instrument executed in Quebec shall be received in lieu of and as *prima facie* evidence of the original instrument, and may be registered and treated under the Act for all purpose as if it were in fact the original instrument, and such notarial or prothonotarial copy shall be registered without any other or further proof of the execution of the same, or of the original thereof, with the seal of the notary or prothonotary attached."

83. *An Act* to amend Chapter 52, 29 & 30 Vic., and Chapter 30, 31 Vic., relating to Municipal Institutions.

We publish this in another place.

95. *An Act* to provide for the appointment of Judicial Officers to whom Estate Bills may be referred.

This is a very short Act contained in one clause, and provides that "the Lieutenant-Governor in Council may from time to time issue commissions to the Judges of the Superior Courts of Law and Equity, empowering them, or any two of them, to report, under the rules and orders of the Legislative Assembly, to the Assembly in respect to any estate bills, or petitions for estate bills, which may be submitted to the Assembly." The rules and orders referred to in this Act are as follows.

"From and after the appointment of Commissioners for the purpose, every Estate Bill, when read a first time, shall, without special reference, stand referred to the said Commissioners, for their Report, and a copy of such Bill, and of the petition on which the same is founded (to be furnished by the petitioner), shall be forthwith transmitted by the Clerk of Private Bills to the said Commissioners, or one of them, in order that they, or any two of them, may, after perusing the Bill, without requiring any proof of the allegations thereof, report to the House their opinion thereon, under their hands; and whether, presuming the allegations contained in the pre-

amble to be proved to the satisfaction of the House, it is reasonable that such Bill do pass into a law, and whether the provisions thereof are proper for carrying its purposes into effect; and what alterations or amendments, if any, are necessary in the same; and, in the event of their approving the said Bill, they are to sign the same; and the said Report, with the said Bill and Petition, are to be transmitted by the said Commissioners to the Clerk of Private Bills; and the same are to be submitted to the Standing Committee on Private Bills, which is not to consider the said Bill before the delivery of the said Report, Bill and Petition, to the Chairman of the said Committee."

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98. *An Act* relating to Unpatented Lands sold for taxes.

This we publish on a subsequent page.

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99. *An Act* to amend the Act chaptered 20 of 31 Vic., intituled, an Act respecting Registrars' Offices, and the Registration of Instruments relating to Lands in Ontario.

By this Act, every Deed executed prior to the passing of 31 Vic., cap. 20, affecting lands situate in more than one county, and of which Deed no memorial has been executed, may be recorded in any one of the counties in which some of the lands are situated, upon proof made in accordance with the said Act, and in the other counties by deposit of a copy of every such deed and proof certified as is provided with respect to powers of attorney in section 47 of the said Act.

One hundred and four Acts in all were assented to; a goodly array, certainly, as far as numbers are concerned, but the wisdom of some of them is more than questionable.

The following are some of the Acts already referred to, and now published in advance of the volume in the hands of the Queen's Printer:—

An Act to alter the names of the Superior Courts in Ontario.

(Assented to 15th Feb. 1871.)

Whereas, &c. Therefore Her Majesty, &c., enacts;—

1. The "Court of Queen's Bench for Upper Canada," shall, during the reign of a King be called "His Majesty's Court of King's Bench for Ontario," and during the reign of a Queen "Her Majesty's Court of Queen's Bench for Ontario."

2. "The Court of Common Pleas for Upper Canada," shall be called "The Court of Common Pleas for Ontario."

3. "The Court of Chancery for Upper Canada" shall be called "The Court of Chancery for Ontario."

4. Notwithstanding anything herein contained, no writ, process, or pleading, shall be held void or irregular, merely on account of the use of the old style of any of said Courts, but the same shall be as valid as if the proper style of such Court had been used.

5. The last preceding section of this Act shall be in force until the first day of January, in the year of our Lord one thousand eight hundred and seventy-two, and no longer, and after such time the same effect and no other shall be given to such misnomer as if such section had never been passed.

An Act respecting Affidavits, Declarations, and Affirmations made out of the Province of Ontario for use therein.

(Assented to 15th Feb. 1871.)

Her Majesty, &c., enacts as follows:—

1. [26 V., ch. 41, repealed except as to commissions issued and proceedings thereunder.]

2. [Lieutenant-Governor in Council may appoint commissioners for taking affidavits, etc., without Ontario, to be used in any court here.]

3. The commissioners so to be appointed shall be styled "Commissioners for taking affidavits in and for the Courts in Ontario."

4. Oaths, affidavits, affirmations or declarations administered, sworn, affirmed or made out of the Province of Ontario, before any commissioner authorized by the Lord Chancellor to administer oaths in Chancery in England, or before any notary public certified under his hand and official seal, or before the mayor or chief magistrate of any city, borough or town corporate in Great Britain or Ireland, or in any colony of Her Majesty without Canada, or in any foreign country, and certified under the common seal of such city, borough, or town corporate, or before a judge of any court of supreme jurisdiction in any colony without Canada belonging to the Crown of Great Britain, or any dependency thereof, or Consular Agent of Her Majesty exercising his functions in any foreign place, for the purposes of and in or concerning any cause, matter or thing depending or in any wise concerning any of the proceedings to be had in the said courts, shall be as valid and effectual and shall be of like force and effect to all intents and purposes as if such oath, affidavit, affirmation or declaration had been administered, sworn, affirmed or made in this Province before a commissioner for taking affidavits therein or other competent authority of the like nature.

5. Any document purporting to have affixed, impressed, or subscribed thereon or thereto the signature of any such commissioner, or the signature and official seal of any such notary-public, or the seal of the corporation, and the signature of any such mayor or chief magistrate as aforesaid, or the seal and signature of any such judge, consul, vice-consul, acting-consul, pro-consul, or consular agent

in testimony of any such oath, affidavit, affirmation, or declaration having been administered, sworn, affirmed or made by or before him shall be admitted in evidence without proof of any such signature, or seal and signature, being the signature or the seal and signature of the person whose signature or seal and signature, the same purport to be, or of the official character of such person.

6. Any affidavit, declaration, or affirmation proving the execution of any deed, power of attorney, will or probate, or memorial thereof, or other instrument for the purpose of registration in this province, may be made before a commissioner appointed under this Act, or other person authorized hereby to administer or take oaths, affidavits, declarations, and affirmations.

7. No informality in the heading, or other formal requisites to any affidavit, declaration, or affirmation, made or taken before any commissioner, or other person under this act, shall be any objection to its reception in evidence, if the court or judge before whom it is tendered think proper to receive it.

An Act to amend Chapter Eighty-five of the Consolidated Statutes for Upper Canada, and the Act passed in the thirty-second year of the reign of Her Majesty, chaptered nine.

(Assented to 15th Feb. 1871.)

Whereas it is expedient to facilitate the taking the necessary examination of a married woman, as by law required, on executing a deed of lands and the granting the necessary certificate thereon: Therefore Her Majesty, &c., enacts as follows:—

1. Sections two, three and four of chapter eighty-five, of the Consolidated Statutes for Upper Canada, are hereby repealed, and sections two, three and four of this Act are inserted in lieu thereof.

