DIARY FOR AUGUST.

1. Mon. *Lammas.*
7. SUN. *8th Sunday after Trinity.*
13. Sat.. Last day for County Clerks to certify County rates to Municipalities and Counties.
14. SUN. *9th Sunday after Trinity.*
18. Thur. Last day for setting down and giving notice for re-hearing.
21. SUN. *10th Sunday after Trinity.* Long Vacation ends.
24. Wed. *St. Bartholomew.*
25. Thur. Re-hearing Term in Chancery commences.
28. SUN. *11th Sunday after Trinity.*
29. Mon. County Court (York) Term begins.

The Local Courts'
AND
MUNICIPAL GAZETTE

AUGUST, 1870.

THE DOMINION ARBITRATION.

The report of the proceedings on this important matter, which we publish in other columns, will be read with interest, not altogether for its intrinsic value as a decision upon a point which is new in this country, but more as a history of the case in its legal aspect.

As to the merits of the case, we have nothing to do, but as to the main legal point, whether the arbitration could proceed without all the arbitrators being unanimous, it is conceded that if it were merely a private arbitration there would be no room for doubt, but, as it is unquestionably of a public nature, it is contended that that fact makes all the difference and obviates the necessity of unanimity amongst the arbitrators. The majority of the authorities and those most in point are American, though there are English cases which seem to admit the principle contended for, bear out the contention.

It seems reasonable to look upon the arbitrators appointed under the provisions of the British North America Act, 1867, in the nature of a court ordained for a special purpose, and if a court, then clearly the majority rule.

It is true that the statute speaks of the "arbitrators;" but the mere use of that word does not necessarily prevent their being in reality something more than mere private arbitrators, and subject to the rule of law applicable to such; and the whole scope and tenor of the British North America Act, 1867, shews that something more was intended—and it may be remarked that even Judge Day does not appear to have expressed an opinion adverse to his co-arbitrators on this point.

We can scarcely imagine what the government of Quebec expected to take by the writ of prohibition which was issued from one of the courts of that Province, returnable next month, except it is desired to force the case to England for a final decision, and this would seem to be the object aimed at, though we doubt if that object will be attained, or if attained, that the result will be satisfactory to the promoters of the writ.

The objection that Col. Gray is a resident of Ontario, and therefore ineligible (when in fact he was a resident of New Brunswick when appointed, and moved to Ottawa to attend to his public duties), seems so feeble, not to say childish, as to betoken a weakness which cannot but damage the case of the Quebec government, both in a political and legal point of view.

The result of these proceedings will be looked for with much interest, whether viewed as a mere question of law on the point of unanimity, or on account of the large amounts at stake, the political bearing of the case, or the important constitutional questions involved.

LIQUOR LICENSES.

Two cases were recently decided by the Court of Common Pleas, arising out of convictions for selling liquor without a license.

In one of these cases (*Reg.* v. *Strachan*,) it was decided that a license to sell spirituous liquors, whether by wholesale or retail, is now necessary either in the case of a tavern or a shop, and in the case of a shop it must not be consumed on the premises or sold in quantities less than a quart. Therefore, the sale of a bottle of gin without a license is contrary to law; and that even if a license be necessary only on a sale by retail, the sale of a bottle of the value of sixty cents would be a sale by retail.

With reference to the form of the conviction it was held that it was not necessary to mention in the conviction the statute under which the conviction took place, nor that it should appear on the face of the conviction that the prosecution commenced within twenty days of the commission of the offence, nor to specify that it was a first or second offence, nor to state to whom the liquor was sold. The court also considered that it is not illegal to award imprisonment in default of distress, &c.

One of the judges in this case also expressed an opinion that although no new by-law had been enacted by the municipality under sec. 6, sub-sec. 6, of 32 Vic. cap. 32 (Ont.), the applicant was bound to have paid for the license, which he had in fact obtained, the amount due under the by-law then in force, and that the payment, after complaint, but before judgment, of the sum fixed by the latter act did not enure to make the license valid from its date.

In the other case that we refer to (*Reg.* v. *King*,) the conviction being under the above act, and stating the time and place of the sale of the liquor, the conviction was considered sufficient, though it did not specify the kind and quantity of the liquor sold.

Shopkeepers would do well to note an additional part of the judgment in this case, to the effect that the *owner* of the shop is criminally liable for any unlawful act done therein, in his absence, by his clerk or assistant; as, for instance, in this case, for the sale of liquor without license by a female attendant. But it might be otherwise if it appeared that the act of sale was an isolated one, wholly unauthorized by him, and out of the ordinary course of his business.

The informer is a competent witness in cases arising under 32 Vic. ch. 32 of the Ontario Statutes.

LIABILITY FOR ACCIDENTS.

We have read with much interest a pamphlet sent to us some time since on "The Evils of the Unlimited Liability of Masters and Railway Companies for Accidents arising from the negligence of Servants, especially since Lord Campbell's Act." The paper is written by Joseph Brown, Esq., Q.C., and was read before the Social Science Association.

The view most favorable to masters and railway companies is advocated very strongly and very ably, but we cannot but feel that the zeal of the writer in the cause he upholds has led him into enunciating some opinions which can scarcely be sustained.

One evil that he complains of is—"the great number of such actions and the length of time which the trial of them occupies, to the hindrance and delay of commercial and other important business"—is certainly not felt in this country as such a hardship as requires any serious consideration.

There is however, much truth in the following remarks:—

"The great evils, however, which I have mentioned, serious as they are, are not those to which I have undertaken to call the attention of the Society. The great and crying evil belonging to the class of actions in question is this—that the penalty of the act of negligence, even when it is proved ever so clearly, almost always falls on one who is perfectly innocent of any blame. A servant carelessly drives a cart over the plaintiff and breaks his leg; but the servant can't pay anything—his master can—therefore the law makes the master pay the damages. Of course the servant in ninety-nine cases out of a hundred is wholly unable to repay his master. The result is that the master is punished, and the servant who did the mischief goes scot free."

But his language is, it seems to us, extravagant when he says:—

"If a tradesman who has saved £10,000 by a life of industry and frugality, sets up a brougham, and his coachman happens in a moment of carelessness to drive over and kill a merchant who is making £2,000 a-year, the master may be mulcted of his whole fortune in damages, though he was entirely blameless."

He argues that the rule *respondeat superior* is only applicable with justice where the servant has followed his master's orders in doing the very act complained of, and that it ought never to be applied where the act done is beyond or contrary to orders; and in support of his contention he calls in the analogy of the criminal law, and cites the institutes of Menu, "the oldest system of law known to us," where it is laid down that,—

"'Where a carriage has been overturned by the unskilfulness of the driver, then, in case of any hurt, the master shall be fined 200 panas; that if the driver shall be skilful but negligent the driver alone shall be fined, and those in the carriage shall be fined each 100, if the driver be clearly unskilful.'"*

He continues: "The rule which thus approved itself to the mind of the Indian lawgiver 3,000 years ago, rests upon the immutable distinction of justice and reason, that in the one case the master is to blame, and in the other he is not. He must of necessity employ servants to do a multitude of things which he can't do himself; he does his best to employ skilful and careful servants; this is all he can do, and, when he

* "Institutes of Menu," by Sir W. Jones, p. 181, ss. 293, 294, last edition.

has done it, to make him answerable for an act of carelessness of the servant is to charge him with what he neither committed nor was able to prevent or foresee.

"Let me guard myself against misunderstanding, by saying, that I am not contending for any immunity for the master in any case where he is justly chargeable with personal neglect or blame. For instance, if he makes regulations calculated to cause mischief—if he knowingly provides materials improper for the work in hand—if he does not exercise due vigilance over his labouring men, and in many other cases, he might fairly be held liable as for his own fault. What I contend against is the law which makes him suffer where he is blameless, the fault lying entirely with the servant—as it commonly does."

After arguing out the position he supports at considerable length, Mr. Brown proposes to carry out his views as to the limitation of the master's liability in this way:—

"Let it be enacted that in no case should a master be responsible in damages for the negligence of a servant beyond the amount of £200, or any other fixed sum which may be considered a sufficient penalty for keeping a servant who committed an error. If, however, the public come to see the injustice of punishing a master at all, where he has taken due care to hire an experienced servant of good character, the requisite amendment of the law would be effected by enacting as follows:—1. That no action should be brought against the master without joining the servant who did the mischief as co-defendant. 2. That the master should be entitled to acquittal on proof that he took due care in the engagement of the servant, and was personally free from any other kind of blame. 3. That the guilty servant should be compelled to pay a part of his wages weekly towards the satisfaction of the damages, with a summary remedy to enforce payment. Imprisonment might be justly added in cases of injury to life or limb.

