DIARY FOR APRIL.

1. Sat .... Last day for notice of trial for York and Peel.
2. SUN ... *5th Sunday in Lent.*
3. Mon ... County Court and Surrogate Court Term com.
8. Sat. ... County Court and Surrogate Court Term ends.
9. SUN ... *6th Sunday in Lent.*
10. Mon ... York and Peel Spring Assizes.
14. Frid.... *Good Friday.*
16. SUN ... *Easter Day.*
23. SUN ... *Low Sunday. St. George.*
25. Tues... *St. Mark.* [Last day for Comp. Ass. Rolls.
29. Sat. ... Articles, &c., to be left with Sec of Law Society.
30. SUN. .. *2nd Sunday aft. Easter.* Last day for Non-Res. [to give lists of their lands.

NOTICE.

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

The Local Courts' AND MUNICIPAL GAZETTE.

APRIL, 1865.

COUNTY JUDGES—THEIR LABOURS AND THEIR PAY.

In the beginning of the present year, a circular was issued from the Bureau of Agriculture and Statistics, calling upon various public functionaries to answer a number of questions in relation to their offices, which information was wanted for the Blue Book of 1864. The following are the questions:

1st.—Name of office?
2nd.—Name (or names) of incumbent (or incumbents) within the year 1864?
3rd.—Date (or dates) of appointment?
4th.—By whom appointed?
5th.—Amount of annual salary?
6th.—Amount received in fees?
7th.—Remarks (if necessary).
8th.—Number of years of service as public officer in any capacity whatever, mentioning the date of first appointment?

One of these circulars was addressed to a County Judge, who, in answering the questions, gave some information which we hope our legislators will take a note of when they next propose to impose a few more labours upon their "beasts of burthen," as County Judges have been forcibly called.

The answers to the questions, as given by the learned gentleman that we allude to, are as follows:

1st.—The office I hold is Judge of the County Court of the County of ———.

2nd.—My name is ———.

3rd.—The date of my appointment was ———.

4th.—My appointment was by the Provincial Government, under the Great Seal of the Province of Canada, during the administration of —.

5th.—My salary is $2,600.

6th.—I receive a travelling allowance of $200, as Judge of the Division Courts. I receive fees as *ex officio* Judge of the Surrogate Court, which, in 1864, amounted to $70 50. I am paid $4 per diem as *ex officio* selector of jurors, under the U. C. Jurors Act, which, in 1864, amounted to $24.

7th.—*Remarks.*—As Judge of the County Court, I am *ex officio* Judge of the Surrogate Court; Judge of the several Division Courts of the County; Chairman of the Court of General Quarter Sessions of the Peace; a Selector of Jurors, under the Jurors' Act; a Ballotter of Militia, under the General Militia Law; an Auditor of Accounts connected with the administration of justice; with various other *ex officio* offices and duties to perform under several of the Railway Acts, the Extradition Act, the continued Bankruptcy Act, the Common Law Procedure Acts, the Chancery Act, the General Election Law, the Common School Acts, the Absconding Debtors' Act, the Act respecting Arrest and Imprisonment for Debt, the Municipal Acts, the Insolvent Debtors' Act, the Insolvent Act of 1864, the General Road Company's Acts, the Act respecting the Partition of Real Estate, the Act respecting the Registry of Deeds, &c., the Overholding Tenants Act, the Act respecting the Support of Insane Destitute Persons, several Criminal Acts, the Assessment Acts, and various other statutes (in all upwards of twenty), which I cannot enumerate or remember: for any one of which, (excepting for those I have named in my answers numbered 5 and 6 respectively, and the occasional duties under the General Election law), I receive no salary, fees or allowance—not even for stationery, light, fuel or travelling expenses. All these duties are imposed by the different statutes I have referred to; and there are some new duties imposed upon the County Judge almost every session of Parliament, without any remuneration or fees being prescribed therefor. No provision or pension whatever is provided in case of inability from old age, accident, exposure, or decay in the service.

8th.—I have been in this service as a public officer upwards of and during eleven years.

It is scarcely necessary for us to enlarge on this matter. We have already and oftentimes expressed our views upon the impropriety and injustice of heaping one duty

after another upon the devoted shoulders of County Judges: broad indeed must they be to bear them. Such a course is unfair to the Judges; and it is both unfair and unjust to the public, whose servants they are. It is contrary to public policy, and tends to the injury of public business. It never seems to strike our law-makers that, in the ordinary business of life, increased remuneration goes hand-in-hand with increased labours and responsibilities; but, according to the practice now in vogue, whenever anything in the shape of local administration has to be done, County Judges are to be the doers of it, and—get nothing for it. Their duties under the Insolvent Act of 1864, is a sufficient example of this, without going further.

We have long been expecting a change for the better in this respect; and though it is long in coming, come it must; and we shall continue, as heretofore, to condemn a practice which we consider most pernicious.

DISPUTES BETWEEN PARTNERS—DIVISION COURT JURISDICTION.

We notice in a recent English Law Periodical, that the Lord Chancellor has introduced a bill to confer a jurisdiction in Equity on the English County Courts. Precisely the same thing was done by Chief Justice Richards, when Attorney General, who, in 1843, succeeded in passing it into law. It is somewhat remarkable that the Lord Chancellor's measure goes just as far and no farther than Chief Justice Richard's act, and that the subjects embraced are the same; and it is something to boast of that in this, as in many other matters of law reform, we colonists are in advance of the mother country.

Our present object, however, is to direct attention to one branch of equity jurisdiction, which we think demands a further extension, namely, small partnership transactions, in respect of which we think the Division Courts should have jurisdiction. There are a vast number of petty partnerships formed in the country; the capital invested is in most cases small, and the term of partnership is commonly limited to a year, during which the partners work together in their common business. Two persons, say a blacksmith and a wheelwright, engage in the manufacture of some implement of husbandry; or two or more persons purchase a threshing, mowing, reaping, stumping or other machine, and form a partnership to work it together, travelling from farm to farm in doing the work. A dispute takes place between them; they want to wind up their affairs, have an account taken, pay the partnership debts, and divide the profits; but, as the law stands, although the amount between them might not exceed $100, the Division Court cannot entertain the question; the parties must go into a court of Equity for relief.

Now this, in respect to the small partnerships we speak of, is practically a denial of justice, for the expenses would swallow up the whole subject matter. 'Tis true Mr. Richards regulated the costs in his act *on homœopathic principles;* but still, any one can see the absurdity of a contention in a Superior Court about a little partnership business for $80 or $100. The law should be amended, so as to enable this class of cases to be speedily and cheaply settled. One single clause would do all that is required to remedy the evil pointed out; let it enact, in substance, that the Division Courts should have the like authority as the Court of Chancery, in respect to the dissolution of a partnership, or where a partner seeks an account of the dealings of a partnership dissolved or expired, the capital not having been over say $200. We trust that this and other amendments necessary for Division Courts, may be brought under the notice of the Attorney General before the next meeting of Parliament.

PUBLIC TASTE IN HUMBUGS.

It has been said that the world is made up of knaves and fools—those that impose upon others, and those that are imposed upon. Mankind loves to be humbugged, and is humbugged accordingly. Every age has had its own peculiar species of vanity in this respect. In the good old times, the credulous public had wizards, witches, magicians, astrologers and such like; in these enlightened days we indulge in spiritualists, table-turners, electro-biologists, prestidigitators, clairvoyants, &c., according as fashion, fancy, or a clever humbug may lead the public taste.

The law does not trouble itself much about harmless nonsense of this kind, but leaves every one to please himself or herself as to the manner in which he or she will be cheated or humbugged. Occasionally, however, these

"cunning" men and women, who claim to have familiar spirits at command, *ad lib.*, are too old-fashioned, or not sufficiently wide awake to cheat people after a legal fashion, particularly in some of the more remote parts of the old country, where they are not so civilized in this respect as we are.

In some of these places witchcraft, in its ancient potency, appears to be considered still to exist; and there is a curious instance of this in the case of *The Queen* v. *Maria Giles*, reported in 13 W. R. 327. The prisoner was indicted for obtaining money under false pretences, under the following circumstances: One Henry Fisher deserted his wife, of which the prisoner was made aware. Desiring to turn an honest penny by this incident in the married life of Mr. and Mrs. Fisher, or perhaps moved by the distress of the wife, and possibly duped by her own folly, the prisoner represented to the wife that she could bring her husband back, "over hedges and ditches," by means of some stuff she had in her possession. It was proved that the wife asked the prisoner to tell her a few words by the cards, to fetch her husband back; that the prisoner asked her how much money she had; that, when she said sixpence, the prisoner said that that would not be enough, whereupon the wife gave her another sixpence; that she said her price was high—it was five shillings; that she asked the wife if she had a clock at home, and if she had anything on that she could leave; that the wife said she had on a petticoat, but it was old; that the prisoner said that it was of no use; that the wife said she had two frocks on, and at the request of the prisoner she left one with her; and that after the prisoner had got the money, she said she *could* bring the husband back, having previously said she *would* bring him back. The jury found a verdict of guilty, but the case was reserved for the opinion of the court.