2. In case such married woman executes such deed in the Province of Ontario, she shall execute the same in the presence of a Judge of one of the Courts of Queen's Bench, Common Pleas, or the Court of Chancery or of the Judge, Junior or Deputy Judge of the County Court, or of a Notary Public for the Province of Ontario, or two Justices of the Peace for the county in which such married woman happens to be when the deed is executed, and any such Judge, Notary Public, or two Justices of the Peace shall examine such married woman apart from her husband, respecting her free and voluntary consent to convey her real estate as expressed in the deed, and if she gives her consent, such Judge or Justices, or Notary Public under his seal of office, shall on the day of execution by her of such deed certify on the back thereof to the following effect:

"I, (*or* we *inserting the name or names and place of residence, &c.,*) do hereby certify "that on this —— day of —— A.D., at —— "in the County of ——, the within deed was "duly executed in my (*or* our) presence by "A. B., of —— wife of —— therein named, "and that the said wife (*or* wives) of the said "(*insert name of husband or husbands*) at the "said time and place, being examined by me "(*or* us) apart from her (*or* their) husband "(*or* husbands), did give her (*or* their) consent to convey her (*or* their) estate in the "lands mentioned in the said deed, freely and "voluntarily, and without coercion or fear of "coercion on the part of her (*or* their) husband (*or* husbands), or of any other person "or persons whomsoever."

3. In case any such married woman executes any such deed in Great Britain or Ireland, or in any colony belonging to the Crown of Great Britain, out of Ontario, she shall do so in the presence of the Chief Justice, or a Judge of the Superior Court, or a Notary Public duly appointed, or of the mayor or chief magistrate of a city, borough or town corporate, or any person authorized by the laws of any such colony for that purpose, who shall examine such married woman apart from her husband, touching her consent in the matter, and certify on the back thereof to the effect, as by the second section of this Act is required.

4. In case any such married woman executes any such deed in any state or country not owing allegiance to the Crown of Great Britain, she shall do so in the presence of the governor or other chief executive officer, or the resident British Consul, or of a Judge of a Court of Record of such state or country, or of a Notary Public duly appointed, or of a mayor or chief magistrate of a city, borough, or town corporate in any such foreign country, who shall examine such married woman apart from her husband, touching her consent in the manner, and certify on the back thereof to the effect, as by the second clause of this Act is required; such certificate to be under the hand and the seal used in the office of the person or court by the person so making such examination; Provided always, that no party to any such deed, or engaged in the preparation thereof, either by himself, his partner or clerk, shall make the examination or grant the certificate required by any of the foregoing clauses under a penalty of four hundred dollars, to be recovered from him, her or them by any person suing therefor in any court of competent jurisdiction.

5. Sections one and two of the Act passed in the thirty-second year of the reign of Her Majesty, chaptered nine, are amended by expunging from section one the words: "any Judge or Justice of the Peace," and from section two the words "the Judge or Justice of the Peace therein mentioned," and inserting in lieu thereof in each of such sections the words "any of the parties entitled by law to take such examination."

6. The following shall be inserted as clause three of said last mentioned Act, and incorporated therewith: "All certificates of discharge of mortgage and the registering thereof, executed or registered previous to the passing of this Act, according to the terms thereof, shall

be as valid and binding as if done since the passing hereof.

An Act relative to Unpatented Lands sold for Taxes.

(Assented to 15th February, 1871.)

Her Majesty, &c., enacts as follows:—

1. Whenever the proper officer or officers having by law the power or authority to make or execute deeds on sales of lands for taxes shall heretofore have made or executed, or shall hereafter make or execute any deed purporting to grant, sell or convey any land or portion of land, the fee of which is in Her Majesty, or purporting to grant, sell or convey the interest therein of any locatee or purchaser from the Crown, and such deed shall recite or purport to be based upon a sale for taxes of such land or interest, the Commissioner of Crown Lands may act upon and treat such deed as a valid transfer of all the right and interest of the locatee or purchaser from the Crown, and of every person claiming under him, in, or to such land or portion of land to the grantee named in such deed, and may cause a patent for such land to be issued to such grantee on completion of the original conditions of location or sale, unless such deed shall be questioned before a court of competent jurisdiction by some person interested in such land within three months after the passing of this Act, or within three months after the making of such deed, and unless notice of such deed being so questioned, shall within the respective times aforesaid be given to the Commissioner of Crown Lands.

2. This Act shall not apply to any deed based or purporting to be based upon a sale for taxes made prior to the first day of January, 1868.

3. Nothing in this Act contained shall interfere with the authority of the Commissioner of Crown Lands under "The Public Lands Act of 1860," to cancel the original sale, grant or location, of any such land.

An Act to amend the Act intituled "An Act respecting the Municipal Institutions of Upper Canada."

(Assented to 15th February, 1871.)

Her Majesty, &c., enacts as follows:—

1. Section 6 of the Act passed in the thirty-first year of Her Majesty's reign, chaptered thirty, is amended by adding the following words after the word "ward" on the third line of said section:—"When there are less than five wards, and of two councillors for each ward where there are five or more wards."

2. Sub-section 12 of section 296 of the Act passed in the session held in the 29th and 30th years of Her Majesty's reign, chaptered 51, is amended by striking out all the words after the word "Runners" in said sub-section.

3. Sub-section (*a*) of sub-section 6 of section 246 of the said Act is repealed, and the following is substituted in lieu thereof:—"Upon any person, for the non-performance of his duties, who has been elected or appointed to any office in the corporation, and who neglects or refuses to accept such office, unless good cause be shown therefor, or takes the declaration of office, or afterwards neglects the duty thereof, and."

4. The council of every municipality may pass by-laws for preventing and removing any obstruction upon any roads or bridges within its jurisdiction.

5. Sub-section 8 of section 299 of the said Act is amended by adding thereto the following: —"And for acquiring and assuming possession of, and control over, any public highway or road in an adjacent municipality (by and with the consent of such municipallty, the same being signified by a by-law passed for that purpose), for a public avenue or walk; and to acquire from the owners of the land adjacent to such highway or road, such land as may be required on either side of such highway or road, to increase the width thereof, to the extent of one hundred feet or less, subject to the provisions of section 325 of this Act, and to other provisions of this Act relating to arbitration."

6. The following sub-section is added to section 349 of said Act:—"For granting bonuses to any railway, and to any person or persons, or company, establishing and maintaining manufacturing establishments within the bounds of such municipality, and for issuing debentures, payable at such time or times, and bearing or not bearing interest, as the municipality may think meet for the purpose of raising money to meet such bonuses."

7. Section 341 of the said Act is amended by adding after the words "Separating two townships in the county," the following:—"And over all bridges crossing rivers, over five hundred feet in width, within the limits of any incorporated village in the county, and connecting any highway leading through the county."

8. Section 342 of said Act is amended as follows, by adding thereto the following words: "And further the County Council shall cause to be built and maintained in like manner all bridges on any river over five hundred feet in width, within the limits of any incorporated village in the county, necessary to connect any public highway leading through the county," and may pass a by-law for the purpose of raising any money by toll on such bridge to defray the expenses of making and repairing the same.

9. Sub-section 3 of section 344 of said Act is amended by adding thereto after the words "Townships of the county," the words "Or any bridge required to be built or made across any river, over five hundred feet in width, within any incorporated village in the county, connecting any public highway leading through the county."

10. Sections 301 and 302 of the said Act shall apply to towns and incorporated villages as well as to cities; provided always that the right of appeal as provided by the said 301st

section shall be to the judge of the county court.

11. Sub-section 2 of section 301 of said Act is amended by inserting the following words after the word "sidewalk," in the sixth line: "or any bridge forming part of the highway."

12. Section 302 of the said Act is amended by adding to the end thereof the following proviso:

"Provided also, that in cases where the council of any city or town shall decide to contribute at least half of the cost of such local improvement, it shall be lawful for the said council to assess and levy in manner provided by the 301st, 302nd, 303rd, 304th and 305th sections of this Act, from the owners of real property to be directly benefited thereby, the remaining portion of such cost without petition therefor, unless the majority of such owners representing at least one-half in value of such property shall, within one month after the publication of a notice of such proposed assessment in at least two newspapers published in such city or town, petition the council against such assessment."