"I submit that such a law would be far preferable to that which now subsists. To see the way in which it operates is enough to extort from one an outcry against the perversity of mankind, and the imbecility of laws to deal with it. Because men are prone to negligence, and because society requires some protection from this propensity, the law has endeavoured to give it by allowing such actions as I have described. What can be more laudable or politic in appearance? Yet the effect has been to let in a flood of fraud and perjury, imposture and injustice—such as excites a doubt whether greater mischief would arise from abolishing such actions altogether. Too often they exhibit the spectacle of a court of law laboriously doing iniquity in the name and with the forms of justice—a scene the most revolting to every right-minded man."

Thus far the Essayist's remarks are mainly confined to the liability of individuals who are obliged to employ servants. He then proceeds to discuss its connection with the liability of railway companies for accidents arising from the default of those who carry on the business, and he considers the question in two aspects—accidents to strangers and to passengers; and there is undoubtedly a distinction fairly to be drawn. He thus speaks of the exceptional nature of railway traffic:—

"Railway traffic is a business which cannot be carried on without danger nor without occasional accidents; and when an accident does occur, the damage arising from it is often so enormous as to be out of all proportion to the payment made by the injured passengers to the company, and not less out of proportion to the act of delinquency which brought about the accident. A momentary oversight by a weary signalman may cause the loss of twenty lives or damages to the amount of £50,000. The public will have trains running from twenty to fifty miles an hour; they will have excursion and luggage trains; and this cannot be done without serious accidents occasionally happening. Drivers and signalmen are only mortals; they will at times be off their guard, or weary, or drowsy, or negligent. Probably they are as careful now as they are ever likely to be. The system of punishing railway companies by enormous damages for accidents arising from the errors or neglects of drivers and other servants has been in force a great many years, without putting a stop to accidents. Whatever amount of care is exercised by railway managers in selecting good and careful servants, the latter are but men and not guardian angels without wings, at two guineas a week, as the public would have them. Is any man so green as to believe that railway traffic can ever be carried on without serious accidents? As well might we expect to navigate the ocean in future without shipwrecks. Every man who embarks in a ship for a distant voyage knows that he must risk his life in so doing, and so does every man who gets into a railway train. The two things are inseparable; the passenger voluntarily encounters the hazard, without which he can't make the journey; he becomes a partner in the risk, and must share the loss when it happens. If a man were to go up in a balloon, and were to break his leg in the descent, many people would say, 'What else could he expect?'

The public can't see that this applies to a journey by railway, and yet our fathers would certainly have said the same of any man who got hurt while travelling forty miles an hour. Is it fair, therefore, to put all the loss on the railway company when an accident happens, seeing that railway travelling cannot be carried on without accidents? The law recognises this in other cases. Where a servant voluntarily takes employment under a master who carries on a dangerous trade, such as the making of gunpowder or the blasting of slate quarries, the law does not allow him any remedy against his master for accidents arising from the nature of the business, even though caused by the neglect of the other men employed in it. The reason is that, by entering into the business he voluntarily ran the risk incidental to it."*

The learned author then enlarges upon the following points: that the damages arising from railway accidents are out of all proportion to the payment received from the passenger and to the error committed by the company's servant: that no infliction of damages can compel or enable directors to do more than employ good servants, it cannot prevent or guard against the errors to which the best servants are liable; and that the enormous amounts given by way of compensation in England greatly encourage attempts at fraud and imposture on companies.

This very able pamphlet concludes by a suggestion that,—

"Some special tribunal ought to be established for the cognizance of all railway accidents —such, for example, as exists in the Admiralty Court, where the judge is assisted by experienced nautical men as assessors. A court composed of one of the judges, with two experienced medical men as assessors, having powers to make private examinations of the claimant, would surely be much better able to detect fraud and imposture and to probe suspicious claims to the bottom than a jury. The experience which they would acquire in dealing with fictitious or fraudulent claims would often prevent the court from being made the tool of rogues. Such a court might exercise with discretion, and ought to be armed with inquisitorial powers. Whatever odious terms may be applied to such a tribunal by popular outcry, every lawyer who has been in the secrets of these cases, knows by experience that all the existing powers of courts of law are wholly inadequate to ferret out, expose and punish the infamous cheats which are daily practised by fraudulent claimants. When one sees, as in a recent case, a man claiming £2,000, and recovering a verdict for £5, one is led to wish that the courts would return to the old practice of amercing '*pro falso clamore suo.*' I have reason to believe, and I say it with disgust, that I have more than once been made the unwitting instrument of cheating railway companies; and no counsel who has been concerned in these cases is free from the same unpleasant suspicion.

"One and the same tribunal ought also to hear and determine all claims arising out of the same accident. This alone would do something to moderate the excessive damages often given by juries, each of whom only hear one case, and are not allowed to take notice of the numerous other large claims behind. It would also diminish the expense arising from so many different actions.

"I venture another suggestion. In very many claims for personal injuries by accidents, the amount of damages chiefly depends on whether the injury will be permanent, or whether nature will not remedy it in a few months. On this point it constantly turns whether the damages should be £500 or £2,000. At present the jury have to decide it on conflicting medical opinions, before sufficient time has elapsed to test the permanence of the injury. The verdict is probably for the larger sum, and very soon after the plaintiff will be seen about and as well as if he had never been hurt. It is astonishing what miraculous cures are wrought by a verdict for large damages! I suggest that in all such cases the court ought to have power to adjourn the inquiry for a time in order to test the supposed permanence of the injury upon such terms as might be just. This might sometimes prevent a company from being compelled to pay five times the real amount of damage."

* Judgment in *Hutchinson* v. *York Railway Company* 5 Exch. 343.

SELECTIONS.

UNPUNISHED DEPREDATORS.

"A GUARDIAN of Two Wards" complains to the *Times* that there are no laws to prevent the "depredations" of usurers. "Instances of strict protection of property, some sad, some almost comical, occur," he observes, "every day before our justices." Three weeks' imprisonment for stealing an apple; ditto for plucking a sprig of lavender; two months for a leaden paper-weight; six years for stealing bones from a dunghill, and so forth; while card-sharpers, skittle-sharpers, and betting-swindlers are watched and punished. And yet there is no check and no law for the "great scheming depredators," the great and wealthy nondescripts, half jewellers, half

money-brokers, who pursue inexperienced youths, just setting out in life, with offers of "confidential assistance," entangle them in their meshes and fatten on the spoil. "Why," asks the guardian, "should there not be a law to make all interest beyond a certain rate illegal and irrecoverable."

The reason is simple enough. Up to a comparatively recent date there was such a law, the continuation of a series running back to the middle ages. It was repealed simply because it was found to do harm instead of good. Of late years judge after judge has censured the impolicy of attempting to hedge round the extravagent or improvident with such paternal restrictions. Equity will still relieve against transactions whose grossness brings them within the limits of fraud, and as the guardian is probably aware, his wards, while infants, are protected by their own disability to enter into a binding contract; beyond this the law does not relieve anyone from any bad bargain he may be foolish enough to make with his eyes open. In truth no laws can or could give a complete protection to young men bent on folly and extravagance (unless they could save them from themselves), and any attempt to do so has merely this result, that it encourages extravagance by deluding its objects with the idea that they can both eat their cake and have it, and sets the harpies who prey on them adjusting their rates to meet an additional risk. The guardian complains of a "black gap between law and justice." In many directions there is such a gap, but in this particular matter the gap complained of is nothing more than the mere inevitably interval by which in a sinful world, "law" falls short, and must ever fall short, of natural equity. If my neighbour attacks me at my garden gate with a big stick, or persists in coming into my garden and trampling on my flowerbeds, the law gives me a remedy; but there are a thousand petty discourtesies and annoyances at his command by which he can inflict upon me an equal amount of discomfort without being amenable to any law; and yet, if a paternal legislature were to attempt an approximation at a complete protection of each of us from the other, the interference would be unbearable, and the remedy far worse than the evil. The gap spoken of by the "Guardian of Two Wards," is one which it is beyond the province of law to bridge over: it is an attribute of law that it shall ever be bounded by such gaps, and this particular gap is not half so black as he paints it. He will do well, therefore, to lay aside his palette and colours, and try whether, by surrounding his two wards with wholesome and manly influences, he cannot render them entirely superior to the wiles of the "depredators" of whom he complains. By so doing he will afford them a protection better than all the many laws which ever existed.—*Solicitors' Journal and Reporter.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

ASSIGNMENT—INSOLVENT ACT OF 1864, SEC. 8—C. S. U. C. CH. 26, SEC. 18—A debtor being in difficulties, assigned all his property to a creditor, who agreed to pay a composition of 40 cents in the dollar within a year. This had been paid, except to defendant, who refused to accept it, and issued execution On an interpleader between the assignee and defendant to try the title to the goods assigned, the jury having found the transaction *bona fide*.

Held, affirming the judgment of the County Court, that such assignment was not avoided by the Insolvent Act, sec. 8, for that statute applies only where proceedings are taken, and as against a person claiming, under it.

Held, also, that the assignment was not invalid under Consol. Stat. U. C. ch. 26, sec. 18. —*Squire* v. *Watt*, 29 U. C. Q. B. 328.

