DIARY FOR MARCH.

1. SUN.. *1st Sunday in Lent.* St. David.
2. Mon.. Last day for notice of trial County Court. Recorder's Court sits. Last day for setting down for re-hearing.
4. Wed.. Last day for notice re-hearing.
8. SUN.. *2nd Sunday in Lent.*
10. Tues.. Quarter Sessions and County Court Sittings in each County.
12. Thurs. Error and Appeal Sittings. Re-hearing Term commences.
15. SUN.. *3rd Sunday in Lent.*
18. Tues.. *St. Patrick's Day.*
22. SUN.. *4th Sunday in Lent.*
25. Wed.. *Lady Day.* Appeals from Chancery Chambers.
29. SUN.. *5th Sunday in Lent.*

The Local Courts'

AND

MUNICIPAL GAZETTE.

MARCH, 1868.

THE CHIEF JUSTICE OF ONTARIO.

We are glad to learn that Chief Justice Draper has at length been induced to take a short repose from the severe and unremitting labours incident to his high position.

For nearly twenty-one years, his pre-eminent abilities have been devoted to the service of his country, in a judicial capacity. His position has been no sinecure; and if any man ever earned a holiday, that man is he whom those of the profession are proud to call their Chief.

His request for six months' leave of absence, made at the urgent solicitation of his many friends, was acceded to with the alacrity of a government that had the good sense to appreciate the services of such an able and faithful servant; and though his absence even for a short time will be a severe loss, it will be borne patiently in the knowledge that he is enjoying and benefiting by his holiday, and in the confident hope that we shall soon again see him take his place in renewed health and strength.

RECENT MUNICIPAL DECISIONS.

Several interesting questions have lately come up for decision before the Judges of the Superior Courts at Toronto, which it may be useful shortly to notice.

The much debated question as to the payment of taxes by candidates and voters has at length been settled, though in what manner is not of much importance, as the law of 1866 as to this point is not likely to trouble us again, at least in the unmanageable shape in which it was originally passed. The decisions carry out the intention of the act despite all difficulties experienced in working it; and non payment of taxes, either by candidates or voters is held to be an absolute disqualification. Candidates must have paid their taxes before the nomination day, (which it has also been established is the first day *of the election*,) and voters must have paid them before the 16th December.

Curiously enough however, in the many cases brought before the judges on the ground of non-payment of taxes, it has never been expressly decided whether when taxes have been due in different wards or municipalities they must have been paid in each, or only for that ward or municipality in which the party resided. Off hand opinions have been expressed both ways, but it is not worth while to discuss it further now.

The position of a person who has been elected to municipal honours by acclamation is still as impregnable as it was under the decisions on the former act. The wording of the act being such as to justify the opinion that if electors themselves take so little interest in municipal matters that an unqualified person is elected without any opposition on the part of those who ought to be most interested, they must make the best of him, and wait for another year to put another in his place.

This brings us to another decision which it will be useful for future candidates to take a note of, and it is this: if two candidates are nominated, one qualified and the other not, the former may as well at once make his choice either to stand upon his rights as the only candidate who can legally be elected, and refuse to contest the seat by going to the polls, and notify the electors to that effect at the nomination and on the polling days, and claim to be seated in lieu of his opponent who goes to the polls; or, he may try the fortune of an election and then, if defeated, claim a new election, for it is held that by going to the polls he waives all right he may have had to the seat without an election.

Another decision has lately been given which though we do not at present contend to have been erroneous, certainly left a candidate in the same awkward position in which circum-

stances had placed him without any fault of his. A list given by a returning officer to one of his poll clerks did not, by some mistake, contain the name of one of the candidates who had been nominated, and the mistake was not discovered until some time after the polling had commenced. It was contended on his behalf that he had not only directly lost several votes by the fact of his name not being on the list, but that he had also indirectly lost many more votes by a rumour having been circulated, apparently on very good foundation, that he was not a candidate; and that thereby many who had intended to vote for him, thinking he had resigned, voted for some one else. Those who are acquainted with the working of elections well known that there is a certain class of voters who habitually vote for the likely man, so that, to use the words so frequently seen placarded at election times, "one vote before twelve is better than two afterwards"—and this candidate may have lost more votes in this way than was supposed. It cannot be denied however that it is the true policy of the law so far as possible, not only to put an end to litigation, but also to prevent election contests being prolonged or multiplied, unless it can clearly be shewn that a fresh election would in all probability lead to a different result.

We must conclude with noticing an important decision with reference to those who are disqualified as candidates by holding certain public offices.

The clerk of a union of counties was elected mayor of a town situated within one of these counties; but, on the objection being taken, it was held that he was expressly disqualified by the statute so long as he remained in office as County Clerk. It was contended that the disqualification did not extend to cases where the person was clerk of one municipality and a member of the Council of another, but the wording of the act and the reason of the thing leave no doubt but that the learned judge was right in ordering a new election for the mayoralty.

MARRIAGE.

Whilst discussing the validity of Marriages solemnized between Christians it may not be uninteresting to notice a decision that has been given in the Superior Court at Montreal, in the Province of Quebec, as to the validity of a marriage celebrated after the manner of one of the Indian nations of this continent.

The marriage, the validity of which was disputed in the case of *Connolly* v. *Woolrich and Johnson et al.*, was one of an unusual character, at least in this age of the world's history, having been contracted by a Christian with a Pagan, a daughter of one of the chiefs of the Cree nation.

The case is reported at great length in the *Lower Canada Jurist*, vol. xi., p. 197, from which we take a summary of the case. From this it will be seen that a number of points, very interesting in themselves, but only incidentally connected with the main question, are touched upon. The facts of this curious case were as follows:

William Connolly was born about 1786, at Lachine, in Lower Canada, which was his original domicile, and remained there till the age of 16, when he went to the North West territory, where he resided at different posts of the North West Company for 30 years. In 1803 at the age of 17 years, he took to live with him, as his squaw or Indian wife, an Indian girl, the daughter of an Indian Chief, with the consent of her father, and cohabited with her as his squaw or Indian wife, according to the usages and customs of the Cree nation to which she belonged. They cohabited in the Indian country, and were faithful to one another there for 28 years, and had a family of six children. They came to Lower Canada in 1831 and cohabited there for a short time as husband and wife. In 1832 Connolly left his squaw, and had a marriage ceremony, after a dispensation by the Bishop, celebrated between himself and his second cousin Julia Woolrich, according to the rites of the Roman Catholic Church in Lower Canada where he continued to be, and he, from that time, till his death, in 1849, cohabited with her as wife.

Mr. Justice Monk, who heard the cause, gave a very elaborate judgment, which, with his full statement of the case is not contained in less than 67 closely printed pages of the *Jurist*. The principal points decided by him incidental to question principally involved, were shortly these:—

That though the Hudson's Bay Company's Charter is of doubtful validity, yet if valid, the chartered limits of the company did not extend westward beyond the navigable waters of the rivers flowing into the Bay:

That the English Common law, prevailing in the Hudson's Bay territories, did not apply to natives who were joint occupants of the terri-

tories; nor did it supersede or abrogate, even within the limits of the Charter, the laws, usages, and customs of aborigines:

That no other portions of the English Common law, than that introduced by King Charles' Charter obtain in the territories of the Company:

That the English law was not introduced into the North West territories by the cession by France to England, nor by royal Proclamation subsequent to that date:

That neither the decrees of the Council of Trent, nor the ordinance of the French kings, nor the British Marriage Acts, were law or in force at Rat River, or in any part of the North West Territories, in 1803:

The answers to the main questions were not arrived at without a mass of evidence being taken, much of which we should not look upon as altogether relevant to the issue, and which did not shew the habits of one of the principal "protectors" of the settlement, to be the most moral in the world. The points decided with respect to the law of marriage, were the following:

That a marriage contracted where there are no priests, no magistrates, no civil or religious authority, and no registers, may be proved by oral evidence, and that the admission of the parties combined with long cohabitation and repute will be the best evidence:

That such a marriage, though not accompanied by any religious or civil ceremony, is valid, and that an Indian marriage between a Christian and a woman of that nation or tribe is valid, notwithstanding the assumed existence of polygamy and divorce at will, which are no obstacles to the recognition by our Courts of a marriage contracted according to the usages and customs of the country:

That a Christian marrying a native according to their usages, cannot exercise in Lower Canada the right of divorce or repudiation at will, though this is a right which, together with polygamy, obtains among the Crees:

That an Indian marriage, according to the usage of the Cree country, followed by cohabitation and repute, and the bringing up of a numerous family, will be recognized as a valid marriage by our Courts, and that such a marriage is valid: the Indian custom being, as regards the jurisdiction of this Court, a foreign law of marriage, which obtains however within the possessions of the Crown of England, and which cannot be disregarded so long as they are unaltered:

That Connolly never lost his domicile of birth and never acquired one in the Indian Territory.