13. Sub-section 12 of section 341 of said Act is repealed, and the following substituted therefor:

"It shall be the duty of County Councils to erect and maintain bridges over rivers forming township or county boundary lines; and in the case of a bridge over a river forming a boundary line between a county and a city, such bridge shall be erected and maintained by the Councils of the county and city; and in case the Councils of such county or city, or the Councils of such counties, fail to agree on the respective portions of the expense to be borne by the several counties, or city and county, it shall be the duty of each Council to appoint arbitrators, as provided by this Act, to determine the amount to be so expended, and such award as may be made shall be final."

14. The following sub-section is added to section 280 of said Act:

"Whenever any stream or creek in any township is cleared of all logs, brush or other obstructions to the town line between such township and any adjoining township into which such stream or creek flows, the Council of the township in which the creek or stream has been cleared of obstructions may serve a notice in writing on the head of the Council of the adjoining township into which the stream or creek flows, requesting such Council to clear such stream or creek through their municipality; and it shall be the duty of such last named Council, within six months after the service of the notice as aforesaid, to enforce the removal of all obstructions in such creek or stream within their municipality to the satisfaction of any person whom the Council of the county in which the municipality whose Council received the notice is situate shall appoint to inspect the same."

15. Section 243 of the said Act is amended, by adding "or thirty duly qualified electors of any municipality" after the word "council" in the first line,"

16. Any by-law which shall be carried by a majority of the duly qualified voters voting thereon, shall, within six weeks thereafter, be passed by the Council which submitted the same."

17. Section 27 of the said Act is repealed, and the following enacted in lieu thereof:

"In case of a township laid out by the Crown in territory forming no part of an incorporated county, the Lieutenant-Governor may, by proclamation, annex the township, or two or more of such townships, lying adjacent to one another to any adjacent incorporated county."

18. Section 153 of the said Act is amended by inserting after the word "aforesaid" in the first line, the following words: "as well as the assessment rolls, voters' lists, poll books, and other documents in the possession of or under the control of the clerk."

19. Sections 29 and 35 of chapter thirty of the Act passed by the Legislature of Ontario in the thirty-first year of Her Majesty's reign shall be and the same are hereby repealed.

An Act to amend the Assessment Act of Ontario, passed in the thirty-second year of the reign of Her Majesty, chaptered thirty-six.

(Assented to 15th February, 1871.)

Her Majesty, &c., enacts as follows:—

1. That sub-section 25 of section 9 of the Act passed in the 32nd year of Her Majesty's reign, and chaptered 36, be repealed.

2. That sec. 84 of the said Act be amended by inserting after the word "township" in the first line, the words "town or village."

3. That sec. 86 of the said Act be amended by inserting after the word "townships," "towns and villages."

4. That sec. 150 of the said Act be amended by erasing the letter "B" in the second line, and inserting therefor the letter "C."

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

AGENCY—NEGLIGENCE.—An undisclosed principal can sue in his own name on any contract of his agent, and it does not affect his suit, whether or not, in the dealings with the agent, the existence of a principal was concealed by the agent.

An agent in whose hands pawns are deposited as collaterals for a loan made for the principal, is a bailee for hire so far as the borrowers are concerned, and is bound to use the ordinary diligence which a prudent man would use in keeping the pawns.

Such bailee is only bound to use ordinary care. This principal can only be held liable for his neglect to use such care.

The question of what constitutes ordinary care is one of fact and is entirely for the jury.

The fact that the bailee used the same care in keeping the pawns as he did with his own goods of like character, may be a circumstance for the jury, but is not even *prima facie* evidence of ordinary care, when there is evidence of how the pawns were lost.

While what constitutes ordinary care is a question for the jury, yet the court will instruct them to weigh, in deciding what amounts to such care, the nature of the pawns, the danger of loss by reason of the temptation, and facility for theft, and the difficulty in recovering them if lost.

The general question of the duty of bailees discussed.—*Bank* v *Smith et al*.—*Supreme Court of Pennsylvania*.—*Phil. Legal Gazette, January* 20, 1871.

Agreement for Sale of Land—Statute of Frauds—Part Performance—Evidence to Connect Writings.—The defendant wrote to the plaintiff's solicitor's that he would give $3,100 for plaintiff's house and lots, and a few days after he signed the following memorandum: "I will give $3,500, together with the choice of one horse, waggon, and teaming harness, or buggy," to which he added "accepted" with plaintiff's signature. The plaintiff conveyed the land to defendant, who paid the sum required down, and gave a mortgage for the balance, but defendant would not give the horse, &c., for which the plaintiff sued:

Held, reversing the judgment of the County Court, that he could not recover; that the contract was within the statute of frauds, and being entire, the part performance could not enable the plaintiff to sue for the part unperformed, without proof of a written agreement; and that such proof failed, for parol evidence, which was inadmissible, was required to connect the memorandum with the previous letter, so as to shew the consideration.—*Taylor* v. *Knowles*, 30 U. C. Q. B. 200.

Sale of Goods—Principal and Agent—Excess of Authority—Nonsuit.—Defendant, living in London, and having 5,000 bushels of barley in his elevator there, employed A. & K., brokers in Toronto, to sell the same, giving them a sample. On 8th June, A & K. wrote defendant, "We have put under offer, subject to your approval, your lot of barley, say 4,000 to 5,000 bushels, cash 50c. net to you in your elevator; answer to be given to-morrow, if accepted." On 9th, defendant answered by letter, giving his approval, which was received on 10th, and on 11th a contract for the sale of the barley to plaintiff was signed by him and A. & K., brokers for defendant, no counter instructions having been received by them. Plaintiff had seen the letters of the 8th and 9th before the contract was signed:

Held, that A. & K.'s authority was to sell on the terms mentioned on 10th, and that defendant was not liable on the contract of 11th.—*Farrell* v. *Hunt*, 21 U. C. C. P. 117.

Mining Leases—Verbal Agreement for Sale of—Defect in Title—Waiver.—Plaintiff, having verbally agreed with defendant for the purchase from him of an interest in certain mining leases, discovered, within a short time after a payment made by him on account, that there was some defect in the title, but he never repudiated the bargain until just before action brought; on the contrary, continued to act as if the bargain was valid: *Held*, that he could not recover back the money paid by him, defendant having sworn that he was ready and willing to carry out his engagement and convey, as agreed upon.—*Patterson* v. *Irwin*, 21 U. C. C. P. 132.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

By-Law—Application to quash—Absence of seal—Licenses to sell liquors.—On application to quash a by-law passed on the 21st December, 1869, under the Temperance Act of 1864, to prohibit the sale of intoxicating liquors, and submitted to the electors on the 2nd February, 1870, it appeared that no seal had been attached to the by-law until after the 2nd March, 1870.

Held, that it was no by-law, and therefore could not be quashed; but the rule to quash it was discharged without costs.—*In re Mottashed and the Corporation of the County of Prince Edward*, 30 U. C. Q. B. 74.

Road Company—Road Running Partially Through Town—Right to Collect Tolls Within Limits of Town.—A joint stock road company had begun operations and were in receipt of tolls several years before the town of Clifton was incorporated, within which part of the road ran: *Held*, affirming the judgment of the Court of Common Pleas, 20 C. P. 107, that the company had the right to levy tolls within the town limits, notwithstanding the incorporation, and that some of the toll-gates were within the town limits.—*The St. Catharines, Thorold and Suspension Bridge Road Company* (*respondent*) v. *Gardner* (*appellant*), (in app.) 30 U. C. Q. B. 109.

SELECTIONS.

COMMITTAL OF DEBTORS.