INSOLVENCY—CONDITIONAL DISCHARGE—PREFERENTIAL PAYMENT.—Upon appeal it appeared that the assignment was made on the 10th June, 1868; that on the 15th April previous, the insolvents had paid to their father two promissory notes, made by them in July and August, 1867, at three months, for $934. The father in his examination swore that these notes were given by the insolvents for their respective private debts *bona fide* due to him for money lent and paid, and for their board between 1863 and 1866; and that he had no knowledge of their business until the 27th April, 1868, when he was asked by one of them for an advance of $2,000, which he refused, not being satisfied with the statement of their affairs then produced to him. His statement was confirmed by the insolvents. The learned county court judge upon this evidence decided that the payments to the father were preferential, and he made the discharge of the insolvents within three years conditional upon their payment of the amount so paid. Upon appeal:

Held, 1. That the evidence could not be assumed to be untrue, and that the payments therefore could not be treated as preferential. 2. That if this were otherwise, the order could not be upheld, for the statute only authorises conditions within the power of the insolvents to comply with.—*In re George H. Wallis & Charles H. Wallis*, 29 U. C. Q. B. 313.

FENCE VIEWERS—DEFECTIVE AWARD BY—JUSTIFICATION UNDER—PLEADING.—The plantiff and

defendant, occupying adjoining lots, having disputed as to the drainage of surface water, referred the question to fence viewers, who awarded that defendant should open a ditch from the line fence between himself and defendant, through the plaintiff's farm, of sufficient depth to carry off the water then in the ditch opened by defendant, about twenty rods in length, and that the plaintiff should make and keep open this same portion of ditch, commencing at the line fence, and of sufficient length, width and fall, to carry off the water; to be two and a half feet deep at the line fence; said ditch to be made before the 1st October, 1865

Held, following *Murray* v. *Dawson*, 17 C. P. 588, that the award was bad, for not sufficiently defining the point of commencement and course and position of the ditch.

Semble, however, that it was not bad as decided in that case, for omitting to specify the time within which each party was to perform his share of the work, for that the time mentioned applied to both.

To an action for trespass on the plaintiff's land, defendant pleaded justifying under the award, alleging that the plaintiff paid half the expense of the award as thereby directed, and that defendant, in pursuance of it, having first duly notified the plaintiff, entered on the plaintiff's land and opened the ditch there as directed by the award, doing no unnecessary damage: *Held*, that the plea was bad, as setting up a right which the award, being invalid, could not give; but that the facts might be found to support a plea of leave and license.—*Dawson* v. *Murray*, 29 U. C. Q. B. 464.

SEDUCTION — EVIDENCE OF RAPE—DUTY OF JUDGE—NEW TRIAL REFUSED —*Held*, following *Walsh* v. *Nattrass*, 19 C. P 453, that where, in an action of seduction, the evidence of the witness shews that a rape was committed upon her, it is the duty of the Judge, in the interest of public justice, to stop the case, and not leave it to the jury, with a direction to find for defendant, if in their opinion it was rape; and this, even where the Judge himself is not clear that a rape has been committed. But *Held*, that *defendant* cannot set aside the verdict for misdirection in this respect, as this will only be done *in the interests of public justice.*—*Williams* v. *Robinson*, 20 U. C. C. P. 255.

SCHOOL RATES—LEVY UPON NON-RESIDENT OF SCHOOL SECTION —School trustees, and collectors under their warrants, have no power, either under Con. Stat. U. C. ch. 64, or 23 Vic. ch. 49, to levy on the property of a non-resident of the school section for rates assessed in respect of property within that section —*The Chief Superintendent of Education in re Chapman* v. *Thrasher et al.* 20 U. C. C. P. 259.

CONVICTION BY MAGISTRATE—C. S. C. CH. 93, SEC. 28—INSUFFICIENCY —*Held*, that a conviction, purporting to be under Con. Stat. C. ch. 93, sec, 28, charging that defendant, at a time and place named, wilfully and maliciously took and carried away the window sashes out of a building owned by one C., against the form of the statute, &c., without alleging damage to any property, real or personal, and without finding damage to any amount, was bad, and the conviction was therefore quashed.—*Regina* v. *Caswell*, 20 U. C. C. P. 275.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

STATUTE OF FRAUDS — SUFFICIENT NOTE IN WRITING —The owner of land gave parol authority to an agent to sell; the agent accordingly entered into a parol contract for the sale, and communicated the fact and the particulars of the contract to his principal by letter.

Held, a sufficient note or memorandum in writing to satisfy the Statute of Frauds.—*McMillan* v. *Bentley*, 16 Chan. Rep. 387.

BUILDING SOCIETIES—POWER TO MAKE NOTES —PLEADING.—Declaration on a promissory note made by defendants, a Building Society, incorporated under Con. Stat. U. C. ch, 53 *Held* good on demurrer; for they might legally make notes under certain circumstances, and it would not be assumed that they had acted illegally.—*Snarr* v. *The Toronto Permanent Building and Savings Society*, 29 U. C. Q. B. 317.

BOUNDARY LINES—EVIDENCE.—*Held*, that the entries in the diary of the surveyor, together with a small piece of map, also produced, supposed to be his (which was all that remained in the Crown Lands office shewing the lines in question run), and the trace of a blaze for a great part of the way, were evidence of the fact of the lines having been run by him in the manner in which he was directed to run them by his instructions (which were produced), although there was no further evidence upon the ground that the original lines had been run.—*Smith* v. *Clunas et al*, 20 U. C. C. P. 213.

PROMISSORY NOTE—STAMPS NOT WHOLLY CANCELLED.—The non-cancellation of some of the stamps to a promissory note, though the rest have been cancelled, invalidates the note, and the plaintiff cannot recover upon it.—*Lowe* v. *Hall*, 20 U. C. C. P. 244.

BILL OF EXCHANGE ADDRESSED TO SECRETARY OF CO.—ACCEPTANCE IN NAME OF CO., AS SECRETARY—PLEADING.—In an action against defendant, by endorsee, on the following bill of exchange:

$100. MONTREAL, Feb. 19, 1869.

Two months after date to the order of myself, at the Jacques Cartier Bank, in Montreal, eight hundred dollars, value received, and charge the same to account of

E. E. GILBERT.

JAMES GLASS,
Secretary Richardson Gold Mining Co.,
Belleville, Ont.

Accepted, The Richardson Gold Mining Co., per JAMES GLASS, *Secretary.*

Held, on demurrer, not to be the acceptance of defendant and that he was not personally liable. —*Robertson* v. *Glass*, 20 U. C. C. P. 250.

WILLS—MISTAKE IN EXECUTION—HUSBAND AND WIFE.—A husband and wife made wills in each other's favor, but by mistake each signed the will of the other. After the death of the husband an act of Assembly was passed, giving the Register's Court the power of a Court of Chancery, and authorizing it, at the petition of the wife to reform the paper and admit it to probate on proof of the alleged mistake. On the filing of the petition authorized, *held:*

1. That the jurisdiction of Chancery would only attach after probate.

2. That it has jurisdiction only to construe or reform an instrument already made; it cannot execute one.

3. The will in this instance is a manifest absurdity, as it purports to give all the property of the wife to herself, and the real and personal estate of S. A. Alter vested on his death in his heirs-at-law and distributees under the intestate acts, and no special legislation could direct their rights; as against them it was unconstitutional.—*In re Estate of Geo. A. Alter, deceased*, U. S. Rep.

CANADA REPORTS.

DOMINION ARBITRATION.

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

IN THE MATTER OF THE ARBITRATION BETWEEN THE PROVINCES OF ONTARIO AND QUEBEC, IN THE DOMINION OF CANADA.

The British North America Act, 1867—Resignation of one arbitrator—Unanimity of arbitrators not necessary—Arbitration on public matters—Writ of prohibition from court of one Province.

Held, that as "The British North America Act, 1867," confers powers to the arbitrators appointed thereunder of a public nature, such powers may be exercised by the majority, and a joint award is therefore unnecessary.

The jurisdiction of the courts of one of the litigant Provinces to interfere to stay the proceedings on the arbitration, by writ of prohibition considered, and *held* that there is none.

[Ottawa and Montreal, February—July; Toronto, Aug., 1870.]

The British North America Act, 1867, section 142, enacts that "The division and adjustment of the debts, credits, liabilities, properties, and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada, and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec."

Under the provisions of this enactment the following persons were appointed arbitrators: The Hon D. L. Macpherson for the Province of Ontario, The Hon C. D. Day for the Province of Quebec, and the Hon. J. H Gray, a resident of the Province of New Brunswick, for the Dominion of Canada.

The arbitrators had several meetings, being attended by Hon. J. H. Cameron, Q C., as counsel for the Province of ntario (assisted by Hon. John Sandfield Macdonald, Q C., Attorney-General for Ontario, and Hon E. B. Wood, Treasurer of Ontario), and by T. Ritchie, Q C., Esq., as counsel for the Province of Quebec (assisted by Hon. Geo. Irvine, Q C., Solicitor General for Quebec.)