A late decision in England shows that a somewhat different view of the law is there taken in cases where a marriage is contracted between a man and woman who profess a faith allowing polygamy, in a country where polygamy is lawful; it having been held that such a marriage was not a marriage as understood in Christendom; and, though valid by the *lex loci*, and though both parties were single and competent to contract marriage, the English matrimonial court will not recognize such as a valid marriage in a suit by one of the parties for dissolution of marriage on the ground of the other's adultery—*Hyde* v. *Woodmansee*, Law Rep. 1 P. & D. 130.

A somewhat similar case to that decided in Lower Canada was the English case of *Armitage* v. *Armitage*, (L. R. 3 Eq.: 343—noted in Dig. of Eng. Law Rep. *ante* vol. III., N. S., p. 301.) But in that case the evidence before the court as to the alleged marriage was not very satisfactory, being that of the supposed husband, who said he was a British subject, born abroad, of British parents; that he came to New Zealand in 1828, and had lived there ever since; that, in 1829, he married Tuhi Tuhi, and that such marriage was solemnized according to the laws and customs then in force in New Zealand; that New Zealand was not then a British colony, and there was not then a Christian minister, nor any register of marriages, in the island; and that Tuhi Tuhi had always lived and still lived with him as his wife. He did not state his parents' name. He said that Hannah, before her marriage, was called Tuhi Tuhi, and not by her father's name, in conformity with the customs of the natives of New Zealand, but there was no evidence what the laws and customs of such natives were. But no evidence was given as to the laws and customs of the natives respecting marriages. The Court held that this evidence was insufficient to establish either of these points.

Curiosity, always rife as to the appointment of new officials, particularly where the offices are of much responsibility or of large emolument, has almost died away with reference to the County Judgeship of York. After such long delay we may well expect that the ap-

pointment will be such as will be thoroughly satisfactory to the profession and the public.

We direct attention to the remarks of a correspondent on the operation of the Insolvent Act, and particularly with reference to what he says with reference to the anomalous position in which official assignees place themselves by a desire to increase their business and their fees.

The present system, it is said, tends to make those assignees, who live by the number of assignments made to them, the agents rather of insolvents than of their creditors. Nothing is more probable than this, and our correspondent forcibly points out the evils arising from it. There is a strong temptation placed in the way of an assignee to facilitate the success of the insolvent in obtaining his discharge, at the expense of the right which creditors have to obtain as much as possible from the insolvent's estate.

ACTS OF LAST SESSION.

We make room in this number for some of the Acts of the Session of the Parliament of Ontario, which has just closed. Promptitude on our part in this respect will be the more appreciated as these Acts, so far as we know, came into operation on the day they were assented to, and therefore long before the public could obtain copies of them. We must confess that we are unable to discover the necessity for the *immediate* operation of any of them; if they were to come into force a month or two hence, when they might be ready for general distribution, no harm would have been done, and perhaps much mischief prevented, which may have arisen from the want of knowledge of their contents.

Headlong legislation seems to be the order of the day, and we shall have to bestir ourselves to keep in view the actual state of the statute law through the cloud of acts, passed and promised, which our "new brooms" have stirred up.

The Municipal Act must lie over for notice until next month.

AN ACT

To secure Free Grants and Homesteads to actual Settlers on the Public Lands.

[Assented to March 4, 1868.

Her Majesty by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. This Act shall be called and known as "The Free Grants and Homestead Act of 1868," and may be so cited or designated in all Acts or proceedings whatsoever.

2. The Statute of the Parliament of the late Province of Canada, passed in the twenty-third year of Her Majesty's Reign, entitled "An Act respecting the Sale and Management of the Public Lands," may be cited and designated in all Acts and proceedings as "The Public Lands Act of 1860," and is the Act hereinafter so designated.

3. The thirteenth section of "The Public Lands Act of 1860" is hereby repealed, except that Patents may issue for all lands heretofore located as free grants under that section, as if this Act had not been passed.

4. The Lieutenant-Governor in Council may appropriate any Public Lands considered suitable for settlement and cultivation, and not being Mineral Lands or Pine Timber Lands, as Free Grants to actual Settlers, under such regulations as shall from time to time be made by Order in Council, not inconsistent with the provisions of this Act.

5. Such grants or appropriations shall be confined to lands surveyed or hereafter to be surveyed, situate within the tract or territory composed of the Districts of Algoma and Nipissing, and of the lands lying between the Ottawa River and the Georgian Bay, to the west of a line drawn from a point opposite the south-east angle of the Township of Palmerston north-westerly along the western boundaries of the Townships of North Sherbrooke, Lavant, Blithfield, Admaston, Bromley, Stafford and Pembroke to the Ottawa River, and to the north of the rear or northerly boundaries of the Townships of Oso, Olden, Kennebec, Kaladar, Elzevir, Madoc, Marmora, Belmont, Dummer, Smith, Ennismore, Sommerville, Laxton, Carden, Rama, and of the River Severn.

6. The person to whom any land may be allotted or assigned under such regulations for a free grant thereof, shall be considered as located for said land within the meaning of this Act, and is hereinafter called the Locatee thereof.

7. No person shall be located for any land under this Act or said regulations unless such person shall be of the age of eighteen years or upwards, nor shall any person be so located for any greater quantity than one hundred acres.

8. Before any person shall be located for any land as aforesaid, such person shall make affidavit to be deposited with the Agent authorized to make such location, that he or she has not been located for any land under this Act or under said regulations, and that he or she is of the age of eighteen years or upwards, and believes the land for which he or she applies or desires to be located, is suited for settlement and cultivation, and is not valuable chiefly for its mines minerals or pine timber, and that such location is desired for his or her benefit and for the purpose of actual settlement and cultivation of such land, and not either

directly or indirectly for the use or benefit of any other person or persons whomsoever, nor for the purpose of obtaining, possessing or disposing of any of the pine trees growing or being on the said land, or any benefit or advantage therefrom, or any gold, silver, copper, lead, iron, or other mines or minerals, or any quarry or bed of stone, marble or gypsum thereon.

9. No patent shall issue for any land located under this Act or under said regulations until the expiration of five years from the date of such location, nor unless or until the Locatee or those claiming under him or some of them shall have performed the following settlement duties, that is to say, shall have cleared and have under cultivation at least fifteen acres of the said land, whereof at least two acres shall be cleared and cultivated annually during the five years next after the date of the location, to be computed from such date, and have built a house thereon fit for habitation at least sixteen feet by twenty feet, and shall have actually and continuously resided upon and cultivated the said land for the term of five years next succeeding the date of such location, and from thence up to the issue of the Patent, except that the Locatee shall be allowed one month from the date of the location to enter upon and occupy the land, and that absence from the said land for in all not more than six months during any one year, (to be computed from the date of the location) shall not be held to be a cessation of such residence, provided such land be cultivated as aforesaid.

On failure, in performance of the settlement duties aforesaid, the location shall be forfeited, and all right of the Locatee, or of any one claiming under him or her, in the land shall cease.