Chief Justice Erle, in giving judgment, said, that a pretence of power, whether physical, moral or supernatural, made with intent to obtain money, is within the mischief intended to be guarded against by this branch of the law, and that the indictment was good. He also considered that there was sufficient evidence to sustain the conviction. "I take the law to be," said he, "that a pretence, within the statute, must be of a present or past fact, and that a promissory pretence that I will do something is not sufficient. The question is, was there a pretence of an existing fact, viz., a pretence before and at the time when the money was obtained, that the prisoner had power to bring back the husband? * * * I think, looking at the whole transaction, that she intended to pretend to the wife that at that time she had power to bring her husband back. I think that there was evidence to go to the jury that the prisoner was a fraudulent impostor, and that she ought to be convicted."

How much more circumspectly would the Davenport Brothers or "Professor" Simmons have managed matters, and escaped the clutches of the law! But, as we before remarked, this old woman is behind the age.

FALSE PRETENCES.

In the books to which magistrates generally have access, there is very little said in relation to the crime of obtaining money or property by means of false pretence; and it has been suggested to us that brief notes of some of the leading cases on this branch of the law, would be acceptable to many of our readers. The enactments on the subject are in substance as follows:

If any person, by any false pretence, obtains, from any other person any chattel, money or valuable security, with intent to cheat or defraud any person of the same.

If any person, by any false pretence, obtains the signature of any other person to any bill of exchange or any valuable security, with intent to defraud or cheat.

If any person obtains any property whatever, with intent to defraud.

If any person, by means of any false ticket or order, or of any other ticket or order, fraudulently and wilfully obtains or attempts to obtain any passage on any railway, or in any steamer or other vessel, each and every such offender is guilty of a misdemeanor, the punishment varying from fourteen years in the Pententiary to five years imprisonment in the common gaol.

Now all these offences are cognizable before a magistrate for preliminary enquiry; that is, he cannot fine or imprison, but may send the case to the Quarter Sessions or Assizes. We think it necessary to mention this, as one communication we have received seems to suppose that a magistrate could summarily convict for such offence. This is not the case.

The decisions on this branch of the law, will show that fraudulent practices cannot be

indulged in with the impunity that most persons imagine: that which is sometimes called "a shave," "a 'cute trick," "a knowing dodge," may bring a dishonest man within the grasp of the criminal law, and send him to the Penitentiary.

In broad terms, it may be stated that any false statement of an existing fact, fraudulently made for the purpose of obtaining money or property, and by which money or property is obtained, and the owner tricked and imposed on, is a crime of the description referred to.

Thus where the secretary of an O. F. Lodge falsely pretended to one of the members that he owed the society more than in truth he did owe, and obtained money thereby, he was held to be properly convicted of the crime of obtaining money under false pretence. A man who writes a begging letter, making false representations to his condition and character, by means of which the party receiving the letter is imposed upon, and money is obtained, is guilty of a false pretence within the statute. An individual passed off a "flash" note as a Bank of England note on a person unable to read, and obtained from him in exchange five pigs and £1 2s. 6d. change: he was held to be guilty of a false pretence. And a person who fraudulently offers a £1 bank note as a note for £5, and gets it changed upon that representation, may be convicted for obtaining money by false pretence, although the party to whom it was passed could read, and the note upon the face of it afforded clearly the means of detecting the fraud.

We must postpone the continuance of this article till next number, having filled our allotted space in the present one.

HEARING FEES—CONFESSIONS.

In our last issue we answered the question of a Division Court Clerk, as to whether it is "correct in practice, at the time of entering confessions in court, to affix to the proceedings a stamp for 'hearing undefended cases,'" by saying, that we considered such a stamp to be necessary. Circumstances then prevented a fuller explanation of our views, which we now give.

We believe that many persons misconceive this matter, which may perhaps partly arise from the practice of the higher courts, which is in its nature essentially different. In those courts the entry is made by the clerk, without the necessity for judicial interposition; whereas in Division Courts the judge must be satisfied, before judgment, first, of the execution of the confession before the clerk or bailiff; second, that the officer taking it receives nothing but his lawful fees for so doing; and, third, that he has no interest in the demand sought to be recovered. We think, therefore, that when the confession, with an affidavit (if there be one) or proof *vivâ voce* of due execution, as required by the statute, is submitted to the judge for his order, the case is *heard* by him, and he thereupon passes judgment, fixing the time in which payment is to be made. This is the proper time to affix the stamp for the hearing. A stamp for the order would also be required, if it were not for the special exception in the statute.

SELECTIONS.

MAGISTERIAL CURIOSITIES.

Two rather curious cases came before the London police courts last week. In one of them a person was taken into custody on a charge of stealing a bracelet from Lady Honoria Cadogan, and she employed an attorney to defend her, who duly appeared in court, but his client was not in the dock. It was stated, without contradiction, that persons under charge are sometimes detained several hours at the police station before they are placed in the dock, and it has been suggested that this is done for the purpose of enabling the polce to hold a preliminary court of inquiry of their own, and that persons are illegally detained in order to afford the opportunity of completing the cases against them. A messenger was despatched to Vine-street Station for the purpose of ascertaining why the prisoner was not forthcoming. On his return he informed the magistrate that the prisoner was certainly in custody at the station, but that "there was at present no charge against her." Here is a British subject absolutely detained in custody at the police station on the sole authority of the police, whilst the magistrate whose duty alone it is to remand or discharge a prisoner, if there are grounds for either course, is actually sitting in court to inquire into all such cases, and yet the police authorities detain the prisoner in custody, without having, upon their own showing, any case against her that would justify them in bringing her before the magistrate. Mr. Tyrwhitt no doubt censured the illegal proceeding, but added, "perhaps it may turn out that the present cause is one of loose practice rather than of system," and the magistrate remarked that the person detaining the prisoner would be liable to an action for damages. An action against a police constable is a very poor sat-

isfaction for so grievous a wrong, and so illegal an act. A "loose practice rather than a system;" why it is from loose practices that many illegal systems grow up, and who can tell how soon any one of the public, whether high or low, rich or poor, may be made the victim of this "loose practice," which has not yet had time to develop itself into a system. If this illegal practice is to be tolerated because it is only a loose one, and is not yet systematised, the sooner we know it the better, as then the necessary measure may be adopted to prevent its growing into a system which all may have cause to deplore.

The second is a case where a charge was preferred against a respectable man by one who had mistaken his identity. A coachman out of place was swindled out of £16, and two days after the robbery, he gave a very respectable man into custody at Charing Cross as one of his swindlers, and a witness at the Lambeth Police Court said that the prisoner was actually present when the robbery took place. The prisoner was fortunate enough to raise a suspicion in the mind of the magistrate that there was some mistake as to his identity, which induced him to liberate the prisoner on his own recognizances. On Tuesday morning he again came before the magistrate, accompanied by a number of respectable witnesses, who successfully established an *alibi*, and he was discharged without the slightest stain upon his character. These cases of mistaken identity are of more frequent occurrence than they used to be, and innocent men may be very often placed in extreme difficulty on being suddenly called upon to account for themselves at any given moment, when, innocently or otherwise, a charge may be attempted to be fixed upon them, and if unable satisfactorily to account for themselves, the chances are that they will be sent for trial for a felony they never committed, and which may be sworn to by a man who is thoroughly honest in giving his testimony. We are all more or less exposed to this grievance; the most prudent can hardly guard against it, and there is no remedy for it, except that which ought to exist in the consciences of all, viz., the extreme caution that should be used in identifying strangers, lest innocent persons may be confounded with the guilty.—*Solicitors' Journal.*

CRINOLINE IN COURT.

We have the highest respect for the "great unpaid:"* we consider the gratuitous performance of a great public duty by the gentry of England as by no means the least important peculiarity of our constitution: but we are constrained to admit that this institution is not entirely free from the imperfections which cleaves to all human affairs. Some of the recorded decisions at petty sessions are, to us at least, inexplicable. We found lately in the daily press an account of one of these judicial curiosities. In a provincial seaport town a man was charged before the magistrates with setting fire to his chimney. The defendant was said to have quarrelled with his wife about her crinoline, an article of dress which he would not allow her to wear. He took it from her, put her out of the house, and then, pushing the crinoline up the chimney, set fire to it by upsetting a parafine oil lamp into the fireplace, by which means he set the chimney on fire. The bench told him he was liable to a penalty of £5, but they only inflicted a fine of ten shillings "under the circumstances."