On the 28th May the arbitrators met to give a preliminary decision to form a basis for the preparation of their final award. The arbitrators disagreed however as to this basis, Mr. Macpherson and Col. Gray agreeing, and Judge Day dissenting.

This preliminary award of the majority, though not delivered for some time after the above date, was as follows:—

"The Arbitrators, under the B. N. A. Act, 1867, having carefully considered the statements made, and the propositions submitted by and on the behalf of the Provinces of Ontario and Quebec, and having heard counsel at length thereupon, do award and adjudge as follows:

1st. That the Imperial Act of Union, 3rd and 4th Victoria, chap. 35, did not create in fact or in law any partnership between Upper and Lower Canada, nor any such relations as arise from a state of co-partnership between individuals.

2nd. That the Arbitrators have no power or authority to enter upon any inquiry into the relative state of the debts and credits of the Provinces of Upper and Lower Canada respectively, at the time of their Union, in 1841, into the Province of Canada.

3rd. That the division and adjustment between Ontario and Quebec of the surplus debt beyond $62,500,000, for which under the 112th section of the "B. N. A. Act, 1867," Ontario and Quebec are conjointly liable to Canada, shall be based upon the origin of the several items of the debts incurred by the creation of the assets mentioned in the 4th Schedule to that Act, and shall be apportioned and borne separately by Ontario or Quebec, as the same may be adjudged to have originated for the local benefit of either; and where the debt has been incurred in the creation of an asset for the common benefit of both Provinces, and shall be so adjudged, such debt shall be divided and borne equally by both.

4th. That where the debt under consideration shall not come within the purview of the 4th Schedule,—whether the same shall or shall not have left an asset,—reference shall be had to its origin, under the same rule as in last preceding section laid down.

5. That the assets enumerated in the 4th schedule of the B. N. A. Act, 1867, and declared by the 113th section to be the property of Ontario and Quebec conjointly, shall be divided and adjusted, and appropriated or allowed for, upon the same basis.

6th. That the expenditure made by creation of each of the said assets shall be taken as the value thereof; and where no asset has been left, the amount paid shall be taken as the debt incurred, the arbitrators having no right to enter into or adjudicate upon the policy or advantages of expenditures or debts incurred by authority of, and passed upon by Parliament.

7th. It is therefore ordered, that in accordance with the above decision, the counsel for the said Provinces of Ontario and Quebec do proceed with their respective cases.

Judge Day dissented from this judgment in the following words:—

The undersigned arbitrator dissents from the foregoing decision of the Honourable D. L. Macpherson and the Honourable J. H. Gray, two of the arbitrators appointed under the B. N. A. Act, 1867.—

Because the said decision purports to be founded on propositions which, in the opinion of the undersigned, are erroneous in fact and in law, and inconsistent with the just rights of the Province of Quebec;

Because the relation of the Provinces of Upper and Lower Canada, created by the Union of 1841, ought to be regarded as an association in the nature of a universal partnership, and the rules for the division and adjustment of the debts and assets of Upper and Lower Canada under the authority of the said Act ought to be those which govern such associations in so far as they can be made to apply in the present case;

Because the state of indebtedness of each of the Provinces of Upper and Lower Canada at the time of the Union of 1841 ought to be taken into consideration by the Arbitrators, with a view to charge the Provinces of Ontario and Quebec respectively with the debt due by each of the Provinces of Upper and Lower Canada at that time; and the remainder of the surplus debt of the late Province of Canada ought to be equally divided between the said Provinces of Ontario and Quebec;

Because the assets specified in Schedule No. 4, and all other assets to be divided under the authority of the said Act, ought to be divided equally according to their value;

And thereupon the undersigned presents an award and judgment based upon his foregoing propositions, and upon the reasons assigned in this printed opinion—in the terms following:—

The arbitrators under the British North America Act, 1867, having seen and examined the propositions submitted on the part of the Provinces on Ontario and Quebec respectively for the division and adjustment of the debts and assets of Upper Canada and Lower Canada under the authority of the said Act, and having heard counsel for the said Provinces respectively upon each of the said propositions, after due consideration thereof, are of opinion that the propositions submitted in behalf of the Province of Ontario do not, nor does either of them, furnish any legal or sufficient rule or just basis for such division and adjustment; and they do award and adjudge that the said division and adjustment ought to be made according to the rules which govern the partition of the debts and property of associations known as universal partnerships in so far as such rule can be made to apply; and the arbitrators having also heard counsel for the Provinces of Ontario and Quebec respectively upon the objection made in behalf of the former Province to the 'jurisdiction and authority' of the arbitrators to inquire into the state of debts or credits of the Provinces of Upper and Lower Canada prior to the Union of 1841, or to deal in any way with either the debt or credit with which either Province came into the Union at that time, and duly considered the same, are of opinion that the said objection is unfounded, and that they have authority, and are bound by the provisions of the said Act, to inquire into the state of the debts and credits of the Provinces of Upper Canada and Lower Canada existing at the time of the Union of 1841, and so to deal with them as may be necessary for a just, lawful and complete division and adjustment of the debts and assets of the said Provinces. And thereupon it is ordered that the counsel for the Provinces of Ontario and Quebec do proceed, in accordance with the foregoing judgment to submit such statements in support of their respective claims as they may deem expedient."

The above judgments were by the three arbitrators ordered to be entered in the minute book, and to be communicated to the counsel for the two Provinces respectively.

About the 16th June the arbitrators severally received from the government of Quebec a minute of Council of that Government, expressing the opinion of the law officers of the Crown of Quebec, "that it was essential to the validity of any decision by the arbitrators, that their judgment should be unanimously concurred in."

The publication of the decision was therefore postponed until the action of the arbitrators could be determined on this point at their next meeting, which was to take place at Montreal on the first Tuesday in July, though the arbitrator

for Ontario demanded that the counsel of both governments should have the decision communicated to them in obedience to the order made.

On the first day of this meeting, in July, at Montreal, the fact of the receipt of this communication from the government of Quebec was announced. A demand was then made on behalf of the government of Quebec that counsel should be forthwith heard on the question of unanimity, and after denial by the counsel for Ontario of the right of the government of Quebec to make any communication to the arbitrators, which was not at the same time made to the counsel or government of Ontario, and a demand made that the decision arrived at should be first declared, the question was submitted, and the arbitrators decided by a majority that Quebec should be heard on the point of unanimity.

The question was therefore argued at length before the arbitrators by

George Irvine, Q. C. (Solicitor General for Quebec), and *Ritchie*, Q.C., for the Province of Quebec :—

The decision of the arbitrators, to be valid, must be the unanimous judgment of the three arbitrators, for by the 142nd section of the British North America Act three arbitrators are appointed, and no provision is contained that the award of the majority shall be binding, and the submission being to three, each must join in the award. Anterior to the Imperial Act the precise terms contained in the 142nd section had been virtually agreed upon between the Provinces : (see the 16th Resolution of the Quebec Conference, as it passed in the Parliament of the late Province of Canada) ; and the English law must interpret the Imperial statute so far as it can be interpreted : Watson on arbitration, 64 ; Caldwell on arbitration, 202 ; Paley on agency, 117.

The Canadian Interpretation Act, which provides that when a power is delegated to three or more persons, the decision of the majority shall be valid, does not apply to the Imperial Act, but is confined to the Canadian statutes, and no such clause is to be found in any Imperial statute.

J. Hillyard Cameron, Q.C., and *Hon. E B. Wood* (Treasurer of Ontario), for the Province of Ontario, *contra* :—

In cases of private arbitration, unless there is a power reserved to the majority, the award must be unanimous. That is the rule of the common law, although not of the French law, which makes the arbitrators a Court where the majority may decide. It is not pretended that at common law when the submission is to three arbitrators with no reservation of power to the majority two can execute a valid award in matters of ordinary private arbitration ; but such is not the law in matters of a public nature. The Interpretation Act has a powerful bearing on the interpretation of the 142nd clause (see the 129th clause of the British North America Act). The Dominion Parliament are given power to deal with the public debt and property. The whole of the questions before the arbitrators in respect to that public debt and property must be considered by the light of the statutes which were passed by the Dominion, one of which is the Interpretation Act Not only therefore are all laws left in force, but the question of the public debt and property is to be left to arbitrators, who are to decide according to the Interpretation Act.

The clear intention of the Legislature in having three arbitrators was that the majority should govern, and this is consonant with common sense and every day experience of arbitrations between private persons, and the Legislature had the possible difficulties arising from a disagreement between the arbitrators for the different Provinces in view when they appointed three arbitrators, one of whom was unconnected with either Province, and was, in effect, as an umpire.