10. All Pine trees growing or being upon any land so located, and all gold, silver, copper, lead, iron, or other mines or minerals, shall be considered as reserved from said location, and shall be the property of Her Majesty, except that the Locatee or those claiming under him or her, may cut and use such trees as may be necessary for the purpose of building, fencing, and fuel, on the land so located, and may also cut and dispose of all trees required to be removed, in actually clearing said land for cultivation, but no pine trees (except for necessary building, fencing, and fuel as aforesaid,) shall be cut beyond the limit of such actual clearing before the issuing of the Patent, and all pine trees so cut and disposed of (except for the necessary building, fencing, and fuel as aforesaid), shall be subject to the payment of the same dues, as are at the time payable by the holders of licenses to cut timber or saw logs. All trees remaining on the land at the time the Patent issues shall pass to the Patentee.

11. On the death of the Locatee, whether before or after the issue of the Patent for any land so located, all his then right and interest in and to such land shall descend to and become vested in his widow during her widowhood in lieu of dower, in case there be such widow surviving such Locatee, but such widow may elect, to have her dower in such land in lieu of the provision aforesaid.

12. Neither, the Locatee, nor any one claiming under him or her, shall have power to alienate, (otherwise than by devise) or to mortgage or pledge any land located as aforesaid, or any right or interest therein before the issue of the Patent.

13. No alienation (otherwise than by devise) and no mortgage or pledge of such land, or of any right or interest therein by the Locatee after the issue of the Patent, and within twenty years from the date of such location, and during the life-time of the wife of such Locatee, shall be valid or of any effect, unless the same be by Deed, in which she shall be one of the grantors with her husband, nor unless such Deed is executed by her in the same presence, and there are the same examination and certificate and at the same time, as shall be at the date of such deed required by Law in the case of married women conveying their real estate.

14. No land located as aforesaid, nor any interest therein, shall in any event be or become liable to the satisfaction of any debt or liability contracted or incurred by the Locatee, his widow, heirs, or devisee, before the issuing of the Patent for such land: After the issuing of the Patent for any such land, and while such land or any part thereof or any interest therein is owned by the locatee or his widow, heirs, or devisees, such land, part or interest, shall during twenty years next after the date of such location be exempt from attachment, levy under execution or sale for payment of debts, and shall not be or become liable to the satisfaction of any debt or liability contracted or incurred before or during that period, save and except any debt secured by a valid mortgage or pledge of such land made subsequently to the issuing of the Patent therefor.

15. Nothing in this Act shall be construed to exempt any land from levy or sale for rates or taxes, now or hereafter legally imposed.

16. Every patent to be issued for any land located as aforesaid shall state in the body thereof, the name of the original Locatee of the said land, and the date of the said location, and that the said Patent is issued under the authority of this Act.

17. This Act shall be taken and read as part of "The Public Lands Act of 1860."

AN ACT

Respecting Overholding Tenants.

[Assented to March 4, 1868.]

Whereas, it is expedient to provide a less expensive and more expeditious mode of proceeding against tenants of occupants overholding wrongfully, than is provided by law; Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of Ontario, enacts as follows:

1. The Act of the late Parliament of Canada, passed in the twenty-seventh and twenty-eighth year of Her Majesty's reign, chapter thirtieth, and intituled "An Act to afford a more expeditious remedy as regards tenants overholding, wrongfully, in Upper Canada," is hereby repealed; Provided, always, that all proceedings had, or taken under the said Act, shall not be affected by the repeal of the said Act, but the same may be carried on and finally determined under the provisions of the said Act as the same might be if the said Act had not been repealed.

2. In case a tenant, after his lease or right of occupation whether created by writing or by verbal agreement has expired, or been determined, either by the landlord or the tenant, by a notice to quit or notice pursuant to a proviso in any lease or agreement in that behalf, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, upon demand made in writing, to go out of possession of the land demised to him or which he has been permitted to occupy, his landlord or the agent of his landlord, may apply to the County Judge of the county, or union of counties, in which such land lies, in term or in vacation, and wherever such Judge may then be, setting forth on affidavit the terms of the demise or right of occupation, if verbal, and annexing a copy of the instrument creating or containing such demise or right of occupation, if in writing; or if a copy cannot be so annexed by reason of the said writing being mislaid, lost or destroyed, or being in the possession of the tenant or from any other cause, then annexing a statement setting forth the terms of the demise or occupation and the reason why a copy of the said writing cannot be annexed, and also annexing a copy of the demand made for the delivering up of possession, and stating also the refusal of the tenant to go out of possession, and the reasons given for such refusal, if any were given, adding such explanation in regard to the ground of such refusal as the truth of the case may require; and this section shall extend, and be construed to apply to tenancies from week to week, from month to month, from year to year, and tenancies at will, as well as to all other terms, tenancies, holdings or occupations.

3. If, upon such affidavit, it appears to such County Judge that the tenant wrongfully holds, without colour of right, and that the landlord is entitled to possession, such Judge shall appoint a time and place at which he will enquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired, or has been determined by a notice to quit or otherwise, and whether the tenant without any colour of right holds the possession against the right of the landlord, and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise.

4. Notice in writing of the time and place so appointed by the County Judge for holding such inquiry, shall be, by the landlord, served upon the tenant or left at his place of abode, at least three days before the day so appointed, if the place so appointed be not more than twenty miles from the tenant's place of abode, and one day in addition for every twenty miles above the first twenty, reckoning any broken number above the first twenty as twenty miles, to which notice shall be annexed a copy of the affidavit on which the appointment was obtained, and of the papers attached thereto.

5. If at the time and place appointed, as aforesaid, the tenant, having been duly notified, as above provided, fails to appear, the County Judge, if it appears to him that the tenant holds without color of right, may order a writ to issue to the sheriff, in the Queen's name, commanding him forthwith to place the landlord in possession of the premises in question; but if the tenant appears at such time and place, the County Judge shall, in a summary manner, hear the parties, and examine into the matter, and shall administer an oath or affirmation to the witnesses adduced by either party, and shall examine them; and if after such hearing and examination it appears to the County Judge that the case is clearly one coming under the true intent and meaning of the second section of this Act, and that the tenant holds without color of right against the right of the landlord, then he shall order the issue of such writ, as aforesaid, otherwise he shall dismiss the case; and the proceedings, in any such case, shall form part of the records of the County Court: and the said writ may be in the form or to the effect of forms number one or number two, in Schedule A, forming part of this Act, according as the tenant is ordered to pay costs or otherwise, and on any such examination the parties shall be competent witnesses.

6. Where any such writ has been issued, either of the superior courts of common law for the Province of Ontario, may, on motion, before the end of the second term after the issue of such writ, command such County Judge to send up the proceedings and evidence in the case to such superior court certified under his hand, and may examine into the proceedings, and if they find cause may set aside the same, and may, if necessary, order a writ to issue to the sheriff, commanding him to restore the tenant to his possession, in order that the question of right, if any appear, may be tried, as in other cases of ejectment.

7. The judges of the superior courts of common law, for the Province of Ontario, may, from time to time, make such orders respecting costs, in cases under this Act, as to them may seem just; and the County Judge, before whom any such case is brought, may, in his discretion, award costs therein, according to any such order then in force, and if no such order is in force, reasonable costs, in his discretion, to the party entitled thereto; and

in case the party complaining is ordered to pay costs, execution may issue out of the county court for such costs as in other cases in the county court wherein an order is made for the payment of costs.

8. The County Judge may cause any person to be summoned as a witness to attend before him in any such case, in like manner as witnesses are summoned in other cases in the county court, and under like penalties for non-attendance, or refusing to answer, or wilfully swearing, or affirming falsely in such case.

9. Nothing herein contained shall prevent any landlord from proceeding under the sixty-third, and ten next following sections of the Act respecting ejectment, chapter twenty-seven of the Consolidated Statutes of Upper Canada, if he thinks it advisable to proceed under the said sections, or shall in any way affect the powers of any judge or judges of the superior courts under the same, or under sections fifty-seven, fifty-eight and fifty-nine of the said Act, or shall prejudice or affect any other right or right of action or remedy which landlords may possess in any of the cases herein provided for.

10. In the case of tenancies from week to week and from month to month, a week's notice to quit and a month's notice to quit respectively, ending with the week or the month, as the case may be, shall be deemed sufficient notice to determine, respectively, a weekly or monthly tenancy.