Under the circumstances! What circumstances? Does the fact that man has so little control over his own temper that in wantonly destroying his own property he recklessly risks that of his neighbour constitute an "extenuating circumstance?" Or will he rely in mitigation of the penalty due to his offence on the circumstance that his wife had irritated him by wearing an objectionable article of dress? We see no objection to his forcing her to lay it aside if he could do so without breaking the law. Or is the "*circonstance attenuante*" simply that the man had gallantly thrown himself into the breach, and done that which most of us long to do, and none of us dare attempt; destroyed his wife's crinoline? We think it must be so; but while we sympathise with the husbands on the bench, we cannot follow the judicial reasoning of their own worships.

"Crinoline is a most dangerous thing;" true; but a chimney once set on fire might be the means of an extensive destruction of life and property, such as all crinolines, from the invention thereof to this day, have not caused, and the penalty attached to the offence charged was intended to prevent conflagrations. Besides there was a very riot of recklessness in the manner of the act which would seem to us to negative any possible suggestion which might be made in mitigation.

If a husband, unable to overcome his wife's perversity by any milder measures, chooses to destroy an offending article of dress, he may indeed deserve the sympathies not only of a bench of justices. but of all the—henpecked and other—husbands in England; but if in the exercise of his right to destroy that which is his own, he violates the law to the possible injury of his neighbours,

"The man may pity, yet the judge condemns;"

and we can see no ground for any relief from the due punishment.—*Solicitors' Journal.*

THE MAGISTRATES AND THE *LOCAL COURTS' GAZETTE.*

A social gathering of the magistracy and others of the county of Elgin, was held in St. Thomas at the holding of the Court of Quarter Sessions for that county, presided over by the sheriff of the county, who occupied the chair, and S. Price, Esq., who filled the vice-

* In England, as explained in our last issue under "English Justices of the Peace," magistrates receive no remuneration for their services; hence the expression in the text.—Eds. L. C. G.

chair. An explanation of the object of this social congress was then made, after which His Honor, the chairman of the Quarter Sessions, delivered an address, pointing out the advantages which might flow from a periodical association of the magistrates of the county, and in which he directed attention to the importance of keeping well up in the current law; the responsibility involved in the office of magistrates, and the consequences both socially and pecuniarily that resulted from neglect on the part of magistrates to cultivate acquaintance with the decisions of the law courts. He quoted from the *Local Courts' Gazette* an illustration of what he was urging, and advised the magistrates to become readers of that useful periodical as one means of posting themselves in the duties of their responsible office.

Mr. Price followed, in a brief speech, in which he seconded the views of the judge.

Mr. Horton, Recorder of the city of London, responded to a call upon him, in a very excellent speech on the social justices of the peace, and of the necessity of maintaining the respect due to it by an intelligent discharge of the duties of the office.—*Canadian Home Journal.*

THE LAW & PRACTICE OF THE DIVISION COURTS.

(*Continued from page* 32.)

Before examining in detail the provisions contained in sec. 71, other causes of an exceptional nature varying this general enactment, and giving a plaintiff the right under certain circumstances to select the tribunal, must be briefly noticed.*

As regards clerks and bailiffs of Division Courts, there is by sec. 83 an express prohibition, for obvious reasons, against their bringing any suit in the Division Court to which they are attached; whilst as respects actions against them a plaintiff seems to have the option of suing there or in any other division which immediately adjoins. There would be a practical difficulty, it is true, where there is only one bailiff acting for the court, but still the right seems to exist. The option is properly given to the plaintiff to meet cases where the cause of action against an officer has arisen in his own division. Officers also are empowered to sue in an adjoining division. The clause (sec. 85) runs thus:—"Every clerk or bailiff may sue or be sued for any debt due to or by him, as the case may be, separately, or jointly with any other person, in the court of any next adjoining division, in the same county, in the same manner to all intents and purposes as if the cause of action had arisen within such next adjoining division, or the defendant or defendants were resident therein." The right here given is permissive, whilst the language prohibiting officers from suing in their own division is imperative.

When proceedings are commenced by attachment against the defendant's goods, the plaintiff is not tied down to the court for the division in which the cause of action arose, or in which the defendant resided, for, under the 202nd section of the act, the proceedings in such case may be conducted to judgment and execution in the Division Court of the division within which the warrant of attachment issued; yet where proceedings have been commenced in any case before the issue of an attachment, such proceedings may be continued to judgment and execution in the Division Court within which the proceedings were commenced: (sec. 203.)

When a claim is made to or in respect of any goods or chattel property, or security taken in execution and attached under the process of any Division Court, or by any landlord for rent, or by any party not being the party against whom such process issued, the parties really interested may be required to interplead when summonses are issued, and the claimant becomes the plaintiff, and the judgment creditor the defendant in the proceeding: (Rule 53).

The court from which these summonses are to be issued is not to be determined by the locality in which the cause of action arose, or the defendant resided, for section 175 expressly enacts that upon application of the officer charged with the execution of the process the clerk of the court may "issue a summons calling before the court out of which such process issues, or before the court holden for the division in which the seizure under which such process was made," both the execution creditor and the claimant; "and the county judge having jurisdiction in such Division Court shall adjudicate upon the claim."

By the act to amend the law of replevin in Upper Canada (23 Vic., cap. 45), replevin may be brought in the Division Court, and it is expressly enacted where the writ may issue

* The provisions of the 10th, 11th, and 13th sections of the act may be here referred to, as relating to the subject of venue, and as connected in a certain sense with the subject discussed in the text.

from. It is in effect nearly the same provision as that contained in sec. 71 of the Division Courts' Act, namely, that "the writ may issue from the Division Court for the division within which the defendant or one of the defendants resides or carries on business, or where the goods or other property or effects have been distrained, taken or detained."

In some cases a plaintiff is restricted by statute to laying his action in a particular locality, and in such cases the direction of the statute must be followed. Thus in actions against justices of the peace, or against any other person or officer, or person fulfilling any public duty, for anything done by him in the performance of such public duty, it is provided how the venue is to be laid, and "in every such action the venue shall be laid in the county where the act complained of was committed, and in actions in the County and Division Courts the action must be brought in the county or division within which the act committed, or in which the defendant resides:" (cap. 126, Consol. Stats. U. C.)

MAGISTRATES, MUNICIPAL & COMMON SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

MAGISTRATES — JURISDICTION. —The jurisdiction of justices of the peace is not ousted by the accused setting up a claim of right which cannot by law exist: (*Hudson* v. *McRae*, 33 L. J. N. S. 65.)

MAGISTRATES—DISCRETION. —Where a statute gives to justices a discretion whether they will do a particular thing, it does not enable them, having heard the case, to refuse a warrant because they think the law under which they are called upon to act is unjust: (*Reg.* v. *Boteler et al.*, 33 L. J. N.S. M. C. 101.)

ELECTIONS—PERSONATING A VOTER. —To complete the offence of inducing a person to personate a voter at a municipal election, under the Imperial act 22 Vic. ch. 35, s. 9, it is not necessary that the personation should be successful; and a conviction for the offence was held good, though it did not set out the mode or facts of the inducement: (*Reg.* v. *Hague*, 12 W. R. 310.)

TRESPASS—AIDER AND ABETTOR—PERSONS ENGAGED IN A COMMON PURPOSE. — I. and T. were driving in a trap along the turnpike road, for a lawful purpose. I. got out of the trap, went into a field, and shot a hare, which he gave to T., who had remained in the trap. I. having been convicted of trespass in pursuit of game, an information was laid under the 11 & 12 Vic. c. 43, against T., charging him with being present, aiding and abetting. On a case stated by the justices, it was *held* that there was abundant evidence on which the justices might have come to the conclusion that both were engaged in a common purpose, and that T. was guilty: (*Stacey* v. *Whitehurst*, 13 W. R. 384.)

MUNICIPAL ELECTIONS — DISQUALIFICATION — CONTRACT WITH CORPORATION.—The defendant was elected alderman for a ward in the city of Hamilton. It appeared that before election he had tendered for some painting and glazing required for the city hospital, that his tender was accepted, and that he had completed a portion of the work for which he had not been paid. A written contract had been drawn up by the city solicitor, but not signed by the defendant, and he swore that before the election he informed the mayor that he did not intend to go on with the work. *Held* (reversing the judgment in chambers) that the defendant was disqualified as a contractor with the corporation; that it was immaterial whether the contract would be binding on the corporation or not, and that his disclaimer could have no effect. (*Regina ex rel. Moore* v. *Miller*, 14 U. C. Q. B. 465.)