The case of *Brown* v. *Watson*, *Dod*, *and Langstaffe* was an action brought against the sheriff of Surrey and the attorneys of the execution creditor for unlawfully imprisoning the plaintiff under an order made by Baron Pigott at Chambers. The plaintiff was ordered to pay a debt and cost within two months, or in default to be imprisoned for six weeks. The plaintiff did not pay, and was arrested. He brought an action; the defendants pleaded the judge's order, and this then was demurred to on the ground that the order was a nullity. The Court of Exchequer held that the sheriff could not be made responsible in an action for obeying a rule or order of the Court, and there was judgment for the defendants.

Was the order of Baron Pigott in accordance with the statute? We think not. Imprisonment for debt is abolished, except in certain specified cases. If a debtor is ordered to pay a sum of money by a certain day, and he does not do so, the judge, after being satisfied that he could have complied with the order, may commit him to prison. The law does not say, "If you do not obey the order or judgment of the Court you may be liable to imprisonment;" but "If you do not obey the order of the judge, and if it is proved to his satisfaction that you have the means of paying, then the judge has the power to commit you." The imprisonment is not contingent on the non-payment, but on the creditor being able to prove that the disobedience is willful. The debtor is not to be imprisoned for his inability to pay, but for his refusal to do so although he has the means at his disposal. It seems to us that a contingent order of committal is bad. It is not within the authority of a judge in any case to make an order of committal for an offence which may or may not be committed. The proof of the offence must be precedent to the judgment. And, further, we remark, that, though a debtor may have the means of paying when the order for payment is made, he may by some occurrence be without means when the day of payment comes, and in that case his imprisonment would be contrary to law. To this there is the reply that it is the business of the debtor to apply to the judge and explain the circumstances, and therefore we rest our objection to the contingent order on the principle and rule we have stated.

We doubt not that the judges would be gladly relieved of the burden cast upon them by the statute. Give the judges, both of the Superior Courts and of County Courts the authority to levy a distringas upon a part of the debtor's income, however derived, and then there might be a total abolition of imprisonment for debt, without injury to creditors or to the credit system.—*English paper.*

ONTARIO REPORTS.

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., Q.C. *Reporter to the Court.*]

REGINA v. HOGGARD.

Conviction—Certainty—Objections to certiorari—Practice.

A conviction, for that one H., on, &c., "did keep his bar-room open, and allow parties to frequent and remain in the same, contrary to law:" *Held*, clearly bad, as shewing no offence.

A conviction, for that the said H. "did sell wine, beer, and other spirituous or fermented liquors, to wit, one glass of whiskey, contrary to law:" *Held*, bad, for uncertainty, as not shewing whether the offence was for selling without license or during illegal hours.

The charge in a conviction must be certain, and so stated as to be pleadable, in the event of a second prosecution for the same offence.

In shewing cause to the rule *nisi* to quash the conviction, it was objected that the recognizance was irregular, being dated before the conviction; but *Held*, that this was ground only for a motion to quash the *certiorari*, or the allowance of it.

[30 U. C. Q. B. 152.]

In this matter two convictions were brought up by *certiorari*.

The first was dated 10th December, 1869, made at Aurora, in the county of York, before Benjamin Pearson, Charles Doan, Jared Lloyd, and John Petch, and convicted George Hoggard, for that he "did, on the ninth day of October, 1869, at the village of Newmarket, in the county of York, keep his bar-room open, and allow parties to frequent and remain in the same, contrary to law"—George Boardman being the complainant; and they adjudged the said George Hoggard, for his said offence, to forfeit and pay the sum of $20, to be paid and applied according to law, and also to pay to the said George Boardman the sum of $3 45 for his costs, the said sums to be levied by distress if not paid within twenty days, and in default of sufficient distress they adjudged Hoggard to be imprisoned for twenty days, &c.

The second conviction, also on the complaint of Boardman, was dated the same day, before the same Justices, for that Hoggard did "on the thirteenth day of November, 1869, at Newmarket, in the county of York, sell wine, beer, and other spirituous or fermented liquors, to wit, one glass of whiskey, contrary to law:" and they adjudged the said George Hoggard, for his said offence, to forfeit and pay the sum of $20, to be paid and applied, &c. (as in the other conviction.)

On the 7th of January, 1870, application was made in Chambers to Mr. Justice Wilson to issue a *certiorari* to bring up these convictions into this Court. The recognizances were entered into by Hoggard and his sureties on the 4th of January. The writs of *certiorari* were issued on the 10th of January. The convictions, with the writs of *certiorari*, appeared to have been returned and filed on the 7th of February.

In Hilary Term last, *Harrison*, Q.C., obtained a rule calling on the convicting Justices and the informer to shew cause why the first-mentioned conviction should not quashed, with costs to be paid by the informer, upon the following grounds:

1. The conviction does not state any offence.

2. Nor state and shew that there was any by-law creating such an offence as is therein attempted to be stated.

3. There is no averment of the hours during which the bar-room was open, to show an offence within any such by-law.

4. Nothing on the face of the conviction to shew that the defendant was a person licensed to sell spirituous liquors, or in any way subject to the operation of such a law or by-law, if any.

5. There was no charge laid before the convicting Justices of any such offence.

6. No evidence before them of any such offence as therein attempted to be stated.

7. The penalty and costs imposed are not warranted by law;

And on other grounds stated in the papers filed.

And why the second conviction should not be quashed, with costs to be paid by the informer, upon the following grounds:

1. That it does not sufficiently state any offence.

2. The offence, if any, is not stated with sufficient certainty.

3. No sale by retail is shewn on the face of the conviction.

4. There was no evidence bofore the convicting Justices of any such offence as there attempted to be stated.

The rule was served on the informer on the 14th May, and on the convicting Justices on the 6th May, 1870.

During this term *Murphy* shewed cause. The recognizance rolls attached to each of the convictions purport to be taken on the fourth day of January in the *thirty-second* year of the reign of Her Majesty, whilst the convictions referred to therein were made in the 33rd year of the reign. The recognizance is therefore irregular, and the *certiorari* ought to be quashed as to both convictions.

As to the first conviction, it is admitted it cannot be sustained.

As to the second conviction, the Statute of Ontario, 32 Vic. ch. 32, sec. 1 enacts that no person shall sell by retail any spirituous, fermented, or other manufactured liquors within the Province, without first having obtained a license authorising him so to do. The defendant was convicted of the offence of selling wine, beer, and other spirituous or fermented liquors, to wit, one glass of whiskey, contrary to law. The conviction is sufficient and ought to be sustained. The objection to the recognizance ought to prevail: *Rex* v. *The Inhabitants of Abergele*, 5 A. & E. 795.

Harrison, Q C., contra. The conviction certified is sufficiently referred to in the roll. The date is mentioned, and the offence charged against the defendant is stated exactly as it is in the record of conviction. The mistake in the date of the recognizance roll can do no harm. At all events, the magistrates and informant cannot now take this objection, for they have returned the conviction. If they had desired to bring up the point, they should have taken the course suggested by the case referred to, and moved to quash the *certiorari*, and enlarged the return of the writ, to enable the defendant to amend the recognizance roll or to enter into a new one.

The first conviction is bad for not shewing or reciting any by-law against keeping a bar-room open, or that defendant kept a tavern, or was in any way liable to be fined. *Newman* v. *The Earl of Hardwicke*, 8 A. & E. 125, shews that when it is not permissible for keepers of ale and beer houses to keep open their houses for sale of liquors before 4 a.m. nor after 10 p. m., or permit the same to be drunk on their premises, yet in a conviction for permitting beer to be drunk and consumed on the premises at a time declared to be unlawful by the order of the Justices of the Peace, against the tenor of the license granted to the plaintiff, and contrary to the form of the Statute, the exact time ought to be stated, and that the magistrates made the order which it was alleged had been violated. Section 362 of the Municipal Act does not make the conviction good. See also R. & H. Dig. "Conviction," 4.