11. The proceedings under this Act shall be entitled in the County Court of the County or union of Counties in which the premises in question are situate, and shall be styled "In the matter of (giving the name of the party complaining) Landlord against (giving the name of the party complained against) Tenant."

12. Service of all papers and proceedings under this Act shall be deemed to have been properly served if made as required by law, in respect of writs and other proceedings in actions of ejectment.

13. In this Act the word "tenant" shall mean and include an occupant, a sub-tenant, under-tenant, and his and their assigns and legal representatives; and the word "landlord" shall mean and include the lessor, owner, the party giving or permitting the occupation of the premises in question and the person entitled to the possession thereof, and his and their heirs and assigns and legal representatives.

14. The following is the Schedule A referred to in this Act:

FORM No. 1.

ONTARIO, TO WIT: Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

[L. S.]

To the Sheriff of the ——— Greeting:

Whereas ——— Judge of the County Court of ——— by his order dated the ——— day of ——— A.D. 186 —, made in pursuance of the "Act respecting Overholding Tenants," on the complaint of ——— against ——— adjudged that ——— was entitled to the possession of ——— with the appurtenances in your Bailiwick, and that a Writ should issue out of our said Court accordingly, and also ordered and directed that the said ——— should pay the costs of the proceedings had under the said Act, which by our said Court have been taxed at the sum of ———. Therefore, we command you, that without delay you cause the said ——— to have possession of the said land and premises, with the appurtenances: And we also command you that of the goods and chattels of the said ——— in your Bailiwick, you cause to be made ——— being the said costs so taxed by our said Court as aforesaid, and have that money in our said Court immediately after the execution hereof, to be rendered to the said ———, and in what manner you shall have executed this Writ make appear to our said Court, immediately after the execution hereof, and have there then this Writ.

Witness ——— Judge of our said Court at ——— this ——— day of ——— A.D. 186—

——— *Clerk.*

Issued from the Office of the Clerk of the County Court of the County, or United Counties of ——— *Clerk.*

FORM No. 2.

ONTARIO, TO WIT: Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

[L. S.]

To the Sheriff of the ——— Greeting:

Whereas ——— Judge of the County Court of the ——— by his order dated ——— day of ——— A.D. 186 —, made in pursuance of the "Act respecting Overholding Tenants," on the complaint of ——— against ——— adjudged that ——— was entitled to the possession of ——— And ordered that a writ should issue out of our said Court accordingly: Therefore we command you that without delay you cause the said ——— to have possession of the said land and premises, with the appurtenances, and in what manner you shall have executed this Writ make appear to our said Court, immediately after the execution hereof and have there then this Writ.

Witness ——— Judge of our said Court at ——— this ——— day of ——— A.D. 186—

——— *Clerk.*

Issued from the office of the Clerk of the County Court of the County or United Counties of ——— *Clerk.*

AN ACT

To remove doubts as to the authority of certain Commissioners to take affidavits and Bail.

[Assented to February 28, 1868.]

Whereas, it is expedient to remove doubts, respecting the authority of Commissioners ap-

pointed under the provisions of chapter thirty-nine of the Consolidated Statutes of Upper Canada, section one, for a union of Counties within this province, to continue to act as such Commissioners and to take and receive affidavits, affirmations and bail, in and for the Junior County, after its separation from such Union of Counties; Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of Ontario, enacts as follows:

1. All Commissioners appointed under the said Act, for any Union of Counties, and resident within the Junior County or any city set apart from a county for judicial purposes, at the time of the separation thereof from such union, have had since such separation, and still have and may exercise the same powers within such Junior County or city to take and receive affidavits, affirmations and bail, as if they had received their commissions or appointments, respectively for such Junior County at the time of the separation of such Union of Counties, anything in any law or statute to the contrary notwithstanding.

2. No such Commissioner shall after the passing of this Act have or exercise any such powers by virtue of such commission save in such Junior County.

AN ACT

For amending the Law of Auctions of Estates.

[Assented to March 4, 1868]

Whereas there is a conflict between the courts of Law and Equity in respect to the validity of sales by auction where a puffer has bid, although no right of bidding on behalf of the seller was reserved, and it is expedient that an end should be put to such conflict; and, whereas, as sales by auction are now conducted, many of such sales are illegal and could not be enforced against an unwilling purchaser, and it is expedient for the safety of both seller and purchaser that such sales should be so conducted as to be binding on both parties. Therefore, Her Majesty, &c., enacts as follows:

1. In construing this Act, "auctioneer," shall mean any person selling by public auction: "Land," shall mean any interest in any messuages, lands, tenements, or hereditaments of whatever tenure.: "Puffer," shall mean a person appointed to bid on the part of the seller.

2. Unless in the particulars or conditions of sale by auction of any land, it is stated that such land will be sold subject to a reserved price, or to a right of the seller to bid, the sale shall be deemed and taken to be without reserve.

3. Upon any sale of land by auction, without reserve, it shall not be lawful for the seller or for a puffer to bid at such sale, or for the auctioneer to take, knowingly, any biding from the seller or from a puffer.

4. Upon any sale of land by auction, subject to a right for the seller to bid, it shall be lawful for the seller, or any one puffer to bid at such auction, in such manner as the seller may think proper.

5. Nothing in this Act contained shall be taken to authorise any seller to become the purchaser at the sale.

6. This Act shall not apply to any sale which has taken place before its passage.

7. This Act may be cited for all purposes as "The Auctions of Estates Act (1868)."

SELECTIONS.

EXECUTION OF DEED.

The main question in this case was whether a certain deed had been duly executed. A deed is an instrument sealed and delivered, and it was contended, in *Xenos* v. *Wickham* that there had been no sufficient delivery of the deed. The plaintiffs, who were shipowners, instructed an insurance broker to effect an insurance upon one of their vessels. The broker agreed with the defendants, who were an insurance company (now sued in the name of their chairman) to effect a policy of insurance in accordance with the instructions he had received from the plaintiffs. The defendants made out the policy and signed and sealed it, and left it in the hands of one of their clerks to be given to the plaintiffs, or their broker whenever they might choose to call for it. After the policy was so made, the broker, without any authority from the plaintiffs, told the defendants that the insurance was cancelled. The defendants thereupon returned the premium they had received in respect of the insurance, and treated the policy as cancelled. Subsequently the plaintiffs vessel was lost, and the plaintiffs claimed the amount insured under the policy. The defendants refused to pay—first, on the ground that the policy had never been duly delivered as a deed, inasmuch as it had always remained in their possession. Secondly, on the ground that, even if the instrument had been duly executed it had been cancelled by the consent and at the request of the plaintiffs. The House of Lords decided both of these points in favour of the plaintiffs. Five of the judges delivered opinions on the case in answer to the questions of the House. M. Smith and Willes, J.J., thought that the defendants were not liable on the policy while Pigott, B., Mellor and Blackburn, JJ., were of opinion that the defendants were liable. The House of Lords took this latter view of the case. The effect of the judgments of the Lord Chancellor and of Lord Cranworth is—that no technical act is necessary for the delivery of a deed. A deed may take effect although it is never delivered to the person who is to be benefited by it, or to any person on his behalf. "The efficacy of a deed depends upon its being sealed and delivered by the maker, not on his ceasing to retain possession

of it." The deed purported to be signed, sealed, and delivered by the directors in the ordinary course of business, and if that did not make it binding upon the defendants, it is difficult to see what would have that effect. On the second point, viz., whether the broker had any implied authority to cancel the deed, so as to relieve the defendants from liability under it, the House also decided in favour of the plaintiffs. There was not so much differ- of opinion on this question. Four out of the five judges who delivered opinions in this case thought that the brokers cancellation of the policy without express authority from his principals did not release the defendants: in other words that an agent, to make a contract, has no implied authority to rescind it after it has been duly made by him. Willes, J., took a somewhat different view, holding that the transaction between the broker and the defendants was never completed and that the cancellation must be regarded as part and parcel of that transaction. The Lord Chancellor and Lord Cranworth followed on this point the opinion expressed by the majority of the judges.