A township councillor being a contractor with the county, and having been elected a deputy reeve, was *held* disqualified from taking his seat in the county council: (*Reg. ex rel. Lutz* v. *Williamson*, 1 U. C. Prac. R. 194.)

Where it appeared that the defendant at the time of his election as councillor had a claim upon the city for certain work done by him under a contract with the corporation, *held* that he was disqualified: (*Reg. ex rel. Davis* v. *Carruthers*, 1 U. C. Prac. R. 114.)

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

NUISANCE TO LAND. — Every man is bound to use his own property in such a manner as not to injure the property of his neighbour, unless, by lapse of time, he has acquired a prescriptive right to do so. The law does not regard trifling inconveniences, and every thing must be looked at from a reasonable point of view. In an action for a nuisance to property by noxious vapours,

the injury must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it. In determining the question, all the circumstances must be taken into consideration; and in places where great public works which develop the material wealth of the country persons must not stand upon extreme rights: (*Tipping* v. *St. Helen's Smelting Co.*, 13 W. R. 289.)

MARRIED WOMAN'S ACT — ORDER FOR PROTECTION.—An order of protection obtained by a married woman who has been deserted by her husband, does not protect property acquired by her by immoral practices: (*Mason* v. *Mitchell*, 13 W. R. 349.)

FARMING LEASE. — A condition in a farming lease that the tenant would perform each year for the landlord "one day's team work, with two horses and one proper person," does not compel him to supply a cart as well: (*Duke of Marlborough* v. *Osborn*, 12 W. R. 418.)

VENDOR AND PURCHASER — SALE OF GOODS — NON-DELIVERY WITHIN TIME SPECIFIED BY CONTRACT—DAMAGES WHERE GOODS NOT TO BE BOUGHT IN MARKET.—Where goods are not delivered at the time specified in a contract for delivery, and their place can be supplied in the market, the measure of damages is the difference between the contract price and the market price, when they ought to have been delivered. If their place cannot be supplied in the market, and the vendee have done all that a person with reasonable care and skill could do to diminish the loss, the measure of damages is the difference between the value of the goods, when they were delivered, and when they should have been delivered.

A. sold B. a certain quantity of caustic soda, to be delivered at certain specified times; and B. sold the same to C., to be delivered at the same times, and informed A. that he wanted it for a customer on the continent; C. sold the same to D., and informed B. of his having done so. None of the soda was delivered within the specified times, and a portion only was delivered afterwards, for carriage of which C. had to pay higher freight and insurance than he would have had if it had been delivered at the specified times; C. claimed from B. the extra freight and insurance, and also made a claim for loss on his sale to D. Such caustic soda could not be bought in the market. In an action by B. against A *Held*, that B. was entitled to recover his loss of profit on the re-sale to C., on the quantity not delivered; and, also, the extra freight and insurance paid, that being the direct consequence of the breach of contract; but that he could not recover the loss on the sub-sale from C. to D., that being too remote: (*Borries et al.* v. *Hutchinson et al.*, 13 W. R. 886.)

LANDLORD AND TENANT—COVENANT TO REPAIR —AFTER-ERECTED BUILDINGS.—A lease of "three tenements or dwelling-houses, and a field or plot of ground adjoining," contained a covenant "well and sufficiently to repair, sustain, and keep the said tenements or dwelling-houses, field, plot of ground, and premises, and every part thereof, as well in houses, buildings, walls, hedges, ditches, fields, and gates, as in all other needful and necessary reparations whatsoever, when and as often as occasion should require during the said term." *Held*, that the lessee was not bound by this covenant to repair buildings erected after the lease on portions of the field: (*Cornish et al.* v. *Cleife et al.*, 13 W. R. 389.)

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

EDGAR v. NEWELL.

Slander—Evidence of character—Justification—New trial.

In an action for slander imputing theft, defendant having pleaded and endeavoured to support pleas of justification, *Held*, that evidence of the plaintiff's general bad character for honesty was properly rejected.

Semble, per *Hagarty J.* that it would have been inadmissible even without the justification; but that, if not guilty only be pleaded, defendant may shew, solely in mitigation of damages and to rebut the presumption of malice, that before speaking the words it was a common rumour in the neighbourhood that defendant had been guilty of the specific offence charged.

The evidence in support of one of the pleas of justification was very strong, sufficient to have warranted a conviction, if the plaintiff had been on his trial. The charge however was made three years after the alleged offence, for which there had been no prosecution, and defendant had no special interest in the matter. The jury having found for the plaintiff, and $150 damages, the court refused to interfere.

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

Slander, the words charged being "Edgar is a thief, and I can prove it." *Pleas*, 1. Not guilty. 2 and 3, Justification. The second plea alleged that the plaintiff before the said time when, &c., to wit on, &c., feloniously did steal, take, and carry away certain goods and chattels, to wit, one over-coat, two horse-blankets, and one bag containing empty bags, of one William Snider. The third plea charged the plaintiff with stealing a barrel of salt of one J. P. O'Higgins.

The case was tried at Stratford, before *Draper* C. J. The words were proved, and defendant gave very strong evidence to shew that the theft charged in the second plea had been committed by the plaintiff about three years previously. He attempted to make out the charge alleged in the third plea as well, but the proof offered was insufficient, and was not pressed before the jury. He also tendered evidence that the plaintiff's character for honesty and his general reputation

in that respect was bad, which the learned Chief Justice rejected, on the ground that there was a plea of justification on the record.

The jury found for the plaintiff, $150 damages.

Christopher Robinson, Q.C., obtained a rule *nisi* for a new trial, on the ground that the justification pleaded in the second plea was clearly proved; or on the ground that the learned Chief Justice improperly rejected evidence tendered by the defendant of the plaintiff's general reputation for dishonesty, and bad character as regards that particular trait or quality.

Robert Smith shewed cause. He contended that the plaintiff having been in effect placed upon his trial on a charge of felony, it would be contrary to the established practice in such cases to interfere with the finding of the jury in his favour, even though it might seem to be against the weight of evidence—*Symons* v. *Blake*, 2 C. M. & R. 416: that the defendant having failed to prove his second plea of justification, the verdict on that issue was clearly right, and a new trial, which would disturb it, should not be granted—*Baxter* v. *Nurse*, 6 M. & G. 935: that the jury might have been properly influenced in their view of the whole case by the fact of such plea having been pleaded without sufficient ground; and that the evidence as to character was properly rejected—*Jones* v. *Stevens*, 11 Price 235; *Thompson* v. *Nye*, 16 Q. B. 175.

Robinson, Q.C., in support of the rule, cited, as to the motion for new trial on the evidence, *Mellin* v. *Taylor*, 3 Bing. N. C. 109; *Regina* v. *Johnson*, 1 L. T. N. S. 513, Q. B.; *Peters* v. *Wallace*, 5 U. C. C. P. 238; *Swan* v. *Cleland*, 13 U. C. Q. B. 335: As to the admissibility of the evidence of character, *Richards* v. *Richards*, 2 Moo. & Rob. 557; *Knobell* v. *Fuller*, Pea. Add. Cas. 139; *Earl of Leicester* v. *Walter*, 2. Camp. 251; *Inman* v. *Foster*, 8 Wend. 602; *Bell* v. *Parke*, 11 Ir. C L. Rep. 424; ——— v. *Moor*, 1 M. & S. 284; *Bennett* v. *Hyde*, 6 Conn. 24; *Bracegirdle* v. *Bailey*, 1. F. & F. 535; *Myers* v. *Currie*, 22 U. C. Q. B. 470; *Jones* v. *Stevens*, 11 Price, 235; *Foot* v. *Tracy*, 1 Johns. 46; *Wyatt* v. *Gore*, Holt N. P. C. 299; *Newsam* v. *Carr*, 2 Stark. N. P. C. 70; *Douglass* v. *Tousey*, 2 Wend. 352; *Wolcott* v. *Hall*, 6 Mass. 514; *Ross* v. *Lapham*, 14 Mass. 275; *Sawyer* v. *Eifert*, 2 Nott. & McCord 511; *Root* v. *King*, 7 Cowen 618; Taylor on Evidence, 4th Ed., 855-6; Rosc. N. P. 576; Add. on Torts 730. As to the effect of a justification being pleaded, Starkie Ev., 3rd Ed., vol ii, 306 note *k*, 641-2; *Cornwall* v. *Richardson*, R. & M. 305; *Snowden* v. *Smith*, 1 M. & S. 286, note *a*; *Root* v. *King*, 7 Cowen, 618.