The second conviction is also defective. It does not allege that the defendant was convicted of any of the offences named in the Statute. The offence is charged in the alternative. It states he was adjudged guilty of selling wine, beer, and other spirituous or fermented liquors. If it had stopped here, it could not be said what offence the person named had been convicted of, whether selling wine or beer or other spirituous liquors, or other fermented liquors. The mere addition of "to wit, one glass of whiskey," cannot make the conviction certain and good in other respects. It does not say the sale was by retail. *Rex* v. *Morley*, 1 Y. & J. 221, is a strong authority that this conviction is bad. In that case the defendant was charged with importing or causing to be imported foreign silks. Judgment was arrested because it was uncertain which offence was charged, viz., importing the silks or causing them to be imported. Many authorities are referred to there, and the general doctrine is sustained, that informations or convictions must be certain, not in the alternative, and be so stated that if the defendant should be again prosecuted for any of the named offences he might plead the former conviction: *Regina* v. *Craig*, 21 U. C. Q. B. 552; *Rex* v. *Pain*, 7 D & R. 678; *Rex* v. *North*, 6 D & R 143; *Reid* v. *McWhinnie*, 27 U. C. Q B. 289. The evidence is returned with the conviction, and does not shew that the whiskey referred to was sold by retail by defendant, or sold by any one. See 32 Vic. ch. 32, sec. 1, (Ont.); 33 Vic. ch. 28, sec. 1, 2, (Ont). In the *Attorney-General* v. *Bailey*, 1 Ex. 281, it was held that sweet spirits of nitre were not "spirits" within the meaning of the English Excise Acts.

RICHARDS, C. J., delivered the judgment of the Court.

As to the conviction first referred to, the objection taken to the recognizance seems of little consequence. Many authorities lay it down that even in those cases where the statute enacts that no conviction under it shall be removed by *certiorari*, if the justice convict where there is no jurisdiction, the *certiorari* is not taken away.

In such a case, where the *certiorari* has been issued, and there has been some omission, the proper course seems to be to move to quash the writ or the allowance of it, and not to shew the defect as cause against quashing a bad conviction. When the objection is to some irregularity

in obtaining the allowance of the *certiorari* or to the issue of the writ itself, if moved against as a substantive matter the Court might give an opportunity to amend, but if urged against quashing a bad conviction no such opportunity is afforded. I am not impressed with the weight of the objection taken to the recognizance as returned on account of the error in the number of the year of Her Majesty's reign in which it is alleged to have been taken. If not more formidable than it appears to me now, I should say that the objection to it cannot according to the practice be taken at this stage of the proceedings.

The first conviction, being acknowledged to be bad on the argument, will be quashed.

The second conviction seems open to grave objection. It is not alleged that the defendant sold the wine, beer, &c., without having a license. He may have sold the glass of whiskey contrary to law, and have had a license.

Under the 23rd section of the Ontario Act, 32 Vic. ch. 32, in all *places* where intoxicating liquors are allowed to be sold by wholesale or retail, no sale or other disposal of the said liquors shall take place therein, or on the premises thereof, or out of or from the same, to any person or persons whomsoever, after 7 P.M. on Saturday night till 6 A. M. on Monday morning thereafter. The section goes on to provide that there shall be no sales in cases where by the by-laws made by the municipality the bar-rooms are to be kept closed.

Is the offence for which the defendant is convicted for selling without a license, or, having a license, is he convicted for selling the liquor during the hours within which it is forbidden by law to be sold? In either case he would be selling contrary to law. The authorities seem clear that the charge must be certain, and so stated that if prosecuted again for the same offence he may plead the former conviction.

It would appear to be all the more necessary to enforce this rule in the present instance, for looking at the papers sent up with the *certiorari* it seems as if the defendant has been convicted of the offence stated in the two convictions on one complaint, which charged him with selling or disposing of spirituous or fermented liquors contrary to the form of the statute.

The evidence returned in both cases seems to have been taken on this complaint, and a single witness deposed that he was at Hoggard's place on the 13th day of November, got one glass of whiskey, and paid five cents for it; it was five minutes to ten o'clock on Saturday evening. He saw Hoggard's name on the sign, and as far as the deponent could ascertain he was "boss" of the house.

If the defendant had a license the proper offence for which to have convicted him, if they deemed the evidence sufficient, was selling liquor between the forbidden hours. If he had no license, then he should have only been convicted of selling the spirituous liquor without a license. There being so much uncertainty about the matter, nothing being said either in the complaint, evidence, or conviction, whether the defendant had a license or not, we think the second conviction also cannot be sustained.

Convictions quashed.

Allan v. Garratt and Williamson.

Insolvent Act of 1864—Deed of composition and discharge—Execution by insolvent, &c.

G. & Co. having made an assignment on the 4th July, 1868, a deed of composition and discharge, dated 8th August, was filed on the 14th September, 1868, not being then signed by the insolvents. It was confirmed by the County Judge on the 2nd December, 1868, but the confirmation was reversed in this Court in March following, on the ground that the insolvents had not executed it. Afterwards in the same month the insolvents executed the deed, without any previous leave from the Judge, and without refiling it; and they then set it up as a defence to this action previously brought on a note.

Held, that the plaintiff, a non-assenting creditor, was not bound by this deed, for the evidence (set out in the case) shewed that the members of the insolvent firm had individual creditors, and it provided only for partnership debts.

Per *Richards*, C. J. The deed was invalid also, because not properly executed by the insolvents.

Per *Wilson*, J. Such execution was not an alteration of the deed, for the insolvents being named in and parties to the deed were only perfecting, not altering, it by executing; but the deposit of such deed with and notice thereof by the assignee, under sec. 9, sub-sec. 2 of the Act of 1864, were necessary after the execution by the insolvents, and for want of this it was ineffectual.

Held, also, that it was no objection that some of the assenting creditors had executed in the name of their firms and by procuration, and that no power of attorney was proved, for they had accepted the composition under it.

Held, also, that the plaintiff was not prevented, by having proved his claim before the assignee, from going on with this action.

Held, also, that the plaintiff having so proved, and having obtained an order in this Court to set aside the insolvents' discharge in the Insolvent Court, with costs to be paid to him out of their estate, was precluded from objecting that the assignee was not duly appointed.

[30 U. C. Q. B. 165.]

Declaration on a promissory note, made by defendants under the firm of Garratt & Co., dated at Toronto, 1st June, 1868, payable four months after date to the order of John Allan & Co., who indorsed it to the plaintiff. The action was commenced on the 25th November, 1868, in the County Court of the County of Hastings, and the declaration filed on the 28th February, 1869.

On the 19th March, 1869, defendants pleaded as to all except $28 55, part of the money claimed, that the defendants heretofore, trading at Belleville, in the County of Hastings, under the firm of Garratt & Co., being indebted to the plaintiff as mentioned in the declaration, and to others, and being unable to meet their engagements, a deed was made on the 4th July, 1868, under the provisions of the Insolvent Act of 1864, and of the amendments thereto, between the defendants, trading under the firm of Garratt & Co., of the first part, and John Parker Thomas, of Belleville, an official assignee for the said County of Hastings, of the second part, whereby defendants, under the provisions of the Insolvent Act of 1864, and amendments, being insolvent, voluntarily assigned to Thomas (accepting thereof as assignee under the said Act, and for the purposes therein provided) all their and each of their estate and effects, real and personal, of every nature and kind whatsoever, to have and to hold to Thomas, assignee, for the purposes of and under the said Act; and a list of the creditors of the defendants was thereto annexed, and other the requirements in the Act contained duly performed, to make the same a valid and binding assignment by the insolvents according to the said Act: that the assignee duly accepted the same, and received proof of the claims of the creditors of the defendants; and the plaintiff,