Putting the matter upon the strictest basis as a matter of private right, the arbitrators had a right to deal with it according to the light cast upon it by the statutes of the country ; but it is not necessary to deal with it on this narrow basis, for, independently of such considerations, it is not a matter of private interest and private arbitration, but a matter of public rights and reference to public arbitration, and therefore the decision of the majority must conclude the minority. This is admittedly the execution of a public trust ; and is not the exercise of a power within the ordinary meaning of the rule regarding subjects of purely private interest : *Grindley v. Barker*, 1 Bos. & Pul 229 ; *The King v. Whitaker*, 9 B. & C. 648 ; *Cortis v. Kent Water Works Co.* 7 B. & C. 314 ; see also Co Litt, 181 (b) ; Roll. Ab. 329 ; Caldwell on arbitration, 2nd Amer. ed. pp. 202, 203 and, 204, note (1) and cases there cited ; Paley on Agency, 3rd Amer. ed. pp. 177 and 178, note (g) and the cases there cited, particularly *Croker v Crane*, 21 Wend. 211, 218 ; *Ex parte Rogers*, 7 Cowen, 526, 530, and note (a) ; *Woolsey v. Tompkins*, 23 Wend. 324 ; *Damon v. Inhabitants of Granby*, 2 Pick. 345.

Shortly after the above argument Judge Day resigned his appointment, which was accepted by the government of Quebec, and a *supersedeas* was issued under the seal of that Province, discharging him from further duties as arbitrator.

On the 21st July, the day appointed for giving judgment, it was objected on behalf of the Province of Quebec that no further action could be taken in the matter owing to the resignation of one of the arbitrators, there not being in fact the three required by the Act. The counsel for Quebec, being overruled in this, stated that they withdrew from the arbitration, and the judgment of the remaining arbitrators was then delivered by the

Hon J. H. GRAY :—At our last meeting a question was raised by the counsel for Quebec, under instructions from their government (a copy of the Order in Council having been transmitted to each of the arbitrators) which would then have been decided but for the abrupt withdrawal of Judge Day, and our subsequent immediate adjournment, namely :—"That it is essential to the validity of any decision to be given by the arbitrators that their judgment should be unanimously concurred in" It remains for me now to express the decision of the arbitrators on that question.

It is to be regretted that a position of this important character should not have been taken before it was known that there was a division o opinion between the arbitrators ; and it may wel

be assumed that it would hardly have escaped the attention of so accomplished a jurist as Judge Day, the Arbitrator of Quebec, had he deemed it tenable, or that he would, under the circumstances of the decision, have undoubtedly brought it to the notice of his co-arbitrators. The learned Judge heard the argument, but left with us no expression of his opinion, save that the arbitration was one of a public nature. The views, therefore, now delivered are those of the remaining arbitrators, and consequently of a majority.

In matters of private reference the law is plain, that unless the terms of the submission provide that a majority may rule, all must agree in the award, or it would not be binding. The impracticability in private affairs of working out an arbitration, if unanimity was essential, led to the adoption, in almost all cases of submission, of the majority clause, or the alternative provision of an umpire. So essential to the successful conducting of an arbitration has this become that in the ordinary forms of arbitration bonds, or of rules of reference, one of these clauses is almost always found inserted. Without such clause, in private arbitration it is admitted unanimity is required.

The point now is—Does the same rule apply to public references or arbitrations?—to which class it is conceded, the present inquiry belongs—the 142nd section of the B. N. A. Act, 1867, under which the arbitration is held, containing no such clause.

Mr. Irvine, the Solicitor General for Quebec, has properly narrowed the question to this point.

Mr. Ritchie in his argument for Quebec, cited Caldwell on Arbitration, p. 102, to prove the undoubted position as to private arbitrations. In the note to that page by the able American editor, who republished the work in the United States, we find the following remarks:—

"There is a wide distinction to be observed between the case of a power conferred for a public purpose and an authority of a private nature.—In the latter case, if the authority is conferred on several persons, it must be jointly exercised, while in the former it may be exercised by a majority."

Further on, at p. 202, he says that referees appointed under a statute must all meet and hear the parties, but the decision of the majority will be binding. The correctness of these views is sustained by the citation of many authorities.

In the case of *Green* v. *Miller*, 6 Johnson, 38, as far back as 1810, it is clearly laid down:—"When an authority is confided to several persons for a private purpose, all must join in the act; *aliter* in matters of public concern" Thompson, J., says: "A controversy between these parties was submitted to five arbitrators. The submission did not provide that a less number than the whole might make an award. All the arbitrators met and heard the proofs and allegations of the parties, but four only agreed on the award; and whether the award be a binding award is the question now before the court No case has been cited by counsel where this question has been directly decided. I am, however, satisfied that when a submission to arbitrators is a delegation of power for a mere private purpose, it is necessary that all the arbitrators should concur in the award unless it is otherwise provided by the parties In matters of public concern a different rule seems to prevail; there the voice of the majority shall be given."

In the case of *Grindley* v. *Barker*, 1 Bos. & Pul. 236, Erle, C. J., says:—"It is now pretty well established that when a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole." The same principle was recognized by the Court of King's Bench in the case of *The King* v. *Beaton*, 3 T. R. 592; see also Paley on Agency, 3rd Am ed. pp 177-8, note *c*, and *Broker* v. *Crane*, 21 Wendell, 211-18.

In *Ex parte Rogers*, 7 Cowen, U. S. Rep. 526, and note *a*, pp. 530 & 585, the whole position is ably and thoroughly reviewed; and in a long note citing the English as well as the American authorities bearing upon the same point, the distinction between public and private references and the duties and powers resulting therefrom are clearly shown, and the power of the majority to decide clearly established The English cases upon the point are not so direct, but in the reasoning of those which have been cited, or can be found, the same principle clearly manifests itself. In the Courts of the United States, decisions are constantly found bearing upon circumstances similar to those in our own Dominion. The varied nature of the business of that country, the different aspects under which questions arise from their position as a congregation of States, the daily development of new conflicts of rights arising from the expanding nature of their society, raise questions which do not come up in England, but the solution of which after all, in the absence of any particular local statutory provisions, is governed by the law of England. Under these circumstances our courts are in the habit of taking those decisions as guides. These cases then determine that in matters of public arbitrations or reference, though provisions to that effect be not specifically made, the decision of a majority shall be incident to the reference. The 142nd section of the British North America Act, 1867, must come within this rule. Were it not so intended, the section would be superfluous, because any one party in a great question of public importance could prevent a decision.

To work out the reasoning of the counsel of Quebec to its legitimate conclusion would place absolute power in the hands of the third or Dominion arbitrator. I have supposed that on points in which Ontario and Quebec were agreed it was my duty at once to assent, and that under such circumstances, whether I differed or not, was of no consequence; but, as the powers of all the arbitrators must be co-equal, if unanimity is essential, I might, by simply disagreeing, prevent an award, even when both Ontario and Quebec had agreed upon it. Such a position is untenable.

Mr. Macpherson and myself are therefore of opinion that the decision of a majority must govern.

The arbitrators then proceeded to hear the arguments of counsel for Ontario on several of the heads stated in the printed case for that Province, and some progress having been made

the arbitration was adjourned until the next day. Soon after the adjournment writs of prohibition against further proceeding in the arbitration, issued from the Superior Court of the Province of Quebec by Judge Beaudry, were served on both the arbitrators, who however met pursuant to their adjournment, and then further adjourned to meet in Toronto, in the Province of Ontario, on the 4th August, 1870. Soon after this last adjournment a writ of *quo warranto* was served on Mr. Gray, calling on him to shew cause why he should not cease to exercise jurisdiction as arbitrator for the Dominion, on the ground that he had become a resident of Ontario.

On the 4th August the arbitrators met for the purpose of considering the questions arising on the service of the writ of prohibition, and as to what further action they should take in the premises.

On the 5th August they again met, and delivered the following judgments as the result of their deliberations:

Hon D L Macpherson.—The two arbitrators now present meet under circumstances calling for the most careful circumspection and thoughtfulness.

The Province of Quebec is not represented before them. The counsel for Ontario calls upon them to proceed with the evidence and to make their award.

The retirement of the arbitrator for Quebec, sanctioned by the Government of that province, was formally communicated to the arbitrators when they met at Montreal on the 21st July last, by an official letter from the Premier and Secretary, the Honourable Mr. Chauveau, in which he further preferred the extraordinary request that the remaining arbitrators "will be pleased to stay further proceedings until such time as they receive notice as to their intentions from the government of this province,"—the Province of Quebec.

A request to stay proceedings until the government of Quebec should determine whether they would appoint another arbitrator was shortly afterwards made by the counsel for that Province, and was upon consideration refused by the arbitrators; whereupon the counsel for Quebec declared that that Province would no longer be a party to the arbitration and withdrew.

Further, each of the two arbitrators now present was, since the retirement of the arbitrator for Quebec, served, while in the city of Montreal, with a writ issued from the Superior Court of the Province of Quebec, the purport of which is to prohibit them from the further exercise of their functions until a new arbitrator should be named for that Province, or to shew cause to the contrary on the 1st of September next.