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

As to the merits. This is one of the many cases in which the court is asked to set aside a verdict of which it cannot approve on a calm consideration of the evidence. The testimony certainly was very strong. It would have sufficed most likely to convict the plaintiff, had he ever been put upon his trial for the offence; and had any right, estate or franchise, or large sum of money been at stake, we think it would be only right to submit the case to another jury. But we hardly see our way to interfere in a case like the present. The charge was made long after the alleged offence had been committed. No person had thought proper to prosecute the plaintiff for it, and the defendant, having no especial interest in the matter, charges the plaintiff generally with being a thief. He does this at his peril, and when sued for damages tries to prove the charge, and fails to convince the jury.

It does not follow, because a man has once committed an offence, that a jury will always regard with favour a person who persists in casting it up against him at any period, however remote. A person may make the charge relying on his being able to prove it to the satisfaction of a jury. We think he must always run this risk. But we do not think a court is bound to set aside, as a matter of right, a verdict rendered against the weight of evidence, but may leave the defendant to the consequence of his own rashness. It is not usual to put a plaintiff, deliberately charged with fraud or felony in a civil action, twice, as it were, upon his trial; at all events, an action for slander is not one in which the ordinary wholesome rule should be set aside.

We think we cannot properly interfere on the merits.

The rejection of the evidence tendered as to character opens a wide field for discussion.

1. Should it be permitted under any circumstances?

2. If admissible in mitigation of damages, can it be received after evidence offered in bar on a plea of justification?

It seems to me that the doubt suggested as to this evidence, is felt more by the text writers than the judges.

Mr. Taylor, in his last edition, page 355, after giving the different views, says, "Such being the arguments on either side of this vexed question, it remains only to observe that the weight of authority inclines slightly in favour of the admissibility of the evidence, even though the defendant has pleaded truth as a justification and has failed in establishing his plea."

He cites a great number of cases. I have examined them. The American authorities certainly support his view. I doubt if the English cases go so far. Most of the cases are *nisi prius* decisions. I am not aware of any express decision of the court in Banc except *Jones* v. *Stevens*, 11 Price, 235, which is directly against its reception.

In *Thompson* v. *Nye*, 16 Q. B. 175, the question rejected was whether the witness had not heard from other persons that the plaintiff was addicted to certain practices, the subject of the slander. The court refused to decide the general point, but held the question rightly rejected, as it should have been confined to rumours existing before the utterance of the slander. Patterson and Wightman, J. J., say they give no opinion on the general question. Coleridge, J., says, "I will only go so far as to say, that I do not wish it to be supposed that I am in favor of allowing the question to be put even in its most limited form. My present impression is against doing so." Erle, J., says, "It is not necessary to give any opinion as to the admissibility of the question in a qualified form. Many learned judges have admitted it, but they all acted on a decision at *Nisi Prius* (*Earl of Leicester* v. *Walter*), which it was not worth the plaintiff's while to question. But in *Jones* v. *Stevens* the point was brought before the full Court of Exchequer; and

there the question was held inadmissible in its general form."

No doubt, *Earl of Leicester* v. *Walter*, 2 Camp. 251, is the chief authority. It was a decision of Sir James Mansfield, and as the plaintiff had a verdict he did not of course, move. In deciding to admit the evidence, Sir James says: "In point of reasoning, I never could answer to my own satisfaction the argument urged by my brother Best" (the objecting counsel) "at the same time, as it seems to have been decided in several cases that, if you do not justify, you may give in evidence anything to mitigate the damages, though not to prove the crime which is charged in the libel, I do not know how to reject these witnesses. Besides, the plaintiff's declaration says, that he had always possessed a good character in society, from which he had been driven by the insinuations in the libel. Now the question for the jury is, whether the plaintiff actually suffered this *gravamen* or not. Evidence to prove that his character was in as bad a situation before as after the libel, must therefore be admitted.

In a case in Ireland, in 1860, *Bell* v. *Parke* (11 Ir. C. L. Rep. 326,) Pigot, C. B., is decidedly of opinion, "that the great preponderance of authority is in favor of reception of the evidence." He cites the passage from Starkie on Slander, (vol. ii, page 88,) relied on by Mr. Robinson in his very able and exhaustive argument on the authorities. Fitzgerald, B., treats it as an unsettled question, Hughes, B. concurring with him. In the last edition of Starkie on Evidence, the point is not touched upon.

In *Bracegirdle* v. *Bailey*, 1 F. & F. 536,—in slander, and not guilty alone pleaded—Byles, J., after consulting Willes, J., held, "that no evidence of bad character, or questions relating to the plaintiff's previous life or habits, tending to discredit him, and to mitigate damages, were admissible, either on cross-examination or examination in chief, and that he could not ask any thing to prove the libel true."

In this court, in *Myers* v. *Currie*, 22 U. C. R. 470, (slander imputing theft), a motion was made for a new trial, because Richards, C. J., rejected evidence of the plaintiff's general bad character previous to the speaking of the words. After consulting the judges of the Common Pleas, the judges of this court refused a rule, for the reasons given in the report.

In this state of the law we think we should discharge the rule for rejection of evidence, and leave the defendant, if he think proper, to endeavour to have the law finally settled by a court of Error.

If it be necessary to decide the point, I should say that I think the fact of defendant pleading specifically the truth of his words and endeavouring to prove them, as a matter of reason, if not of clear authority, should operate to the exclusion of evidence of rumours or of general bad character.

Where a defendant pleads only not guilty, and endeavours to shew that he was not actuated by any malice or actual desire to injure defendant, he stands, in my judgment, in a very different position from one who deliberately places a justification on the record. This at once takes away from his conduct that palliation which he can naturally urge on not guilty.

I am inclined to hold, notwithstanding the doubts expressed in *Thompson* v. *Nye*, that with only not guilty pleaded, a defendant might be allowed to shew, solely in mitigation of damages and to rebut the presumption of malice, that prior to his utterance of a specific charge, it was a common talk or rumour in the neighbourhood that the plaintiff had been generally spoken of as having done the thing charged.

This would tend to shew that defendant may have acted not from malice, but rather from heedlessness. If, on the other hand, he put a justification on record, he deliberately charges the plaintiff with the crime as a fact, and I think he should not be permitted to resort to what could only be a palliation and indication of the absence of malice. The justification suggests a wholly different idea of defendant's conduct, and is always held to aggravate it.

General evidence of the plaintiff's bad character for honesty, &c., seems to me to open a far wider field of enquiry, and should not, I think, be received with or without a justification pleaded. A plaintiff, as has been often said, cannot be expected to be prepared to vindicate every act of his life. The existence of a common fame and rumours that he had done a particular act is a fact, not a mere opinion, and when shewn to be current prior to defendant's utterance of the slander, and wholly unconnected therewith, might, I think, be receivable strictly in mitigation of damages.

The state of the authorities on both points is most unsatisfactory.

We think the rule for a new trial should be discharged.

Rule discharged.

ELECTION CASE.

(*Reported by* R. A. HARRISON, ESQ., *Barrister-at-law.*)

THE QUEEN EX REL. HEENAN v. MURRAY.

Election of Reeve—Procedure—Time—Efficiency of election.

Where four members of a village council, being at least a majority of the whole number of the council when full, met, and at their first meeting a resolution naming one of them as reeve was put and seconded, and no dissent was expressed, whereupon the clerk, in the hearing of all, but while two of the members were retiring from the council chamber, declared the resolution carried, the reeve was held to be duly elected.

Though the statute declares that the members of every municipal council shall hold the first meeting *at noon*, and at such meeting organise themselves as a council by electing one of themselves as reeve, an election at six o'clock, p.m., on the same day, is a sufficient compliance with the statute.

[Common Law Chambers, March 12, 1864.]

The relator complained that Thomas Murray, of the village of Pembroke, merchant, had not been duly elected, and had unjustly usurped the office of reeve of the municipality of the said village of Pembroke, under the pretence of an election, held on Monday, the 18th January, 1864, at the town hall in the said village of Pembroke; and declaring that he the said relator had an interest in the said election as one of the municipal councillors for the said municipality of the village of Pembroke, and a candidate at the said election for the said office of reeve, showed the following causes why the election of the said Thomas Murray to the said office should be declared invalid and void, viz.: first, that there was only two members of the said council, viz.,

the said Thomas Murray and John Supple, present when the said alleged election took place; second, that no vote in favor of the motion to elect the said Thomas Murray was given by any of the said councillors; third, that the clerk of said council illegally declared the said Thomas Murray duly elected reeve, without taking the vote of the councillors upon the motion to elect him as reeve; fourth, that the said election did not take place at noon of the third Monday in January, as required by law, but about the hour of six o'clock in the evening of that day.