before the commencement of the suit, elected to come in, and did come in, under the said proceedings, and assented to said assignment, and proved his claim thereunder, to wit, the cause of action in the declaration mentioned. And defendants say that thereafter, to wit, on the 8th day of August, A.D. 1868, a deed of composition and discharge, under the provisions of the said Act, and under the said assignment, was made and entered into by and between the defendants of the first part, and the several persons whose names and seals were thereunto subscribed and affixed, being also respectively creditors, or agents, or attorneys of creditors of the defendants, and being a majority in number of those of their creditors who were respectively creditors for sums of $100 and upwards, and who represented at least three-fourths in value of the liabilities of the said defendants, of the second part (which said deed, without the schedule, was set out in the plea). And defendants aver that there were no separate creditors of either of them the defendants, and that the deed was executed by the defendants and by a majority in number of those of their creditors who were respectively creditors for sums of $100 and upwards, and who represented at least three-fourths in value of the liabilities of the defendants; and all other requisitions under the Insolvent Act have been observed, so as to make the deed of composition and discharge have the same effect with regard to the remainder of the creditors of the defendants, or either of them, and be binding to the same extent upon him and them, as if they were also parties to it. And defendants say they have always been ready and willing to pay the said composition according to the said deed, secured as mentioned in said deed, and that they offered to pay the same according to the said deed, and before action proffered and tendered to the said plaintiff the promissory note of the defendants endorsed in terms of said deed, but the plaintiff would not receive the same. And the defendants bring into Court under the next plea, $28.55 as the composition on the plaintiff's claim now matured: *i. e.*, the amount of the first note made by defendants and endorsed under the terms of the composition deed, which has matured since the tender of the note by the defendants to the plaintiff; and all things have been done and happened to render the said deed of composition and discharge valid in law, and to release the defendants from the cause of action in the introductory part of the plea mentioned. And as to $28.55, above referred to, defendants bring the same into Court, and say it is enough to satisfy the claim of the plaintiff in respect of the matters therein pleaded to.

On the 19th March the plaintiff joined issue on the pleas.

Under the Law Reform Act of 1868, the case was taken down to trial at the Spring Assizes of 1869 for the County of Hastings, before Wilson, J.

The assignment by the defendants of their estate and effects to Mr. Thomas, the official assignee, on the 4th of July, 1868, as set out in the plea, was proved, and that the plaintiff proved his claim before the assignee under that assignment at $151.17.

The execution of the deed of composition and discharge, dated 8th August, 1868, by thirteen out of twenty-three of the creditors who had signed, and who were creditors for over $100 each, was also proved. The claims of the creditors whose signatures were proved exceeded three-fourths in value of the total claims of all the creditors having demands of $100 and upwards against defendants. Many of the creditors were co-partners in trade, and signed the names of their respective firms; others signed the names of the firm or of their principals by procuration; but they had all received the promissory notes given as the composition notes, except the plaintiff and Hughes Bros., of Montreal, whose debt was about $201.39. On the 19th August the plaintiff proved his debt at $152.17, before the assignee, and the assignee received it on the 15th October, 1869. The assets of defendants' estate were $9,000 or $10,000. The assignee thought 7s 6d. in the £ was the full value of the assets. Tee composition agreed to be paid was 10s. in the £.

The assignee at first was named by the Board of Trade of Belleville, not an incorporated board, but afterwards by the Board of Trade of Kingston. Several creditors had filed their claims before the deed of composition was filed. The composition deed was filed on the 14th September, 1868, and did not then contain the signatures of the defendants. The deed was confirmed by the learned Judge of the County Court of the County of Hastings, and he discharged the insolvents absolutely on the 2nd December, 1868, though the discharge was opposed by the plaintiff.

The plaintiff appealed against the decision of the learned Judge of the County Court in Hilary Term, 1869, to this court. The judgment of this court was given on the 6th March, 1869, allowing the appeal, and the order of the learned judge in the court below granting the discharge of the insolvents was directed to be rescinded. The principal ground on which the judgment was given was the omission on the part of the defendants to execute the deed of composition. See the report, 28 U. C. Q. B. 266.

The signature of the defendants was affixed to the deed of composition about three weeks before the 1st of April, 1869, and after the commencement of the action. It did not appear in the evidence that any leave had been given by the learned Judge of the County Court to sign the deed, or that it had been refiled after it was executed by the defendants. The witness who saw it signed by defendants said it was executed by them in Mr. Ponton's office, and Mr. Northrup, the clerk of the County Court, was not present.

The plaintiff's counsel objected at the trial that the deed of composition and discharge was not executed by defendants at the time this action was brought.

2. That that deed only relates to partnership debts of the insolvents, and does not bind non-assenting creditors for partnership debts or other debts.

3, The deed should have been for the benefit of all the creditors, without distinction as to partnership debts or individual debts.

4. There was no proper or sufficient evidence of the execution of the instrument by the discharging creditors, the execution of some being in the name of partnership firms, and it not being

shewn by which partner of the firm, add whether under power of attorney or otherwise.

5. Thomas was not a duly appointed assignee, not being appointed by a duly qualified board of trade

6. It was only shewn that three or four creditors proved their claims before the official assignee, and that is not sufficiently proven.

7. As to the plea of payment of money into court, the amount paid in does not cover the interest, but only the face of the note, and therefore defendants must fail.

The learned judge called the attention of the parties to the fact that the pleas were in bar of the action, and not to its further maintenance, as they should have been, the deed having been executed by the defendants after the commencement of this suit. He, however, gave leave to amend by putting the pleas right as to this point if necessary.

He disposed of the case without a jury, and decided in favor of the defendants, reserving to the plaintiff leave to move to enter a verdict for him for such amount as the court might think fit, if of opinion he was entitled to succeed in the suit. He added, he would do what he could to maintain the arrangement, but there were grave questions which required consideration.

In Easter Term, 1869, *K. Mackenzie*, Q. C., obtained a rule *nisi*, pursuant to the leave reserved, to enter a verdict for the plaintiff for $155.69, or such other amount as the court might think the plaintiff entitled to, on the grounds taken at the trial, and on the ground that on the evidence the verdict should have been entered for the plaintiff for the said sum, or some other sum; or for a new trial, the verdict being contrary to law and evidence.

In the same term *Wallbridge*, Q C., shewed cause. Under section 9 of the Insolvent Act of 1864 the deed binds all the creditors of the insolvents. There were no individual creditors. The plea shews it, and it was so proved at the trial: *Bamford* v. *Clewes*, L R. 3 Q B. 729. As to the executing creditors signing in the names of their firms, they not only sign the instrument but have received the composition under it, and therefore are bound by it, and no one else can raise the objection now. *Bloomley* v. *Grinton et al.*, 9 U. C. Q. B. 455, is an authority establishing this point. As to Thomas's authority as assignee, the plaintiff proved his debt before him, and elected to prove under the commission, and cannot now deny the authority of the assignee, or proceed in this action: *Elder* v, *Beaumont*, 8 E. & B. 353; *Newton* v. *Ontario Bank*, 13 Grant 652; s. c. in Appeal, 15 Grant 283. The plaintiffs by taking issue on the plea generally merely put in issue the execution of the deed, and not the performance of all conditions precedent: *Bramble* v. *Moss*, L. R. 3 C. P. 461. It is sufficient to shew that the deed is executed by the proper number of creditors representing the proper amount of debts, and it is of no consequence whether they prove their claims before the assignee or not. As to the amount paid into court, the note was 5s. more than the plaintiff was entitled to under the composition arrangement. He cited *Wright* v. *Jelley*, L. R. 4 Ex. 9; *Rixon* v. *Emary*, L. R. 3 C. P. 546; *In re Holt and Gray*, 18 Grant, 568; *McNaught* v. *Russell*, 1 H. & N. 611; the judgment in this court when the allowance of the discharge of these defendants was set aside, 28 U. C. Q. B. 266; *Clapham* v. *Atkinson*, 4 B. & S. 722; *Dingwall* v. *Edwards*, 4 B. & S. 738; *Hodgson* v. *Wightman*, 1 H. & C. 810.