The arbitrators noticed that neither the letter of Mr. Chauveau nor the application of the counsel for Quebec named any time within which it was expected such new appointment would be made.

The retirement of the Quebec arbitrator took place, on the 9th July. Mr. Chauveau's letter is dated on the 19th, and on the 22nd the writ was obtained and served. But up to this moment the arbitrators are not informed that any new arbitrator is appointed, nor in fact that it is the intention of the government of Quebec to make a new appointment.

If the government of Quebec has power under the statute to appoint another arbitrator, and if it is their intention to do so, they have had more than reasonable time for the purpose, since their acceptance of Judge Day's resignation. It was the indefinite character of the delay asked for, which induced the arbitrators to refuse it. The writ which was issued and served almost immediately after that refusal is equally indefinite and might tend to create the impression that delay in completing the award and not to obtain a reasonable time to appoint another arbitrator was the object really desired.

It appears to me, unskilled as I am in legal technicalities, taking an equitable, common sense view of the question, to be beyond any reasonable doubt that no provincial tribunal has, or can claim any jurisdiction to examine into or decide any question referred to arbitration by the 142nd section of the British North America Act of 1867, and it may be confidently asserted that the Imperial Parliament intended the award to be absolutely final. But other and not unimportant legal questions (even if not really difficult) present themselves which, if insisted on, must be determined by some competent tribunal.

Can one of the arbitrators who has undertaken and entered upon the duties assigned by the statute, and who is under no mental or physical disability, retire from or abandon these duties before completion? This question is not one on which the other arbitrators can be expected to express an opinion.

It is, however, connected with the perhaps, more strictly legal enquiry: Does the Act of the Imperial Parliament authorize the withdrawal of an arbitrator with or without the concurrence of the party who appointed him? and does it provide for the substitution of another in his place? Again, are the arbitrators who (though respectively appointed by the governments of the Dominion and of the two Provinces) derive all their power and authority from the Imperial Statute, amenable to any government or local tribunal in matters falling strictly within the scope of their powers and duties.

The statute itself does not in terms confer any authority whatever with regard to the reference on any tribunal but the arbitrators. Can there then by implication arise a power to delay, which might be so exercised as to defeat the object of the enactment? The parties interested are the Provinces of Ontario and Quebec. Can either of them as a matter of legal or moral justice call upon one of its own courts to interrupt or control the proceedings of a jurisdiction created for the sole purpose of deciding rights and interests as between the two Provinces?

If so, the authority must belong equally to the courts of either Province, and what would be the effect of a not impossible conflict between them in their directions to the arbitrators or otherwise?

These and perhaps other questions are opened by the events above stated.

They have been seriously and dispassionately considered, and not the less that their determination may involve personal responsibility to an extent which could not be and was not anticipated when the arbitrators accepted their appointment.

I feel, however, that the first duty of the arbitrators is to make a just award; that they are

not responsible for the embarrassment which the present state of things has given rise to, and which adds greatly to their responsibility while it increases, if possible, their anxiety to do right.

By simply performing what they believe to be their duty, if they do anything (while impartially exercising their best judgment) that may be looked upon as prejudicial to the interests of Quebec in the voluntary absence of counsel for that Province, the just responsibility cannot be charged upon them.

If in proceeding they act illegally, their award will not be binding and can do no injury. If it should be binding the loss of the judgment and assistance of an arbitrator for the Province of Quebec, however much the remaining arbitrators may regret it, and especially that they are deprived of the valuable aid of the arbitrator who has resigned, is not their fault. The withdrawal was his act and it has been deliberately adopted by his government, who have taken legal steps in one of their own Courts by their Attorney-General, to stop further proceedings. They have thus placed the arbitrators in the invidious position of either retracting their refusal to grant indefinite delay to the Province of Quebec, or of being placed in conflict with one of the highest tribunals of that Province.

As a public functionary in the matter, as well as in my private capacity, I desire to evince in every proper way my profound respect for the court whose process has been served on the arbitrators But it appears to me they cannot without a virtual abdication of their functions as arbitrators accept as a justification for a departure from their previously declared opinion, the preliminary order of prohibition (which I venture to think will not be finally confirmed) of a tribunal of that Province whose arbitrator's course has unnecessarily brought about this complication. I am of opinion that the arbitrators will best discharge the trust reposed in them by proceeding with the reference, and making, without unnecessary delay, an award which shall divide and adjust the debts, credits, liabilities, assets and properties of Upper and Lower Canada.

As already pointed out, if they have under the circumstances no power to make an award, the attempt to make one will create no prejudice to either party.

If they have the power, the duty arising under the Statute from an acceptance of their appointment, imperatively requires them, not by any act of theirs to suffer the time occupied and the cost occasioned by the proceedings so far taken to be utterly wasted, or to unnecessarily postpone the rendering of a final award.

The government of the Province of Quebec and the arbitrator appointed by them have had due notice that the present meeting would be held for the purpose of proceeding with business, and that it would be competent for the arbitrators, therefore, so to proceed in accordance with well established rules.

In order, however, to remove any possibility of misapprehension or doubt, I think it better, under the peculiar circumstances, that notice should now be given to the Province of Quebec and to Judge Day, of the intention of the arbitrators to proceed in accordance with the opinions just expressed, and that the arbitrators should adjourn until Wednesday the 17th inst., giving notice to all parties to the reference, that on that day they will proceed, should the government of Quebec not think proper to be represented or to assign any new or sufficient reason for their absence.

Hon. J. H. Gray—My colleague the arbitrator for Ontario having expressed a desire to adjourn for a week or ten days in order to afford time for a notification to the government of Quebec that the arbitrators would certainly proceed in absence of arbitrator or counsel on their part, unless at the next meeting they are represented—I shall most certainly concur. I think we should exhaust every reasonable effort to induce co-operation in this matter; but in order to prevent the delay which is now granted being in any way attributed to a doubt as to the power or intention of the arbitrators to proceed, it is as well to explain with distinctness the views of the arbitrators on the authority or the power of the courts of any of the provinces to prohibit or restrain their proceedings. With the highest respect for the courts of Quebec, on any matter coming within their jurisdiction, it is plain this arbitration does not. It derives its authority from an Imperial act. The government and Province of Quebec, of which those courts form a constituent part, is simply a party to the arbitration. Another province whose courts and government are entirely independent of and beyond the jurisdiction of the courts of Quebec is the other party—while the Dominion government simply appoints the third arbitrator by the authority of the Imperial act, which constitutes the tribunal. How is it possible that a subordinate part of the two provinces—because the courts are only parts of the whole machine of government—can control the action of another province and government and the arbitrator appointed by a third government, in a matter of submission to which the province, whose courts assume the authority, only appoints one out of three co-equal arbitrators? How can the courts of Quebec restrain the Province of Ontario or the arbitrator appointed by the government of that province, or the arbitrator appointed by the Dominion government, in a matter in which the whole proceedings may be carried on outside of the province or the territoral jurisdiction to which their process can possibly run? If so, the courts of the other provinces must have equal jurisdiction; and how absurd would it then be for the courts of Ontario to come forward and punish the arbitrators for not proceeding—for not discharging the duties they had undertaken—punished by Quebec for going on—punished by Ontario for not going on! Can any construction of the language of the Imperial statute sanction such a conflict of jurisdiction? But even if the proceedings were held within the limits of the territorial jurisdiction of the courts of one of the provinces, the subject-matter itself and the parties proceeding therein may be and are, as regards that subject-matter, entirely exempt from that jurisdiction. Apart from the common-sense view of such a question, which must strike every man, the courts of law in England have left no doubt upon the point. The highest authorities, both in chancery and common law, have decided that even where proceedings in arbitration were carried on within the locality over which the courts had jurisdiction, and in which their process had full force,

yet the courts would exercise no jurisdiction to restrain an arbitrator from making his award unless there was something in the conduct of *the parties to the reference* which rendered such interference necessary. The principle being, as laid down by Kerr on injunctions, page 142, that "there is no original jurisdiction of the court in the nature of a writ of prohibition to restrain an arbitrator from proceeding to make an award." Mr. Cameron cited a great many cases in which this position is illustrated and sustained, among others *The King* v. *Burdell et al.*, 5 A. & E. p. 619; *Harcourt* v. *Ramsbottom*, 1 Jacobs & Walk., C. R. 504; *Pope* v. *Lord Duncannon*, 9 T. R. 177; *The Newry & Enniskillen R. Co.*, v. *The Ulster R. Co.*, 8 D. G. McN. & G. 486. In *Pope* v. *Lord Duncanon*, where the plaintiffs had revoked the authority of their arbitrator and notified the defendant, and the arbitrator refused to act, and the other arbitrators had notwithstanding proceeded and made their award, the court refused to restrain the defendant from acting upon the award—the Vice-Chancellor saying; "As in this case there is nothing whatever to show that the power which the plaintiffs had given to the arbitrator was revoked upon any just or reasonable grounds, I am bound to conclude the revocation was a wanton and capricious exercise of authority upon their parts, and consequently the motion must be refused" The resignation of Judge Day and the revocation of his authority by the Quebec government was no act of Ontario or of the arbitrator appointed by the Dominion, and it is therefore difficult to see why the Province of Ontario should be prejudiced by that act; or why the arbitrator appointed by the government of Ontario, or the arbitrator appointed by the Dominion government, should not proceed to discharge their duty. In the case of *The King* v. *Bardell*, 5 A. & E. 619, during the argument, Judge Patterson says: "Is there any instance in which the court has interfered to prevent an arbitrator making an award after revocation? The award may be a nullity when made, but that is a different point." Platt replies "search has been made for precedents, but none have been found. Blackstone's commentaries, vol. 3, edition of 1862, page 117, says: "'A prohibition is a writ issuing properly only out of the Court of Queen's Bench, being a prerogative one; but for the furtherance of justice it may also now be had in some cases out of the Court of Chancery, Common Pleas or Exchequer, directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court." If old Blackstone is still law, and the Imperial Act, British North America Act, 1867, is still in force—no other court but the Arbitrators' Court can have cognizance of the arbitration.