The relator made oath, that he was one of the councillors for the municipality of the village of Pembroke for the year 1864; that the council of the said village of Pembroke is composed of five members; that on Monday, the 18th day of January, instant, the following four members elect of the said village council, viz., John Supple, Michael O'Meara, the said Thomas Murray, and the relator, met at the town hall of the said village of Pembroke; that Alexander Moffatt, one of the councillors elect, was not present at said meeting; that Andrew Irving, the clerk of the said council, presided at said meeting; that after the said four members of council had made their declarations of office and of qualification, it was moved by the said John Supple, and seconded by the said Thomas Murray, that the said Thomas Murray be reeve of said county; that upon the motion being put by the said clerk to the said council for their vote on the same, the relator objected to the election of the said Thomas Murray to the office of reeve, and made his objection known to the said clerk and members present of said council; that the said Michael O'Meara also objected to the election of said Thomas Murray as reeve, and made his objection known to the clerk and members present of said council, calling out in answer to the said question the words "No, no;" that thereupon, and before any vote was taken upon the said motion, the relator and the said Michael O'Meara were in the act of going out of the door of the said council room, having left their seats at the council for the purpose of leaving the same, and without any vote having been taken on the said motion, the said clerk, Andrew Irving, said that if no amendment was made to the said motion, he would have to declare the said Thos. Murray duly elected reeve of the said village of Pembroke; that no vote was taken or given by any member of the said council on or for the said motion; that the said Thomas Murray accepted the said office of reeve, and received from the said clerk, Andrew Irving, a certificate under his hand and the seal of the said corporation to enable him to take his seat as a member of the county council of the united counties of Lanark and Renfrew.

Michael O'Meara made oath, that he had heard read the statement and relation of Jas. Heenan in this matter, and that the same was true in every particular; that he also heard read the affidavit of the said James Heenan, and knew the statements therein contained to be true.

C. S. Patterson showed cause, and filed the affidavit of John Supple, wherein it was sworn, that he was one of the municipal councillors of the village of Pembroke; that on the 18th day of January, 1864, he attended, as such councillor, a meeting of the councillors of the said village, held in the town hall; that the following councillors were present, viz., Thomas Murray, Michael O'Meara, James Heenan, and deponent, at said meeting; that the said councillors then made the declaration of office required by law; that after the said councillors made the declaration of office, and whilst the four of them were still present, Andrew Irving, the clerk of the municipality, called the council to order and said, "Now is the time to elect your reeve," or words to that effect; that immediately after the clerk made the announcement, and whilst the four councillors were present, a resolution was placed in the clerk's hands, moved by deponent and seconded by Thomas Murray, to the effect that Thomas Murray be reeve; that the clerk read the resolution to the council, the four being still present, and said if there were no amendment offered he would have to declare it carried; that after a sufficient time had elapsed for an amendment to be put in, and there being none moved, and whilst the four councillors were still in the hall, Thomas Murray called "Question!" when the clerk again read the resolution, and, there being no dissenting voice, declared the motion carried, and that Thos. Murray was duly elected reeve of the village of Pembroke; that at the time the clerk declared the said Thomas Murry elected, the four councillors were still present, and must have heard the declaration of the clerk, as he spoke in a loud tone of voice, and the room in which the meeting was held is small; that the said relator, James Heenan, was not a candidate for the said office of reeve, nor was there any other candidate for the said office at the said election except the said Thomas Murray, nor was the said James Heenan's name mentioned, or any other person, at said election, in connexion with the said office, other than the said Thomas Murray.

The affidavit of John Supple was corroborated by the affidavits of Richard Fallow and James P. Moffatt, both electors, who happened to be present when defendant was declared elected by the clerk.

R. A. Harrison supported the summons, and cited Con. Stat. U. C. cap. 54, secs. 130, 132.

HAGARTY, J.—The statute directs, that the council, being at least a majority of the whole number of the council when full, shall, at their first meeting, after making the declarations of office and qualification, organize themselves as a council, by electing one of themselves to be reeve, &c. (Sec. 132.)

At the first meeting here, four councillors were present, and they should, according to the statute, have chosen their reeve.

The relator and his fellow-councillors admit that a resolution naming Murray as reeve was put and seconded; that he (relator) and the others expressed dissent, and rose to go away; that while in the act of going, the clerk said that if no amendment were moved, he would have to declare Murray elected.

Two witnesses swear in reply that no dissent was expressed to the resolution; that after ample time had elapsed, a member called "Question!" and there being no dissenting voice, the clerk declared Murray elected; that when he did so the four councillors were present, and must have heard him do so.

The fact of their being present, and hearing the clerk ask if no amendment moved, &c., is admitted.

It is quite true that the reeve should be elected by a majority. It is equally true that the councillors should, in obedience to the law, have elected, or at least fairly tried to elect, a reeve, at this their first meeting.

The relator and his friend do not assert that when they heard the clerk say he would have to declare Murray elected, they protested or made any further expression of dissent. I think, therefore, we must assume the law to have been complied with, and that when the clerk, trying to do his duty, and to obey the law, in the hearing and presence of the four councillors, declared publicly that if no amendment were moved he would have to declare Murray elected, and no one dissenting therefrom, the latter was elected by a legal vote duly made.

We all know that in representative bodies the great majority of resolutions are passed without any formal voting by yeas and nays.

I cannot but consider that this election should stand.

I think the relator and his friend tried to prevent the law being obeyed. They suggested no candidate of their own, and made no *bona fide* attempt to have a formal vote taken. Taking their own account, they rose to go away, leaving their legal duty unperformed, and heard notice given that Murray would be declared elected, if no amendment were offered.

The other objection, that this election did not take place till six o'clock, is too trivial to require serious notice.

The summons must be discharged with costs, to be paid by the relator.

Order accordingly.

CHANCERY.

(*Reported by* ALEX. GRANT, Esq, *Barrister-at-Law,*)
Reporter to the Court.

PATTERSON v. JOHNSON.

Injunction—Trade fixtures.

The purchaser of the equity of redemption in certain mortgage premises erected thereon a machine shop, wherein he placed a boiler and engine, and introduced into the building three lathes, a wood-cutter, and a planing machine, all of which were worked and driven by such engine, but were in no way attached to the machine shop except by belting or similar means, when in motion; being in every other way unconnected with it or any of the fixed machinery, and capable of being removed without disturbing the machinery, or doing any damage to the realty in any way.

Held, on a motion to dissolve an injunction which had been obtained *ex parte*, that these articles were removeable as trade fixtures.

The distinction between chattels affixed with nails or other fastenings, and those resting by their own weight, remaining chattels or becoming part of the realty, considered and doubted.—*McDonald* v. *Weeks*, 8 U. C. Chan. Rep. 297, considered and approved of.

In this case an *ex parte* injunction had been granted restraining the defendant from removing certain articles placed in the machine shop, in the pleadings mentioned by the defendant since he had gone into possession of the premises, he having purchased from the mortgagor his equity of redemption in the property upon which the shop was erected. The defendant now moved upon affidavits to dissolve this injunction, on the grounds stated in the head note and judgment.

Tilt, for the motion.

Crombie contra.

VANKOUGHNET, C.—This was a motion to dissolve an *ex parte* injunction, restraining the defendant from removing from the premises certain machinery, among which are three lathes, a wood-cutter, a planing machine and a circular saw. It is as to these articles that a dissolution of the injunction is sought. The plaintiff is the mortgagee of the land, and the defendant the assignee of the equity of redemption. The defendant, and not the original mortgagor, erected upon the land a machine shop, in which he placed a boiler, engine, and the articles above mentioned, with some others. Such of the machinery as can be treated as having been affixed to, and thus become part of the realty, are doubtless covered by the plaintiff's mortgage, though placed on the land subsequently to its execution. But the defendant contends that the articles above named never were in any way affixed to the realty—never became a portion of it; were but deposited in the machine-shop—worked there from time to time, but in no way attached to it except by belting or some such means when in motion—in every way disconnected with it, or any of the fixed machinery, and capable of being removed without disturbing it or doing any damage to the realty in any way—in fact portable. This contention of the defendant is, I think, established, although the affidavits on behalf of the plaintiff would lead to the contrary conclusion, and give the idea that all these portions of the machinery were fastened in and to the building, so as to be immoveable without drawing nails or bolts. Yet I think the defendant's affidavits more explicit and reliable as to the exact state and position of the machinery, and accordingly I will for the present, assume them to be true, giving to the plaintiff the opportunity to cross-examine the defendant's witnesses if he desire it, he proceeding promptly to do so.