K Mackenzie, Q C., and *Henderson* (of Belleville) contra. The deed of composition and discharge was signed by defendants after it was filed, only about three weeks before the trial, without any leave or authority from the County Judge to make the amendment.

Sub-sec. 2 of sec. 9 of the Act of 1864 contemplates the deposit of the deed with the assignee after it has been duly executed. Sub-sec. 6 authorizes the filing of the deed with the clerk of the court, and an application for its confirmation, after giving notice. It must be filed so that the creditors may have access to. The statute contemplates notice to be given and steps taken within a certain time after filing, or after the deed has been duly executed. Now when was this deed duly executed, and as a duly executed deed has it ever been filed? There has been a material alteration of the deed after it was filed Under this English Act this would avoid the deed: *Seilin* v. *Price*, L. R. 2 Ex. 189. *Wood* v. *Slack*, L. R. 3 Q. B. 379, merely decides that where the deed when registered was a valid instrument, adding two names to the schedule would not make it void. The second and third grounds of objection seem concluded by the judgment already given by this Court in disallowing the discharge of the defendants by the County Judge of Hastings, and the following authorities: *Rixon* v. *Emary et al.*, L. R. 3 C. P. 546; *Ex parte Glen, In re Glen*, L. R. 2 Ch. App. 670; *Tomlin et al.* v. *Dutton*, L. R. 2 Q. B 466; *European Central R. W. Co.* v. *Westall*, L. R. 1 Q B. 164; *Steiglitz* v. *Eggington*, Holt N. P. C. 141. The extract from the evidence given before the commissioner, and filed on the trial, shews there were separate debts. There were only sixteen names to the deed representing debts over $100. Five of these names are signed by procuration. Being a deed each one must execute it under seal: *Steiglitz* v. *Eggington*, Holt N. P. C. 191. The five persons executing without authority reduces the number to eleven.

The plaintiff could not appeal until he proved his debt, and the deed of composition and discharge was not entered into until after the assignment. His proving under the commission is no bar to this action: *Harley* v. *Greenwood*, 5 B. & Al. 103. The payment into Court is not sufficient. It should include the interest down to the time of paying into Court: *Kidd* v. *Walker*, 2 B. & Ad. 705.

RICHARDS, C.J.—The deed of composition and discharge is set out in the judgment of Mr. Justice Wilson in the matter of the insolvency, when it was before this Court, 28 U. C. Q. B. 266. It seems only to refer to the debts of the insolvents, and not in any way to their individual debts and creditors, if they have any. The authorities referred to shew this is the effect of the deed, and that it does not bind non-assenting creditors of the partnership or of the individual partners only This seems to be the view entertained by Mr. Justice Wilson in the judgment referred to.

It is contended that both defendants had individual liabilities. Williamson, in his evidence before the Judge in the Insolvent Court, which

was filed on the trial of this cause, said he had a lease of C. Brown, of Montreal, of a dwelling house, for fifteen months, payable quarterly; the lease had not expired when the assignment was made; it was leased to himself individually. There was further evidence about the debt to his mother, which he said was a gift and not a debt, and she had agreed to forgive him for working for her a year since the assignment. He said he had paid a quarter's house rent after the assignment; the lease was current at the time of the assignment; whatever rent was due at the time of the assignment, or accrued after, he paid after the assignment. Was not certain if rent due at time of assignment; there was disputed rent unpaid arising out of a dispute about taxes.

In Garratt's evidence, taken before the Judge of the Insolvent Court, and also filed on the trial, he said he lived in Mrs. Hunt's house and had a written lease for five years from the 1st September, 1866, rent payable quarterly: lease then current: part of a quarter had accrued, but was not due when the assignment was made. He added that the list attached to the deed of composition and discharge shewed all his liabilities as far as he knew them.

The nature of the transaction between Williamson and his mother is not clearly shewn by that portion of his evidence taken before the Judge, which was referred to on the trial of this cause. He says he had borrowed money from his mother, in all about $1,200. The largest part went into the business. "It was to be paid when I was able. I owe her that amount, *except the amount of notes I turned out to her.* I owe her still the difference. * * * At the time the assignment was made I owed her a balance, and made agreement since I made assignment to remain the year and wipe out the debt. * * * It was a gift, and not a debt which she could sue for * * * I had agreed with brother for $400 a-year. He and mother live together. My services go to her, and she forgives my debt." It does not appear, what these notes were that he turned out to her; nor when he turned them out. If he owed her so as to justify him in turning out notes to her, it would seem to be a debt which he owed; and she is and was so much his creditor, that he agreed to work a year to discharge the liability. This looks very like a debt.

The lessor of the house under the sixth section of the Insolvent Act of 1864, and section 14 of the amending Act of 1865, would seem to have a claim on the estate of the insolvents for his rent then due or accruing due under the lease for the year then current, or perhaps more, and this certainly seems like an individual debt.

These latter remarks will apply equally to Garratt's lease then subsisting.

The deed of composition and discharge at the commencement of this suit, and to within three weeks of the trial, according to the judgment of the court, was not a valid and binding instrument on the plaintiff, for the reason that it was not signed by the insolvents. The instrument, as I understand, had been filed. The discharge of the defendants under it had been confirmed, and an order made granting the discharge absolutely. This order having been appealed from, was disallowed. Without taking any further steps in the Insolvent Court, or giving any further notice, and before the two months contemplated by subsection 7 of section 9 of the Insolvent Act of 1864 have elapsed, these defendants, having become parties to the deed, set it up against the plaintiff's claim in this action.

(*To be continued.*)

CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—I wish to draw your attention to the 60th section of the Dominion Statute, 32, 33 Vic. cap. 22 (1869), whereby, without declaring such offences as are therein provided against, to be crimes or misdemeanors, it is declared, that "whosoever *unlawfully or* maliciously commits any damage, injury or spoil to or upon any real or personal property whatsoever, either of a public or private nature for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exeeeding $20, as to the justice seems meet, and also such further sum of money as appears to the justice to be a reasonable compensation," &c.; "which last mentioned sum, &c., shall be paid to the party aggrieved," &c., and if the moneys are not paid with costs, "the justice may commit the offender to the common gaol, &c., not exceeding two months, &c., and kept at hard labor, &c.; Provided that nothing therein contained is to extend to cases where the party acts under a fair and reasonable supposition that he has a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game," &c.

Now it occurs to me to enquire of you, that as the words "unlawfully or maliciously" are disjunctive, whether or not any complaint for a trespass where the damage is within the prescribed amount, and there can be no pretence for the party acting under a supposition of right, may be tried summarily by a justice of the peace under this statute? because every trespass is "unlawful" whether it be "malicious" or not.

Most of the preceding sections constitute particular acts "unlawfully and maliciously" committed, misdemeanors or felonies, and certain other acts of a more grievous nature are constituted felonies; or the words "unlawfully" and "maliciously" are coupled by the conjunction "and." So that if there exists no doubt (which I do not admit) as to the

power of the Dominion Legislature over that class of cases. I should like your opinion as to whether or not the jurisdiction of prescribing a remedy for a civil trespass does not belong exclusively to the Provincial Parliament under the British North America Act, 1867?