SPECIAL CONSTABLES.

The Government (of England) have issued two circulars with reference to the employment of special constables, one of which purports to give instruction to special constables as to the discharge of their duties, the other to prescribe the plan for their organization. The first circular states in the following terms the legal powers and duties of constables for suppressing and preventing riots and disturbances of the peace:—

"Every constable is called upon by the common law to do all that in him lies for the suppression of riot, and each has authority to command all other subjects of the Queen to assist him in that undertaking.

"In cases of breaches of the peace, as riots, affrays, assaults, and the like, committed within the view of the constable, he should immediately intefere (first giving notice of his office, if it be not already known), separate the combatants, and prevent others from joining in the affray. If the riot, &c., be of a serious nature, or if the offenders do not immediately desist, he should take them into custody, securing also the principal instigators of the tumult, and doing everything in his power to restore quiet.

"He may arrest any one assaulting or opposing him in the execution of his duty.

"When a breach of the peace is likely to take place, as when persons are openly preparing to fight, the constable should take the parties concerned into custody.

"If a party threaten another with immediate personal violence, or offer to strike, the constable should interfere and prevent a breach of the peace. If one draw a weapon upon another, attempting to strike, the constable should take him into custody.

"It is provided by law that every special constable shall have, exercise, and enjoy, not only within the parish or place for which he shall have been appointed, but also throughout the entire county for which the magistrate who appointed him is justice of the peace, all such powers authorities, and advantages, and be liable to all such duties and responsibilities, as any constable within his constablewick by virtue of the common law, or by any statute or statutes."—*Solicitors' Journal.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

PUBLIC HIGHWAY—RIGHT OF CROWN TO GRANT—LIABILITY OF PATENTEES AND THEIR GRANTEES FOR NON-REPAIR. — Grantees of the Crown, of public highways, are indictable at the suit of the public for default in repairing such highways, although they are also liable to the Crown for the breach of their covenant to that effect contained in the patent; and this liability follows and accompanies the transfer of the property, so as to make the purchaser of part and mortgagee of the residue also indictable for the same cause, although it has been expressly agreed between grantor and grantee that the former shall and the latter shall not be bound to repair.

Semble, that an agreement by the Crown that the grantee should not be liable to repair, could not, with the grant of the tolls, have relieved them from the public duty of necessary repairs.

The patent, in this case, granted a certain public toll-bridge, with a planked and macadamized toll-road, together with all toll-gates on said road or bridge, "and now vested in us, and the tolls arising from said bridge and road, on certain conditions contained, &c.:" *Held*, that the patent was not *ultra vires*, but passed the soil and freehold and the right and franchise of taking tolls thereon and in respect thereof, and that the road was not at the time when, &c., a Government work, to be repaired by Government, but by defendants.

Held, also, that to maintain the indictment against defendants, it was not nece-sary that the Government Engineer should first have condemned the road by certificate.—*Regina* v. *Mills et al.*, 17 U. C. C. P. 654.

PRINCIPAL AND AGENT.—A. had authority to collect rent, and to contract for the sale of property, and to receive the down payments.

Held, that such authority did not entitle him to receive payments on a mortgage given for unpaid purchase money.

Where such an agent had at one time, without authority, received some payments on such mortgage, which the principal did not publicly repudiate, and another mortgagor who did not appear to have had notice of these payments, made a

payment to the agent, on his mortgage, fourteen months after the agent had ceased to receive any mortgage money, such payment was held to be not a good payment. —*Greenwood* v. *The Commercial Bank of Canada*, 14 Chan. Rep. 40.

APPEAL — INSURANCE — FIRE POLICY—CONDITION AS TO INCUMBRANCES — VENDOR'S LIEN — FALSE SWEARING. — One of the conditions of a policy of insurance was that every incumbrance affecting the property at the time of assurance, must be mentioned in the application, otherwise the policy should be void. The property in question had been conveyed to the plaintiff and his wife by one S and wife, in consideration, as expressed in the deed, of a then subsisting indebtedness by S. and wife to plaintiff, and of a bond by plaintiff *alone* to support S. and wife during their lives, who by the said deed *released to plaintiff and wife all their claims upon the property.* In his application for assurance plaintiff stated the property to be unencumbered:

Held, affirming the judgment of the Court of Common Pleas, 16 C. P. 493, that there was no lien for purchase money, and that the property was not encumbered.

Another condition of the policy was that any fraud or attempt at fraud, or false swearing, on the part of the assured, should cause a forfeiture of all claims under the policy. After the loss by fire plaintiff made a statement under oath, that he was absolute owner of the property at the time of the fire, whereas, under the conveyance to him and his wife, he was only jointly interested with her therein:

Held, reversing the above judgment, J. Wilson, J., *dissentiente*, that he was not guilty of false swearing within the meaning of the condition; for that the word "false," as used there, meant wilfully and fraudulently false (of which defendants had themselves at the trial acquitted plaintiff), whereas it was merely an incorrect description of his title with which he could be charged.

Remarks upon the equitable doctrine of the vendor's lien for unpaid purchase money. — *Mason, appellant*, v. *The Agricultural Mutual Assurance Association of Canada, respondents*, 17 U. C. C. P. 19.

MASTER AND SERVANT.—Where a person employed for a certain term at a fixed salary payable monthly is wrongfully discharged before the end of the term, he may sue for each month's salary as it becomes due; and the first judgment will not be a bar to another action for salary subsequently coming due.—*Huntington* v. *Ogdensburgh and Lake Champlain Railroad Company*, 7 Am. Law Reg. 153.

ONTARIO REPORTS.

ERROR AND APPEAL.

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

HARROLD *v.* THE CORPORATION OF THE COUNTY OF SIMCOE, AND THE CORPORATION OF THE COUNTY OF ONTARIO. (*a*)

Appeal—Bridge lying between two counties—Joint liability to maintain.

The counties of Simcoe and Ontario are connected by a draw-bridge between the two counties, over a water channel called the Narrows, on Lake Simcoe.

By sec. 327 of C. S. U. C. cap. 54, where a bridge lies wholly or partly between two counties, the Councils of such municipalities shall have joint jurisdiction over it.

The bridge in question here having been left open, the plaintiff, who was passing along the highway, fell into the Narrows, and was injured.

Held, affirming the judgment of the Court of Common Pleas, 16 C. P. 43, VanKoughnet, C., *dissentiente*, that the defendants were liable to plaintiff in a civil action for the damage sustained by him; that the word "between" must be construed in its popular sense; and that where a bridge is constructed over navigable water, and connects two opposite shores lying in different counties, such bridge is between such two counties, and they are jointly answerable for its maintenance, even though the counties, as respectively containing the townships between the shores of which the current flows, reach to the middle of the water, and are divided only by the invisible, untraceable line called *medium filum aquæ*.

This was an appeal from the judgment of the Court of Common Pleas, reported in 16 C. P 43, where the facts of the case are fully stated

M. C. Cameron, Q. C., and *Christopher Robinson*, Q. C., for the appeal, in addition to the authorities cited below, referred to *Deveril* v. *G. T. R. Co.*, 25 U. C. Q. B. 517; *Webb* v. *Port Bruce Harbor Co.*, 19 U. C. Q. B. 615, 623; *Joy* v. *McKinn et al.* 1 U. C. C. P. 13, 28.

R. A. Harrison, contra, cited *Reg.* v. *Inhabitants of Brightside Bierlow*, 13 Q. B. 933; *Erie City* v. *Schwingle*, 10 Harr. 384; *City of Dayton* v. *Pease*, 4 Ohio, 80; Con. Stat. C. cap. 28, ss. 74, 75; Con. Stat. U. C. cap. 45, sec. 331, subsec. 2.

DRAPER, C. J. (January 2nd, 1868.)—Without hesitating for an instant that the respondent, the plaintiff below, has a good right to recover damages for the very serious injury he has sustained, I have experienced much difficulty in adopting a conclusion on the question, from whom he should so recover.