It is greatly to be regretted that there was no counsel, as in the case of the unanimity question, to argue the other side; but, as has been remarked by my colleague, that is not our fault. If these legal questions are to be raised on every occasion, it was manifestly of the highest importance that Judge Day should have remained at his post. He did not resign—so far as we know—because he differed with his colleagues in concluding that the decisions of the arbitrators need not be unanimous. He assigned no such reason for his resignation, and on that question gave no decision, and so far as his colleagues know, expressed no opinion, although he was present at the argument, and subsequently looked into the authorities with his colleagues. His resignation, as stated at the time, was on other grounds; but whether they have his able assistance or not, the remaining arbitrators must proceed with the work, and decide on all questions as they arise according to the best of their judgment.

The meeting then adjourned till the 17th instant.

On that day the arbitrators proceeded with the reference, no person being present on the part of the Province of Quebec.

ONTARIO REPORTS.

COMMON PLEAS.

Reported by S. J. VanKoughnet, Esq., *Barrister-at-Law, Reporter to the Court.*)

In re Bridget Donelly.

By-law—Conviction for using blasphemous language—No statement of words used—Jurisdiction—Evidence.

A conviction by a magistrate stated that defendant did, on, &c, at, &c., being a public highway, use blasphemous language, contrary to a certain by-law, which was passed almost in the words of C. S. U. C. cap. 54, sec. 282, sub-sec. 4, but there was no statement of the words used. *Held*, bad.

Semble, also, that there was nothing in the evidence set out below, giving the magistrate jurisdiction to act.

[20 U. C. C. P. 165.]

In Michaelmas Term last, *McCarthy* obtained a rule to quash a conviction, a *certiorari* to bring up all papers connected therewith having been previously returned, on the ground that there was no jurisdiction, no offence shown, no statement of the words used, &c. &c.

The conviction set out that Bridget Donelly did on, &c., at ———, being a public highway in the county of Simcoe, use blasphemous language, contrary to a certain by-law of the corporation of the county of Simcoe, passed 18th October, 1860, entitled, &c., and adjudging her to pay one dollar, &c., and costs, to William Atkinson, the complainant, $4 20 for his costs, &c., awarding distress and imprisonment for ten days in default.

The 7th clause of the by-law was as follows: "It shall not be lawful for any person to utter or use any profane oath, or any obscene, indecent, blasphemous or grossly insulting language in any of the streets or public places or highways within this county."

This was passed under sec. 282, sub-sec. 4 of cap. 54, Con. Stat. U. C., almost in the same words.

Harrison, Q. C., shewed cause. He cited *Rex* v. *Liston*, 5 T. R. 338, 341; *Reg.* v. *Justices of Cheshire*, 8 A. & E. 398; *Rex* v. *Justices of Westminster*, 2 A & E. 241; *Hespeler & Shaw*, 16 U.C. Q. B. 104; *Reg.* v. *Bolton*, 1 Q. B. 66; *In re Clark*, 2 Q. B. 619; *Reg.* v. *Justices of Buckinghamshire*, 3 Q. B. 806; *Hopkins* v. *Mayor of Swansea*, 4 M. & W. 621; *King* v. *Speed*, 1 Lord Ray. 683; *Davis* v. *Nest*, 6 C. & P. 167; *Re Perham*, 5 H.

& N 30; *Reg.* v. *Nott*, 4 Q. B. 768; *Reg.* v. *Scott*, 4 B. & S. 368; 29 & 30 Vic. cap. 50, s. 1.

McCarthy, contra, cited Paley on Convictions, 433; *Bailey's Case*, 3 E & B. 607; *Rex* v. *Sparling*, 1 Str 497; *Rex* v. *Neild*, 6 East. 417; *Rex* v. *Pappineau*, 2 Str. 686; *Rex* v. *Hazell*, 18 East. 141.

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

This conviction, and the papers returned to us as the foundation of it, present a very singular instance of the application of this statute, and the by-law passed thereunder. The objections urged are of the most substantial character.

The first to be considered is the omission of any statement of the words used to constitute the offence.

It is said in Paley on Convictions (1866), page 210, "Another rule in describing the offence is, that it is not sufficient to state, as the offence, that which is only the legal result of certain facts; but the facts themselves must be specified, so that the court may judge whether they amount in law to the offence," citing *Regina* v. *Nott*, 4 Q. B. 768, 783. Again: "It may be collected, as a general rule, that, where an act in describing the offence makes use of general terms which embrace a variety of circumstances, it is not enough to follow in a conviction the words of the statute, but it is necessary to state what particular fact prohibited has been committed."

A case of *Regina* v. *James*, Cald. 458, is there cited, but I have not been able to see it in the book cited. Buller, J.: "It is not true that in framing a conviction it is sufficient to follow the words of the statute in all cases. In some, indeed, it may, as where the statute gives a particular description of the offence; but it is otherwise where a particular offence is included under a general description. Where a particular act constitutes the offence, it may be enough to describe it in the words of the Legislature; but where the Legislature speaks in general terms, the conviction must state what act in particular was done by the party offending to enable him to meet the charge."

Some of the older cases cited by Paley are expressly in point. In *Rex* v. *Sparling* (1 Str. 497) a conviction for profane swearing was quashed because the oaths were not set out; "for what is a profane oath or curse is matter of law, and ought not to be left to the judgment of the witness. * * Suppose it was for seditious or blasphemous words, must not the words themselves be set out, be they ever so bad, that the court may judge whether they are seditious or blasphemous?"

Regina v. *Scott* (4 B. & Sm. 868) was a conviction for "profanely cursing one profane curse, in these words (setting them out), twenty several times repeated," and he was fined £2, apparently 2*s.* for each oath. The sole question was as to the right to include all the curses in one conviction. Wightman, J., says, "The curse is set out, which without doubt is profane." In *Lloyd's* case (2 Ea. P. C. 1122) it was held that an indictment for sending a threatening letter should set out the letter.

Regina v. *Nott* (4 Q. B. 768) was an indictment against a magistrate for administering "an oath touching certain matters and things, whereof the said J. N. at the time and on the occasion last aforesaid, had not any jurisdiction or cognizance by any statute in force, &c. The statute 5 & 6 Wm. IV. cap. 62, sec. 13, prohibits the administering by any justice of the peace or other person, of any oath "touching any matter or thing whereof such justice, &c., hath not jurisdiction, &c., by some statute in force at the time being." The indictment was held bad. Lord Denman says, "It is quite clear the having or not having jurisdiction is matter of law depending upon facts on which the court is to form its opinion. The facts, therefore, should be so stated as to enable the court to form its opinion." Patteson, J.: "There is not anything to show what the matter of the oath was. It never can be a question for a jury whether a particular oath was or was not within a given jurisdiction."

Assuming it to be generally correct to state that it is sufficient in a conviction to follow the words of the statute creating the offence, we have to see if this conviction can be supported.

The applicant is convicted for using blasphemous language on a public highway.

The commission of the offence, defined as "using blasphemous language," is, in the words already quoted, only "the legal result of certain facts."

When a statute makes it penal to "commit any wilful and malicious mischief," it must be impossible, I think, to uphold a conviction which merely stated that a man was convicted of doing a certain "wilful and malicious mischief," without a statement of the facts constituting the offence.

It would not suffice to say that a man committed champerty, or maintenance, or sedition, &c.

In re Perham (5 H. & N 30), the conviction was for unlawfully, by threats, endeavouring to force one W. J., a workman, to depart from his hiring. It was objected that the threats were not set out. The conviction was upheld. Channel, B. (at p. 32) says, "The offence is not the threat, but the forcing or endeavouring to force the workman to depart from his employment: the threats are the means by which that is done." Pollock, C. B. (at p. 34): "To whom the threats were addressed, and whether they were of a description to act upon the mind of the party threatened, so as to create the offence charged, is all matter of evidence."