I observe the Acts respecting petty trespasses in Upper Canada, Con. Stat. U. C. cap. 105, and Statute of Canada, 25 Vic. cap. 22, remain unrepealed. I imagine if either were to be repealed it would have to be done by the Provincial Parliament under the 13th sub-section of section 92 of the British North America Act, 1867; and if similar or any other provisions were to be made by the same Parliament it might well be done under the 15th sub-section of the same section, because there is power given to impose 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 that section. The Dominion Act of 1869 purports to repeal the 28th section of Con. Stat. of Canada, cap. 93, as set forth in Schedule B. of Dominion Statute of 1869, cap. 36, p. 410, unless the second paragraph of the 1st section, which provides a very wide field for thought and consideration, that "such repeal shall not extend to matters relating solely to subjects as to which the Provincial Legislatures have under the B. N. A. Act, 1867, exclusive powers of legislation," limits the repeal, and withholds from its provisions certain cases of petty trespass.

It would be interesting to know your opinion as to whether section 28 of Consolidated Statutes of Canada, cap. 93, or the section of the Dominion Statute just referred to is to be regarded as the sole authority for a summary proceeding for a petty trespass not maliciously committed. You will observe that the terms 60th section of the Dominion Statute, and of the 28th section of the Consolidated Statutes of Canada, cap. 93, are not the same. The terms of the latter are, "If any person *wilfully or maliciously* commits any damage," &c., and the terms of the former are, "Whosoever *unlawfully* or maliciously commits, &c., any damage," &c.

Yours, &c.,

February, 1871. UNION.

[The above affords an argument for the existence of a competent court to settle all such questions, and thereby avoid involving people who have to administer the law in trouble. The subject is well deserving discussion. If the expression of our opinion would probably serve a useful purpose, we should not hesitate to consider it in all its bearings. It involves one of many difficult questions of constitutional law which will present themselves for decision under our new political state of existence; but because those of our subscribers who are magistrates, and who are not supposed to be well versed in law, may be misled, we think it well to say as to the first question put by "Union," that the 92nd section of the B. N. A. Act, 1867, confers upon the Provincial Legislature the power (to the exclusion of the Dominion Parliament) to make laws in relation to property and civil rights; and, as a general proposition, we think with that power goes the right to legislate, prescribing remedies and punishments for trespass or injuries thereto—for whatever affects the subject at all, the power to legislate upon it must be confined to one jurisdiction, and cannot be divided between the two legislative bodies—that is, for anything short of, or apart from, a criminal offence. If it be considered necessary to constitute any act or trespass relating to property, or any other subject, a crime, the Provincial Parliament would still possess the undoubted right to prescribe and control the *civil* remedy; the Dominion Parliament alone would have the exclusive jurisdiction to declare the crime and prescribe the procedure and the punishment; but nothing short of enacting a law declaring the crime would take the remedy out of the jurisdiction of the Provincial Legislature.

As to the last question in "Union's" letter, we think the word "maliciously" does not materially affect the question, unless the Dominion Parliament were to declare that the "wilfully AND maliciously," or "wilfully OR maliciously," or "unlawfully *or* maliciously" doing certain acts affecting a man's property or civil rights should constitute or be declared a crime or misdemeanor; and for want of that exercise of jurisdiction, we are, as at present advised, of opinion that the 22nd section of C. S. of Canada, c. 93, is still in force, and that it will be probably decided by the Dominion General Court of Appeal when constituted, and that if the Dominion Parliament chooses to exercise jurisdiction on the subject it can only be done by way of making a law in such a form that there will be no doubt of

its intention to declare certain acts affecting property and civil rights crimes.

It has been held that whenever the imposition of punishment may be by imprisonment for enforcing any law, that such is to be regarded as criminal law; but we apprehend that that could be scarcely held to apply to our Constitutional Act of 1867, because, as observed by "Union," the power to impose such punishment is expressly conferred upon the Provincial Legislatures for enforcing any law of the Province made in relation to any matter coming within any of the subjects concerning which exclusive jurisdiction is conferred upon them; whilst jurisdiction as to the criminal law and procedure in criminal matters is expressly withheld.

There is another question which may arise out of the peculiar provisions of the B. N. A. Act, 1867, that is not touched by "Union," which it may interesting to consider; and it is this:—Although the Dominion Parliament may declare the criminal law, and prescribe the procedure in criminal cases, what right has that body to pass any enactment constituting a jurisdiction for the trial of criminal offences when the Provincial Legislatures have exclusively the jurisdiction conferred upon them by the 14th sub-section of the 92nd section of organizing Provincial Courts of both civil and criminal jurisdiction?—unless the enactment of the 101st section, which gives the Dominion the power of establishing any additional courts for the better administration of the laws of Canada, means that, notwithstanding the power so conferred on the Provincial Legislatures, the same jurisdiction exists in the Dominion Parliament—EDS. L. J.]

THE COURT IN A FOG—Last week Mr. Justice Blackburn reprimanded the usher of the Court for opening or not opening the windows on foggy mornings, and subsequently told persons with coughs to leave the Court. Likely enough clergymen would be glad to order coughers to leave the church if they had the authority to do so. The learned judge ordered the gas to be put out, which resulted in partial poisoning, as the gas could not be turned of as soon as it was put out. Upon candles being called for, the usher informed the Court that there were only two candlesticks, which the judge shared with counsel. It did not occur to the usher to invest twopence in potatoes and extemporise candlesticks. When the new Law Courts are built there will be no more discomfort for lawyers or suitors. And when will the new Law Courts be built? Perhaps our great-grandchildren may see them commenced.—*English Paper.*

SPRING CIRCUITS, 1871.

EASTERN CIRCUIT.—*Mr. Justice Wilson.*

Brockville	Tuesday	March	21
Perth	Tuesday	"	28
Ottawa	Monday	April	3
Kingston	Wednesday	"	12
Cornwall	Tuesday	"	25
L'Orignal	Monday	May	1
Pembroke	Monday	"	8

MIDLAND CIRCUIT.—*Mr. Justice Morrison.*

Whitby	Monday	March	20
Napanee	Monday	"	27
Cobourg	Monday	April	10
Lindsay	Monday	"	17
Peterborough	Friday	"	21
Picton	Tuesday	May	2
Belleville	Friday	"	5

NIAGARA CIRCUIT.—*Mr. Justice Galt.*

Hamilton	Monday	March	20
Milton	Wednesday	April	12
St. Catharines	Monday	"	17
Welland	Monday	"	24
Barrie	Monday	May	1
Owen Sound	Tuesday	"	9

OXFORD CIRCUIT.—*The Chief Justice of the Common Pleas.*

Guelph	Monday	March	20
Woodstock	Monday	"	27
Berlin	Monday	April	3
Brantford	Monday	"	10
Stratford	Monday	"	17
Cayuga	Tuesday	"	25
Simcoe	Tuesday	May	2

WESTERN CIRCUIT—*The Chief Justice of Ontario.*

Sandwich	Tuesday	March	21
Chatham	Tuesday	"	28
Sarnia	Tuesday	April	4
St. Thomas	Tuesday	"	11
London	Monday	"	17
Goderich	Tuesday	May	2
Walkerton	Tuesday	"	9

HOME CIRCUIT.—*Mr. Justice Gwynne.*

Brampton	Tuesday	March	21
Toronto	Tuesday	"	28

Examining a woman in court, Dunning asked of a certain man, "Was he a tall man?"

Witness: "Not very tall, your honor; much about the size of your worship's honor?"

Dunning: "Was he good looking?"

Witness: "Quite the contrary; much like your worship's honor; but with a handsomer nose."

Dunning: "Did he squint?"

Witness: "A little, your honor; but not so much as your worship by a good deal."

Whereupon Dunning declared himself satisfied, and sent the witty old woman down. He was very coarse; which led "honest Jack Lee" to give him the following severe rub; Dunning was telling one day, in court, that "he had just bought some good manors in Devonshire."

"I wish, then," said Jack, "that you had brought some of your good *manners* here with you."