As I understand it, this bridge was a public bridge, coming within the 316th section of the Municipal Act; and as no question on the point has been raised, I assume there was a proclamation declaring it to be no longer under the control of the Provincial authorities, in which case it should thenceforth be controlled and kept in repair by the Council of "the municipality."

What municipality? is the question. There is a reference to a by-law or by-laws on this subject, and a by-law of the Council of the County of Ontario was admitted, but it forms no part of this appeal-book; and therefore whether it purports to be passed under the 339th section of the statute, or whether it is founded on the assump-

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(*a*) Argued 25th January, 1867, before Draper, C. J., VanKoughnet, C., Richards, C. J., Hagarty, A. Wilson, J. Wilson, JJ., Mowat, V. C.

tion that this bridge comes within the definition contained in the 327th section, does not appear.

It is upon this question only that I feel any doubt of the correctness of the judgment appealed from. Is this bridge one that lies wholly or partly *between* these two counties? Does the word "between" mean that the road or bridge separates the two counties, so that a traveller might go along, it being neither in one county or the other, but between both, or might pass across it from the limits of one county over the limits of another? Such was the interpretation given to the 12th Vic cap. 81, sec. 39, in *Wood v. The County of Wentworth and The City of Hamilton*, 6 U. C. C. P. 101, an enactment very closely resembling that now under consideration. To illustrate the difference, take an ordinary township having roads between every concession, and side roads running between lots—say at every fourth and fifth lot. It could not be accurately said that the concession roads ran between lots, or that the side roads ran between the concessions. Or take Yonge-street, which, running north and south, divides or passes between several townships in its extent. It could not be said that the roads crossing this from east to west, and continuing onward through townships divided by Yonge-street, were roads *between* such townships. Or suppose two townships, the east side of one separated from the west side of the other by nothing more than a surveyor's line, but with a road running east and west through both; could that road be called a road *between* the townships, which only continued across the line marked by the surveyor as the limit of each?

In the present case, if the Narrows are not part of either county, but are a water channel separating them, then a bridge across the Narrows is undeniably between the two counties; but if each county, or the townships (Orillia and Mara) of the counties where the Narrows are, reach *ad medium filum aquæ*, is it a substantial distinction that the thread that divides them is an imaginary line in water, instead of a surveyor's line on land, in either case length without breadth? It was my first impression, that on this view of the question the judgment could not be supported. It does not appear by the case that the township of Mara, in the county of Ontario, and the township of Adjala, in the county of Simcoe, are conterminous. Looking at the maps and at the formation of the shores of lakes Simcoe and Couchiching, I feel little doubt that the actual surveys of those townships extended only to the water's edge. Indeed, lake Couchiching seems only to be the lower part of lake Simcoe, gradually widening from the Narrows and contracting again into the river Severn. The description of the county of Simcoe contained in the Territorial Division Act, Con. Stat. U. C. cap 3, declaring the islands in lake Simcoe lying wholly or for the most part opposite to the county of Simcoe to be part of that county, would, if considered by itself, exclude the idea that any of the townships of which the county consists extend into those waters; and the description of the county of Ontario, in the same statute, contains nothing from which it can be inferred that its boundaries extend beyond the water's edge. Looking no further, and bearing in mind that the Narrows are a navigable channel across which it has been found necessary to erect a draw-bridge, in order to afford passage to steamboats and other vessels, there would seem every reason to hold that this bridge, or part thereof, was, strictly speaking, between the two counties.

But there are other sections in the Territorial Act which must not be overlooked.

I apprehend that when the statute was passed lake Simcoe was held to extend to the river Severn, and that that part which is popularly called lake Couchiching was not, nor, that I am aware of, has been recognised as a distinct body of water by any enactment. Then, in order to understand section 8, we must first read section 5, which declares that the "limits of all townships lying" on certain rivers and lakes which are named and are all waters separating the Province from the United States, "shall extend to the boundary of the Province in such lake or river, in prolongation of the outlines of each township respectively, and, unless herein otherwise provided, such townships shall also include all the islands, the whole or the greater part of which are comprised within the outlines so prolonged." Then, by section 8, "the limits of townships on" certain waters, among which are lake Simcoe and the river Severn, "and any other rivers, lakes or bays not hereinbefore mentioned, shall in like manner extend to the middle of the said lakes and bays, and to the middle of the main channels of the said rivers respectively, and, unless herein otherwise provided, shall also include all the islands, the whole or greater part of which are comprised within the outlines so prolonged."

It appears to me that by making all the islands in lake Simcoe, which are wholly or for the most part opposite to the county of Simcoe, part of that county, without regard to which side the middle line of the lake those islands lie, is to make a different provision with regard to them from that which would obtain under the general terms of the eighth section; and as the first section of the statute especially declares that the several counties shall consist not only of the townships enumerated, but that certain of such counties shall also include other lands as thereinafter mentioned, that the enactment placing these islands in the county of Simcoe, excludes, as to the islands in lake Simcoe, any operation of the eighth section, and possibly might be held to prevent the extension of the side-lines of the townships as mentioned in that section.

But on the whole, while freely admitting the difficulties of reconciling all parts of the act, and of meeting every objection which a literal adherence to the language used might give rise to, I think that, loking at the question before us, we may properly give to the word "between" the popular rather than the more limited, though possibly more rigidly correct sense; and that we should hold that when a bridge is constructed over navigable waters, and connects two opposite shores lying in different counties, we should hold such a bridge to be between such two counties, and that they are jointly answerable for its maintenance, even though the counties, as respectively containing the townships between the shores of which the current flows, reach to the middle of the water and are divided only by the invisible, untraceable line called *medium filum aquæ*.

I think the appeal should be dismissed with costs (*a*).

VANKOUGHNET, C.—I think the Court of Common Pleas rightly held that a county is liable for damages sustained in consequence of the non-repair or insufficient construction by it of a road or bridge over which it exercises control. It is true that the county is not, by the Municipal Act, in express terms made liable for such default; but I take it that a corporation charged with or assuming the custody of a road or bridge, and having funds, or the means of obtaining funds by exacting tolls or levying a rate upon the members of the corporation with which to make repairs, is at common law bound to keep such road or bridge in an efficient state. The difficulty that existed in the case of *Russell* v. *Men of Devon* (2 T. R. 667) does not present itself here; for the inhabitants of a county in this Province are an incorporated body or municipality, and as such possess corporate property and rights, and are subject to many duties, and can sue and be sued. The same obstacle that existed to suing the inhabitants, as such, of a county or parish, stood in the way of a suit against the justices in Quarter Sessions (supposing them to be otherwise liable), for they were not incorporated, and were a shifting body of individuals merely. Though section 341 of the Consolidated Municipal Act transfers all the powers, duties and liabilities of the magistrates in Quarter Sessions, in regard to roads, &c., to the municipal corporation of the county, it does not limit the powers or liabilities of the corporation to those conferred or imposed upon the Quarter Sessions. One reason probably, why the corporations of townships, cities, towns and villages, were in express words made liable to individuals in a civil suit for damages, was that, with rare exceptions, all roads lying within those several municipalities are under their respective control and charge. The mere fact of a road passing through and from one township to and into and through another adjoining township or other municipality, without interruption or change of line or character, does not make it a county road. Each township and other municipality controls the portion of such continuous road lying within its borders, and is responsible for it, unless the road be on other grounds a county road. The statute does not remove the common law liability, though it does not state or enact it.