Assuming, then, the state of facts represented by the defendant to be true, I am of opinion that I cannot treat the machines in question as part of the realty, but must consider them as chattels removable at the will of the owner, subject to sale by him and to execution against his goods. I have read carefully and with great interest the judgments of the Queen's Bench here in *Gooderham* v. *Denholm* 18 U. C. Q. B. 203, and of my brother Spragge in *McDonald* v. *Weeks*, 8 U. C. Chan. R. 297. I think there is strong reason and good sense in the remarks of my brother Spragge in the latter case. It does seem in many cases that could be put, but a flimsy distinction that articles are fixtures, when nailed or screwed or bolted into a building, and are not so when their own weight gives them steadiness in their place without such aid. Take the case of a house which by its own weight sustains its position on the ground; the owner does not want a cellar, perhaps, has no need to let it into the ground, or to require any foundation for it other than the surface of the ground itself. Could it be said that this was a chattel which did not pass under a deed of the land, which the owner evidently intended to improve and benefit by the erection of it? But while there might be little difficulty in treating such a structure as part of the realty, the character to be given to such articles of less bulk, such as

machines used on the realty or in connection with the fixtures (in the literal sense of the term,) erected on the land, is not so plain. Where such an article as a boiler or engine is built into a house or fastened upon the land, it may well be called a fixture: it literally is so, and the owner may be considered as having devoted so much of the realty, at all events, as is necessary for the use of such machinery, to the purpose of it, and of having thus intended to benefit the realty. But there is great difficulty in extending this character to articles of machinery which have not been actually affixed to the land, such as those in question here. As I understand the evidence, the defendant erected a machine-shop, into which he fastened a boiler and engine. With this engine, to the extent of its power, he could drive any machinery for which the building was adapted, and which he chose to introduce into it He has there at present a circular saw, a wood-planer, and lathes. He may choose to abandon this description of machinery and introduce something else. He has not in any way declared his intention of making these part of the realty: he has not in fact made them part by attaching the one to the other. The articles are all portable—can be moved by hand from place to place in the building, and out from the building. It is true they are there to be used with certain fixed machinery, with which they can be connected from time to time for the purpose of moving them. But can I say that for this reason they have become fixtures?

I have had the advantage, since the decisions in our own courts above quoted, of examining the following recent authorities bearing more or less upon this question. *Wilson* v. *Whateley*, 1 John & H. 436; *Jenkens* v. *Gething*, 2 John & H. 520; *Haley* v. *Hammersley*, 7 Jurist, N. S. 765, in which Lord Campbell approves of the judgment of Vice-Chancellor Wood, in *Mather* v. *Fraser*, 2 Kay & J. 536; *Bates* v. *Beaufort*, 8 Jur. N. S. 270; *Gibson* v. *Hammersmith*, &c., 9 Jur. N. S. 221. While in many cases articles which have been merely attached to the freehold by nails or screws have been held removable as chattels, when this can be effected by simply drawing the nails or screws without doing damage, I find no case in which portable machines, such as the present, have been treated as fixtures irremovable, when they have not been fastened or attached in some way to the land. This distinction seems to be preserved, not merely for convenience, but because the law leans in favor of trade by treating, when it properly can, articles used in trade as disposable chattels. While, as I have already remarked, on the one hand, the distinction between articles resting by their own weight in a particular position, and articles sustained in it by nails or bolts seems a flimsy one, and not readily sustained by any principle, (a distinction, however, not always observed, as pointed out before;) on the other hand, where this evidence of intention to make any article, in itself a chattel, a part of the realty, and when the act of affixing it there are wanting, it will be almost impossible, in any case, to say what things remain chattels, and what have become part of the freehold.

I think I must treat the machines in question here as chattels.

Gordon v. Ross.

Mortgagor and mortgagee—Insolvent Act—Power of sale.

Where a mortgagor becomes bankrupt the mortgagee is not compelled to go in under the act, but may proceed to sell the property under a power of sale in his mortgage.

This was a motion for an injunction to restrain the sale of a steamboat by a mortgagee under a power of sale contained in his mortgage. The plaintiff was the assignee in insolvency of the mortgagors.

Hoskin for the motion contended that under the Insolvent Act of 1864, section 5, sub-sec. 5, a mortgagee's only remedy was to file a claim in the matter of the insolvency, when the proceedings would be taken which that sub-section points out. He referred also to 9th and 12th sub-sections.

Crombie contra, referred to the 4th and 5th sub-sections as shewing that it was not compulsory on the mortgagee to proceed under the insolvency.

Mowat, V. C., refused the injunction, and held that a mortgagee was not obliged to file a claim, but was at liberty, in lieu thereof, to exercise the power of sale contained in his mortgage.

INSOLVENCY CASES.

(Before His Honor S. J. Jones, Judge County Court Brant.)

(*Reported by* H. McMahon, *Esq., Barrister-at-Law.*)

Henry v. Douglass.

Attachment under Absconding Debtors Act—Attachment under Insolvent Act—Priority.

Where a writ of attachment under the Absconding Debtors Act is received by a sheriff and acted upon by attaching defendant's goods, and afterwards writs of *fi. fa.* are placed in his hands against defendant, and he subsequently receives an attachment against defendant under the Insolvent Act of 1864, *Held*, that defendant's property passed to the official assignee, but that the assignee would be obliged to give the execution creditors the priority to which they would be entitled.

A writ of attachment had issued against the defendant under the Insolvent Act of 1864, to which the Sheriff of the county of Brant made the following special return: — "That before he received the writ he had attached all the defendant's property under an attachment out of the county court of the county of Brant against the defendant as an absconding debtor, at the suit of John Gardham, and that he held such property to satisfy such attachment, and also a warrant of attachment out of the division court, at the suit of James Weyms, in which, judgment was obtained and execution issued before the receipt of the writ in this matter, and also for the benefit of any other attaching creditor, under the Absconding Debtors Act, who should attach in due course of law. That the personal property attached being perishable, he had caused it to be sold, and that the proceeds were insufficient to satisfy the said attachments. That also, before he received the said writ, two *fi. fas.* against the goods and one *fi. fa.* against the lands of the said defendant, were placed in his, the said sheriff's, hands, and that, therefore, he could not place the property and effects of the said defendant in the hands of an assignee or guardian until relieved from the responsibilities and liabilities to the said attaching and execution creditors."

A summons was obtained by *VanNorman*, on 14th December, 1864, on reading the plaint in the declaration, and the writ of attachment issued under the Insolvent Act of 1864, and the sheriff's return thereto, calling on the sheriff of the county of Brant to shew cause why he should not amend his return, and why he should not execute said writ, and make a proper return thereto. On the return of the summons the sheriff appeared in person, and contended that under the writ of attachment against the defendant as an absconding debtor (at the suit of Gardham) he was compelled to seize and hold the property; and that as the plaintiff in this suit was one of those who, by his affidavit, procured the issuing of Gardam's attachment, he is now estopped from seeking to set aside Gardham's writ.

Totten on the part of the creditors holding *fi. fas.*—The attachment under the Absconding Debtors Act, the *fi. fas.*, and the attachment under the Insolvent Act, are all issued from the same court—that is, the county court, and consequently they must take precedence according to their priority in point of time. By sec. 2, sub-sec. 7, and sec. 3, sub-sec. 22 of the Insolvent Act, the writ in insolvency can only affect the estate of the insolvent as it stood at the time of the issuing of the attachment under the Insolvent Act, and at that time the Insolvent had no estate —it was in *custodia legis*.

Griffin, in support of summons.—Sec. 3 Insolvent Act of 1864, makes the act of absconding an act of insolvency, otherwise any creditor taking out an attachment against an absconding debtor would defeat the Insolvent Act (*Notley* v. *Buck*, 8 B. & C. 160; Arch. Bkp. Law 176). Here the sheriff has notice of the insolvency proceedings before he pays over the money. The assignee has power to investigate fraudulent claims and settle priorities. An attachment against an absconding debtor is only the taking and holding the defendant's goods as a security for the plaintiff's claim, and the claims of such other attaching creditors under the Absconding Debtors Act as shall attach in due course of law. As to how creditors shall be dealt with who have securities, see sec. 5 sub-sec. 5 Insolvent Act.