I think the conviction is bad on its face.

It has also been objected that there was nothing in the evidence to give the magistrate jurisdiction to act.

The information states that B. D. has been guilty of circulating (*sic*) blasphemous and grossly insulting language in several public places and highways within the township of Tecumseh, by saying and swearing that the said W. A. defrauded her, by giving her two five-dollar bills instead of two tens.

I think it was a most absurd act of the magistrate to proceed against the woman on such a charge.

When the complainant was examined at the hearing, he merely swore that Donelly, having spun some yarn for him, refused to take silver for it, and he then gave her a ten-dollar bill, and took back six at her request, and changed another $10, and got small bills for the same.

Another witness swears he was present w..en

the above took place, as to the money, but deposes nothing as to the woman's language.

The magistrate writes on the deposition that, plaintiff and defendant being present, the charge being read, and defendant asked what "she had to say in the matter, the defendant acknowledged and still says plaintiff defrauded her, and now in open court and before me, the justice, makes use of blasphemous and grossly insulting language, by saying that both plaintiff and his witness has sworn false and is perjured."

If it were necessary to decide this part of the case, I should say that the papers returned to us on the *certiorari* disclose no offence to warrant the conviction. The whole charge is, in fact, that she said and swore that Atkinson defrauded her by giving her two five-dollar bills instead of two tens.

Nothing whatever appears to show that she swore in any way that can be called a profane oath, or that any person was present except the complainant, or that the charge of defrauding her was made in any loud or violent manner, &c.

If a person can be convicted on such testimony as this, it must of course follow that simply to say to a person on a public road that he had defrauded the speaker in some matter, is *per se* an offence under this by-law.

As to our looking behind the conviction, to see if there were any evidence to warrant it or to give jurisdiction to the magistrate, I refer to *In re Bailey* (3 E. & B. 618) and *Regina* v. *Bolton* (1 Q. B. 72). The weight of the evidence is left to the magistrate, but if there be no evidence whatever, it seems that the conviction cannot be upheld.

The distinction is clearly pointed out by Lord Campbell in the first cited case.

We cannot refrain from expressing our regret that any person's liberty should have been interfered with on such absurd grounds, or that the administration of justice should be entrusted to persons who, however possibly in other respects respectable, are capable of inflicting such serious injury in the abused name of the law.

Rule absolute to quash conviction.

DIVISION COURT.

In the Sixth Division Court of the Co. of Norfolk.

In The Matter of Appeal of the Long Point Company and the Township of Walsingham.

Assessment—Statute Labour.

[Simcoe, July 9, 1870]

This is an appeal by the Long Point Company from their assessment for the year 1870, upon property owned by them in the Township of Walsingham. The Company appealed from the assessment of the Assessors to the Court of Revision, which upheld the assessment as made by the assessors, and the Company appealed from decision of the Court of Revision to me.

Wilson, C. J.,—Certain technical objections were taken to the proceedings which I overruled on the argument, and I now proceed to consider the matter upon its merits.

The matter of appeal may be substantially divided into two heads:

First:—Over-assessment in the value of the property.

Second:—The liability of the property of the Company as situated, to be assessed for statute labour.

As to the first point, it appears from the evidence, that the property of the Company was assessed for $5,200 in 1868, that being the first year of their ownership In the following year it was raised to $7,000, when a general increase was made in the assessed value of all the property in the Township. This year (1870), it is again sought to be raised to $8,500, although the evidence shows that no general increase has been made in the assessed value of the property in the municipality, but, if anything, rather a decrease. I find that the property is kept as a shooting and trapping preserve, where game and fur are protected; and that it is unremunerative to the proprietors in a pecuniary point of view, and costing them more yearly than the revenue derived from it. It has been held that lands covered with water, are not assessable at all, and if this decision is sound, then there can be no doubt of an over assessment; but as this view of the matter has not been insisted upon, I have not given it much consideration. See *In re Paxton*, 6 L C. G., 12

From the evidence of value and other matters proved I am satisfied that $7,000 is the full assessable value of the said property, and. I therefore reverse the decision of the Court of Revision upon that point, and decide and direct, that the said property shall be assessed for the sum of $7,000, and no more, and that the assessment roll of the township be amended accordingly.

As to the second point, I find that the property of the Company consists of an island composed of land and marshes, the nearest part of which is three or four miles, and the farthest part twenty-five miles from the road division in which the council have placed it. I find that no roads built on the main land would be of any service, value or benefit to the property of the Company. It does not, therefore, seem reasonable or just that the property should be laid under a burthen which will under no circumstances produce a benefit to them. And upon examining the Assessment Act and the Municipal Institutions Act, while I find that power is given to municipal councils to divide the municipality into road divisions, I also find, "that every resident shall have the right to perform his whole statute labor in the statute labor division in which his residence is situate, unless otherwise ordered by the municipal council, (see sec. 88); and also "in all cases where the statute labor of a non-resident is paid in money, the municipal council shall order the same to be expended in the statute labor division where the property is situate, or where the said statute labor tax is levied;" (see sec. 88). It seems to me, therefore, that the Council, though they have power to regulate and make the road divisions, must exercise such power in a reasonable manner, and that it would be unjust and absurd to contend that they have the power to order a man to come twenty-five miles to perform his statute labor, or that they can so make road divisions that property can be taxed for roads which cannot by any possibility be of any service, value or benefit to the property. Such contention is certainly unreasonable, and it seems to me totally at variance with the spirit and intention of the Assessment Act.

I therefore reverse the decision of the Court of Revision on the second point also, and direct that the statute labor assessed against the lands of the said Company be struck out and the Assessment Roll of the said Township amended accordingly.

And I direct the respondents to pay the costs of this appeal.

CORRESPONDENCE.

Master and servant—Deserting employment.

To the Editors of the Local Courts Gazette.

Gentlemen,—I have a case in hand under the Master and Servant Act, on which I would like your verdict. By kindly giving your opinion, you will confer a favor on my brother-magistrates as well as myself.

A master engages verbally a servant for three years, as follows: to pay him the first year say 75c. per day, the second year $1 per day, and the third year $1.25 per day. Under this arrangement the servant completed the first two terms and a portion of the third, but now refuses to finish the balance of the third year. Can he be made to do so, seeing that he has already wrought a portion of the time? Can I proceed under the Master and Servant Act, Con. Stat. U. C. cap. 75, and fine or imprison the servant for leaving or deserting his master? Is the bargain made for the three different years, at different rates of wages, three distinct and separate bargains, running over a period of only twelve months each, and therefore, though verbal, still binding, as each agreement succeeds the other? Your reply, through the columns of the *Law Journal*, will oblige,

Yours truly, M. C. Lutz, J. P.

Galt, Sept. 2, 1870.

[The agreement must be looked upon as one agreement for three years, and not three distinct bargains. At the end of the first or second year, even though the agreement was void under the statute if the service had continued, a new agreement might have arisen by implication of law from the conduct of the parties, and the hiring would probably be looked upon as a yearly one. But it does not follow from this that the summary remedy given by the statute can be invoked in the case put by our correspondent. The act speaks of "agreements or bargains, verbal or written," and says that "a verbal agreement shall not exceed the term of one year," evidently intending thereby a definite agreement between the parties, not one arising by implication of law, and the agreement referred to was for three years. The operation, moreover, of the subsequent sections is limited to the words in the third section, as defining the agreement intended. The summary remedy given by the act, which is of a penal character, is only applicable to cases coming strictly within it. We do not think a magistrate would be safe in fining or imprisoning the servant, under the Master and Servants Act.—Eds. L. C. G.]

To the Editors of the Local Courts Gazette.

Gentlemen, — Will you please to throw a little light upon "Form 118. Assignment to be endorsed on replevin bond, if required?" This is to be done by the *bailiff*, and "in witness thereto" he "sets his hand *and seal of office.*"

1. Has a Division Court bailiff a seal of office?

2. If he has not, *must* the form be copied to the letter, as required by the rules for guidance of Division Court officers?

3. The next question, possibly, I have no right to expect an answer to, without sending a fee. If the wording of the form is copied, and the seal is not a seal of office, does the assignment hold good?

I am yours very truly,

T. A. Agar, C. D. C., Peel.

Brampton, Aug. 17, 1870.

[We presume that in wording the form as it now stands, the framers did so for the purpose of showing that the assignment was made by the bailiff in his official capacity only. We do not know any provision requiring a bailiff to have a seal of office, but we think that the decisions of the courts in reference to somewhat similar matters would go to show that if the words of the attestation clause were used as in the form, it would be presumed, if necessary, that the seal attached by the bailiff was his official seal. We think, in this view, that it would be well to use the words of the form, and that the assignment, even if the bailiff used an ordinary seal, would be sufficient.—Eds. L. C. G.]

In a suit for divorce recently tried before Judge Patchen, of Detroit, it was decided that a farm should be equally divided between the severed couple, on the ground that the woman, by her hard work, had done as much as the man to acquire the property.