I am of opinion, however, that this action must fail, because the bridge in question is not a bridge lying wholly or partly *between* a county and an adjoining county; not, in fact, a bridge lying between these two counties, within the meaning of sec. 327 of the Municipal Act. These two counties embrace certain townships which touch and adjoin one another, separated only by a geographical line, unsubstantial and invisible. They are not divided by any bridge, and strictly speaking nothing does or can lie between them. When you speak of something lying between two other places or things, you mean, in the accurate use of language, something lying between the boundaries or limits of the other two places or things; something dividing them, or within the borders of that which does divide them. You don't in such a case employ the word "between" as meaning something common to two parties or places, as when you speak in the common ordinary terms of a well or a stable as in use between two parties, or common to both, and which, consistently with the meaning of the words thus employed, may be wholly on the premises of one of the parties. If you were asked, "Does anything in the shape of a road bridge or river, lie between two countries?" you would not say, "Yes, there is a road or a river which passes through the one county into the other." The Legislature have made no distinction between roads and bridges in this, nor, indeed, so far as I have seen, in any other section of the Act; and perhaps the case of this bridge is a single and exceptional one, not within the thought or view of the Legislature at the time, and is therefore a *casus omissus*. That we cannot help; our duty is to interpret the language of the Legislature as we find it, and not, contrary to its meaning, to employ it to cover a case which the Legislature has not provided for, or has overlooked. In this country are many roads continuous and unbroken, which, as one line of road, traverse two or more counties, running from one into the other, without any visible boundary or mark to fix the limits of the road or portion of road within any one of such counties. Take the road known in former times as "Dundas Street," which commencing, I believe, as far west as London, was continued and travelled over to the eastern boundary of Upper Canada. This road passes of course through many counties. Would it be pretended that the different counties through which this road ran, were to unite and exercise joint jurisdiction over it? If not in the case of such a road, neither, I think, in the case of a bridge, situate as this is, which does not lie between two counties, but lies partly in one and partly in another, in unbroken length, as in the case of a road running from one county into another. Each municipality, as the law stands, can alone, in my judgment, be made responsible for the maintenance and repair of so much of such a bridge as lies within its borders, as in the case of a road similarly placed, unless the road or bridge is assumed by the county; and if this in the case of a bridge be inconvenient, the Legislature must do, as they have not done, make the distinction and provide the remedy; for, as I have already said, roads and bridges are placed by them on the same footing, and this action is made to rest upon a supposed statutory liability, and not upon any liability at common law.

The Legislature have, I think, however, made their own meaning plain by the language they have employed in several sections of the statute. In the 327th section this joint jurisdiction is given over a road or bridge lying between two municipalities, "although such road or bridge may so deviate as to be wholly or in part within one county." The Legislature, here, I think, shew clearly, that what is meant is a road or bridge running along or between the borders of two counties. The language quoted, if not entirely out of place, would be unnecessary and

(*a*) NOTE.—At common law, if a bridge be within a franchise, those of the franchise are to repair it. If the bridge be part within the franchise and part within the gildable, so much as is within the franchise shall be repaired by those of the franchise, and so much as is within the gildable by those of the gildable; *and so it is if it be in two counties*, mutatis mutandis.

useless in reference to a road running through or from one county into another; for it must, as a matter of course, be partly in one county and partly in the other. It could not deviate so as to be partly or wholly *in some places* in the one county. It must necessarily be in both counties, otherwise it would be a road having its limits entirely within the one county. When you are dealing with a continuous road passing through two counties, you would not speak of it as a road "deviating so as in some places to be wholly or in part within one of the counties." Section 339 gives the County Council exclusive jurisdiction over every road or bridge dividing different townships, "although such road or bridge may so deviate as in some places to lie entirely or in part within one township."

Section 341, which transfers to the Municipal Council the powers of the Magistrates in Quarter Sessions, provides that in case "any such road or bridge lies in two or more counties, it shall belong to the Council of such counties;" that is, as I understand it, each county shall own so much of the road as lies within its boundaries; for no joint jurisdiction is given anywhere except under the 327th section, and I have already, I think, shown that that does not apply to a road running through several counties. Now, in this 341st section the Legislature makes the distinction, as to roads which lie partly in one county and partly in another, and roads which lie between two counties. If they had meant, under the 327th section, to include roads which run from one county into another, they would have emyloyed the word "between" in the 341st section, instead of using the words "lying in" two counties.

Again, in sub-section 3 of section 342 the language is, "roads or bridges running or being within one or more townships, *or* between two or more townships of the county, *or* between the county and any adjoining county or city, &c." This shews that the Legislature was alive to the distinction and difference in roads lying in one or more townships, and roads lying between them. I suppose no one would think of applying this section to Yonge street, for instance, which runs from and out of the City of Toronto, into the County of York, so as to treat this street as a road lying *between* the city and county, and thus giving the county jurisdiction over it, even in the city; which must be the inevitable result, if, under the word "between," is to be classed a road passing through two adjoining municipalities. So, again, in section 343, any township may aid any adjoining county "in making, &c. &c., any road or bridge lying between the township and any other municipality." Does this mean a road passing through and from one township into and through another? Does it mean that the township, besides maintaining the road within its own limits, shall or may also aid in maintaining it where it has passed beyond those limits and is within another municipality? Surely not. For these reasons, I think that the two municipalities, the defendants here, did not acquire under the Statute any joint authority over the bridge in question, and, therefore, could not be made jointly liable for any defect in it.

If I were prepared to agree in the premises of the learned Chief Justice, as to the limits of the counties, I would come to the same conclusion as he has; but it seems to me that the counties must be co-extensive with the limits of the townships composing them respectively, and these by the Territoria Act meet in the middle of "The Narrows." I think each county must keep in repair the portion of the bridge lying within it.

This defence does not appear to have been urged in the Court below, nor to have been made a ground of nonsuit, nor the subject of a motion against the verdict for the plaintiff, nor is it made a distinct ground of appeal here; but it has been urged here, in argument, without objection, and I suppose under the first reason for appeal, and if available, is, I apprehend, too patent to be overlooked.

RICHARDS, C. J., HAGARTY, A. WILSON, J. WILSON, J. J., and MOWAT, V. C., concurred with DRAPER, C. J.

Per Curiam.—*Appeal dismissed, with costs.*

COMMON LAW CHAMBERS.

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

IN RE MIRON V. MCCABE.

Division Courts—Jurisdiction—Reduction of claim by payment or set-off—Prohibition—Stay of proceedings.

Held, 1. That a balance of an account which originally exceeded $200, but had been reduced by *payment* (not set-off) to under $100, was within the jurisdiction of a Division Court.

2. Affidavits, to be used on an application for a prohibition, should be entitled in the court to which application is to be made, but should not be entitled in any cause.

3. There is no authority in this country for a judge to stay proceedings in court below pending prohibition.

[Chambers, Dec. 14, 1867.]

A summons was granted in this matter by Mr. Justice Morrison, on the 29th November last, calling upon Miron, the plaintiff in a suit in the Ninth Division Court of the County of Hastings, against McCabe, defendant, and upon the judge of the said court, to show cause why a writ of prohibition should not issue to the said judge to prohibit him from further proceeding in the said Division Court on the said plaint, and from enforcing the judgment therein, on the ground that the said court and judge had no jurisdiction of the said plaint; and that the plaintiff's claim is not within the jurisdiction of the Division Court, and so appears from the particulars thereof, being for a balance due upon an unsettled account exceeding the sum of $200; and why the said Miron should not pay the costs of the application; and in the meantime that all further proceedings in the said court be stayed.

It appeared that the summons in the court below was issued on the 23rd October last, stating the plaintiff's claim at $67 47½.

The particulars of claim attached to the summons claimed a *balance* of account, as follows:

Terence McCabe, Esq.,

1867.	To Joseph Miron, the younger,		Dr.
May.	To 6 months 23½ days service, at the rate of $34 per month.....	$234	55
	Cash paid men.....	2	00
		$236	55
Cr.	By.....	169	07½
	Balance due.....	$67	47½

The affidavit filed by the defendant stated that this was a balance claimed on an unsettled account, as appeared by the particulars of claim; that when the case came on for trial, on the 4th November, he appeared in person to defend the same, and objected that the court had not jurisdiction in the matter, as the unsettled account exceeded in amount two hundred dollars; that the judge overruled the objection, heard the cause, and gave judgment in favor of the plaintiff for $9 97c. and costs; that the plaintiff's application for a new trial is still pending; that no execution has issued on the judgment, and the defendant has not paid the amount of the judgment; that he does not owe the plaintiff anything; and that the sum of $169 07½c. credited by the plaintiff on his claim, is part of a set-off which the defendant has against the plaintiff's claim; and that no agreement or settlement had taken place between them in reference to the said claim or set-off, or any part thereof.