JONES, Co. J.—I will refer to those sections of the Insolvent Act relating to the matter in question. Sec. 2, sub-sec. 7 provides that the assignment shall vest in the assignee the books of account and all the estate, &c., of the insolvent, *which he has* or may become entitled to at any time before his discharge, &c. And by sec. 3, sub-sec. 22, it is enacted that (in cases of compulsory liquidation like the present) by the effect of the appointment of the official assignee the whole estate and effects of the insolvent, *as existing at the date of the issue of the writ*, and which may accrue to him up to the time of his discharge, shall vest in the said official assignee, in the same manner and to the same extent and with the same exceptions as if a voluntary assignment had at that date been executed in his favor by the insolvent. Sec. 4, sub-sec. 9 provides that the assignee may in his own name sue for the recovery of all debts due to the insolvent, and in the prosecution and defence of suits may take all proceedings the insolvent could, and may intervene and represent the insolvent in all suits by or against him *which are pending at the time of his appointment*, and may have his name inserted in place of that of the insolvent.

Sec. 5, sub-sec. 4 enacts that in the preparation of the dividend sheet due regard shall be had to the rank and privilege of every creditor, *which rank and privilege, upon whatever they may be legally founded, shall not be disturbed by the provisions of this act.* And the 9th sub-sec. of the same sec. provides "that the costs incurred in suits against the insolvent after due notice of an assignment or of the issue of a writ of attachment in compulsory liquidation has been given according to the provisions of said act, shall rank upon the estate of the insolvent."

I had delayed giving judgment in this matter in hopes that the rules and regulations to be framed by the judges of the superior courts, as provided by the 18th sec. of the act would throw some light on the point in question; but although a tariff has been made, no rules have been published. In the English Act special provision is made for cases like the present. There the o heriff is not the officer who executes the process issued out of the bankrupt court, and the whole procedure in bankruptcy is so different from ours as to afford but little assistance in construing our statute. It is to be hoped that the legislature will, by proper amendments of the Insolvent Act, place the law in question on a more satisfactory footing, and also provide some method by which a set of rules and regulations for working the act may be framed, that shall be applicable to the whole of Upper Canada, instead of leaving it, as it is at present, for every county judge to frame separate rules for his own guidance.

I have had great difficulty in arriving at a decision in this matter that is satisfactory to myself; but after carefully examining the act and the cases as far as I have been able, I have come to the conclusion that notwithstanding the writs at law in the sheriff's hands against the defendant's property, his whole estate is subject to liquidation under the Insolvent Act, and that the attaching and execution creditors must come into that court, where they could no doubt claim such priority as they would be entitled to, on account of the proceedings that they have taken at law. As far as the executions are concerned, there can be no doubt, if the judgments are regular, and the writs are properly in the sheriff's hands before the issue of the attachment from the insolvent court, that they would have a priority, and would require to be first satisfied out of the insolvent's estate. But as the whole property, real and personal, of the insolvent is held by these writs, and this property may, for aught we know, be far more than sufficient to satisfy these writs, and as it is impossible to separate as much as may be sufficient to satisfy these executions from the residue of the insolvent's estate, the only course in my opinion that can be adopted is, for the whole estate to pass into the hands of the assignee, who would be obliged to give the execution creditors that priority that they would be entitled to. This is also the course that I think would be suggested by sec. 5, sub-secs. 4 and 9, above cited, and the other clauses of the act above referred to are reconcilable with the assignee giving to these creditors their priority in the distribution of the assets of the estate.

In holding that the *fi. fas.* in the sheriff's hands cannot have the effect of keeping the estate out of the hands of the assignee, it follows, of course, that the attachments against the defendant as an absconding debtor cannot have that effect. The Absconding Debtors' Act, it is true, provides for a certain distribution of an insolvent's estate; but I think it could never be argued that the Legislature in passing the Insolvent Act, intended that it should be inoperative merely because one creditor, after an act of bankruptcy committed by his debtor absconding, should choose to take out an attachment against him as an absconding debtor, especially where, as in this case, no other creditor could adopt that proceeding, the defendant being now within the jurisdiction of the court.

The Insolvent Act does not contemplate any other equitable distribution of the insolvent's estate except under that act. And it even provides that any *general assignment* for the benefit of creditors (no matter how equitable) made by the debtor, except it be made under the provisions of that act shall not only be ineffectual but shall be an act of insolvency, rendering the estate liable to compulsory liquidation under the act (see sec. 3, sub-sec. *i.*) If the attaching creditor has a priority by virtue of his attachment, it will be the duty of the assignee to allow it to him under sec. 5, sub-sec. 4 of the act.

I therefore order that the sheriff do amend his return to the writ of attachment issued in this matter accordingly. The costs of the plaintiff's attorney to be costs in this matter.

CORRESPONDENCE.

Scatcherd's Cheap Law Bill.

TORONTO, Feb. 25, 1865.

TO THE EDITORS OF THE LAW JOURNAL.

Gentlemen,—Will you not again take up the subject of Mr. Scatcherd and his Law Costs bill or motion, and advise the profession in the matter?

Would it not be well for a meeting of attorney to be called, and a committee appointed, to draft a petition in the premises, and have it duly presented to the House of Parliament?

Something should be done.

Yours truly,

AN ATTORNEY.

[In April, 1863, we fully expressed our views on Mr. Scatcherd's Cheap Law Bill. (See 9 U. C. L. J. 85.) Our remarks then made received the approval as well of the public as of the profession. Some one, unknown to us, did us the honor of having our remarks republished in the form of a circular, and mailed to members of Parliament and others.

We had hoped that even Mr. Scatcherd would by this time have seen the folly of his pet bill. If he aspires to the dignity of half a statesman, we shall look for something better from him than this stupid piece of buncomb. It is a mistake to suppose that lawyers are especially interested in the death of such a measure. The persons really interested are the public. To cheapen litigation will be to make it more plentiful; and lawyers, like other members of the human family in the social scale, can prosper on "small profits and quick returns." If the bill, or anything half as absurd, become law, we venture to affirm that lawyers will have twenty suits for every one that is now entered in court. The profession, in a pecuniary point of view, will not suffer; but the public, whose interest it is that there should be little litigation, will be the real sufferers.

Some people are astonished that in Canada, with a population so sparse, compared with that of the mother country, suits are so plentiful—that while in some of the larger cities of England we read of two or three records at most entered for trial at an assize, we find twenty times the number in towns in Upper Canada, where the population is twenty times less than at home. The secret is, that in Canada a suit costs at least five times less than a suit in England. Then cheapen the suit in Canada by making it five times less than it now costs, and the certain increase in number is a mere matter of computation. Men of ordinary intelligence are alive to this state of things, and it is to be hoped that Mr. Scatcherd, if really in earnest, will some day or other acquire sufficient intelligence to realize the depth and breadth of his folly.—EDS. L. J.]

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APPOINTMENTS TO OFFICE.

SURROGATE CLERK.

SIR JAMES LUKIN ROBINSON, Baronet, of Osgoode Hall, Barrister-at-Law, to be Surrogate Clerk, under the provisions of the chapter 16, Consolidated Statutes of Upper Canada. (Gazetted March 4, 1865.)

COUNTY ATTORNEY.

EDWARD TAYLOR DARTNELL, of Osgoode Hall, Esq., Barrister-at-Law, to be Clerk of the Peace and Crown County Attorney, for the United Counties of Prescott and Russell. (Gazetted March 4, 1865.)

CORONER.

GEORGE C. McMANUS, Esq., M.D., Associate Coroner, County of Simcoe. (Gazetted March 18, 1865.)

NOTARIES PUBLIC.

GEORGE AIREY KIRKPATRICK, of Kingston, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted March 4, 1865.)

SAMUEL BICKERTON HARMAN, of Toronto, Esquire, to be a Notary Public in Upper Canada. (Gazetted March 4, 1865.)

ARTHUR MANDEVILLE RICHARDS, of Clinton, to be a Notary Public in Upper Canada. (Gazetted March 4, 1865.)

HUGH McKENZIE WILSON, of Brantford Esq., to be a Notary Public in Upper Canada. (Gazetted March 4, 1865.)

JOHN M. BRUCE, of Hamilton, Esq., Barrister-at Law, to be a Notary Public in Upper Canada. (Gazetted March 18, 1865.)

JAMES SWIFTS, of Kingston, Esquire, to be a Notary Public in Upper Canada. (Gazetted March 18, 1865.)

TO CORRESPONDENTS.

"CLERK SECOND DIVISION COURT CO. LINCOLN," "SEVERAL READERS," in our next.