The plaintiff, in his affidavit, stated that the defendant paid him on account of his wages, and in liquidation of the account, at different times, in all, the sum of $155 15c. in cash: that the sum of $42 was paid by the defendant to one Gordon, on the plaintiff's written order, as he believes; that the extent of contra account of the defendant against the plaintiff was, as he believes, no more than $13 92c.: that his claim was for a balance of wages for the sum of $67 47½c., and it would only have been for $25 47½c. if he had known of the order in favor of Gordon, for $42 had been paid: that the defendant, at the trial, fully entered into his defence; and that the sum awarded to the plaintiff by the judge is justly due to him.

It was sworn on behalf of the plaintiff that an execution had been issued on the judgment, on which the deponent believed certain cattle of the defendant's had been seized.

Spencer showed cause.—*Siddall* v. *Gibson*, 17 U. C. Q. B. 98. shews that it was an irregularity to entitle the affidavits used on this application in any court as these affidavits were entitled*. On the merits he referred to *McMurtry* v. *Munro*, 14 U. C. Q. B. 166; *Wallbridge* v. *Brown*, 18 U. C. Q. B. 158; *Turner* v. *Berry*, 5 Exch. 858.

Osler supported the application. The affidavits, it is laid down expressly in Arch. Pr. 12 Edn. 1755, in a case of prohibition, "should be entitled in the court to which, or to the judge of which, the application is to be made, but not in any cause or matter." See also 11 Edn. 1727. And on the merits he referred to *Re Denton*, 32 L. J. Exch. 89; see also 1 H. & C. 654; *Furnival* v. *Saunders*, 26 U. C. Q. B. 119; *Hodgson* v. *Graham*, 26 U. C. Q. B. 127; *Higginbotham* v. *Moore*, 8 U. C. L. J. 68.

ADAM WILSON, J.—The Division Courts have jurisdiction of "all claims and demands of debt, account or breach of contract or covenant, or money demand, where the amount or balance claimed does not exceed one hundred dollars." The amount of the plaintiff's side of the account did not exceed one hundred dollars; but the question is, whether the amount or balance claimed exceeds that sum?

That depends upon the meaning to be placed upon the expression, "the amount or balance claimed." In the case of *Woodhams* v. *Newman*, 13 Jur 456, the wording of the English County Courts Act was, that those courts should have jurisdiction of "all pleas of personal actions, wkere the debt or damage claimed is not more than twenty pounds, whether on balance of account or otherwise;" and there it was held that the meaning of the words "balance of account or otherwise," was where the parties themselves had balanced the account, or where it was balanced by payments made on account; but that the plaintiff was not at liberty to reduce his claim by crediting the defendant with a set-off; for he could not compel the defendant to rely on his set-off, by giving him credit for it. *McMurtry* v. *Munro*, 14 U. C. Q. B. 166, is to the same effect, and is founded upon *Woodham* v. *Newman*, cited by Mr. Justice Burns, as in 7 C. B. 654. *Turner* v. *Berry*, 5 Exch. 858, points to the same distinction between payment and set-off; and so also does *Furnival* v. *Saunders*, 26 U. C. Q. B. 119.

The distinction between the two is quite plain. A *payment* is a sum expressly applicable in reduction of the particular demand on which it is made; that demand is therefore reduced by the extent of the payment. To constitute a payment, the transaction must have the assent of both parties, and for such payment no action is maintainable; while a *set-off* is a separate and independent demand which one party has against the other, and in respect of which he is as much a creditor of the other, as that other is to him, and for which he can as well maintain a separate action, as his creditor can for his demand.

In a case of payment, the payment must be pleaded (if the plaintiff do not credit it), when the demand is sued for in respect of which the payment was made, otherwise it is entirely lost, and can never be recovered back: *Marriott* v. *Hampton*, 7 T. R. 269; 2 Smith's Leading Cases 375; while a set-off need not be pleaded, and credit for it cannot be forced upon the party against his will.

A payment was always a deduction at the common law, while it required a statute to enable a set-off to be made to an action.

I am satisfied, therefore, that if the balance claimed here be a balance resulting from *payments* made by the defendant, and not from a set-off credited to him against his will, the judge below had jurisdiction.

It is stated in Archbold's Practice, that on a question of prohibition, the court will look, not merely at the plaint and particulars, but at the actual facts; and if it appear that the claim is in substance for damage arising out of a matter excluded from the jurisdiction of the court (as malicious prosecution), a prohibition will be granted.

Referring, then, to the summons and particulars in this case, it appears the demand sued for was a debt or account, in which *the balance claimed* did not exceed one hundred dollars.

The defendant undertakes to show that although this does so appear in the summons and particulars, yet it was not for such a claim in fact, because the *balance claimed* was an arbitrary, unwarranted balance, struck by the plaintiff himself, for the mere purpose of making it appear that his claim was within the jurisdic-

* The case referred to only decided that the "affidavit, &c., should not have been entitled in any *cause*."—EDS. L. J.

tion of the inferior court, and was not such a balance as was within the provisions of the statute.

I have already stated that a balance which is less than $100 of a claim exceeding that amount, but reduced below it by payment, is a balance within the meaning of the statute—does the defendant show that this balance was not arrived at in that way, but in some way unauthorized by the statute? The defendant calls it the balance of an *unsettled* account, as appears by the particulars, that he objected at the trial that the *unsettled* account exceeded two hundred dollars, and that the sum of $169 07½c. credited by the plaintiff on his claim is "part of a set-off which the defendant has against the plaintiffs claim, and that no agreement or settlement had taken place between them, in reference to the said claim or set-off or any part thereof." This does not plainly show that the credit was a set-off in its proper signification, as distinguished from a payment, nor does it show of what the alleged set-off consisted, so that I could have determined whether it was or was not a set-off, while the plaintiff distinctly swears the defendant "paid him on account of his wages and in liquidation of the account at different times, in all, the sum of $155 15c. in cash," and "that the defendant's *contra account* was, as he believes, no more than $13 92c." This latter sum is, I presume, a set-off, but leaving that out of consideration, there is the full claim of $236 55c. reduced by payments amounting to $155 15c., leaving a balance claimed of debt or account of, $81 40c., and so not exceeding one hundred dollars. The Division Court had therefore clearly jurisdiction in this matter.

The defendant's affidavit read in connection with the plaintiffs, is not so candid as it should have been; he represents the credit of $169 07½c. *as part* of a set-off which he has against the plaintiff, leading one to suppose that *the whole sum of* $169 07½c. is a set-off, and that it is *part* of a *larger* set-off which he has against the plaintiff, while the plaintiff shows that it is only a part of this sum which is a set-off at all, and that such set-off is only $13 92, while all the rest of it is a payment.

I am glad to be able to come to this conclusion, in a case where the whole dispute is about the trifling sum of $9 97c., and where complete justice has been done between the parties.

If however it had appeared that the jurisdiction of the Division Court had been exceeded, I should have been obliged to have interposed, however small the sum in litigation might have been, for there can be no question of greater consequence at any time brought before a Superior Court, than the maintenance of all other Courts within their legitimate jurisdiction. I think there was no just cause for disputing the jurisdiction of the Court below.

I should notice also that the affidavits on which this motion is founded are rightly intituled in the Superior Court and not in any cause or matter.

And I should also say that the summons for a prohibition should not perhaps have stayed the proceedings of the Court below.

This power has been expressly given to the judge in England, by the Imperial Statute 19 & 20 Vic. c. 108, sec. 40, which is not applicable here. I state this that this particular summons may not be taken as an admitted precedent.

I must discharge this application with costs, to be paid by McCabe to Moore.

Summons discharged with costs.

CORRESPONDENCE.

Assignees in Bankruptcy Matters—The operation of the Act.

To the Editors of the Canada Law Journal.

Gentlemen,—When the present Bankrupt act was passed, every one supposed that an act so long talked of, or should be nearly perfect. The working of the act since 1864, clearly, on the contrary, proves it to be a bungled, defective affair. I propose to point out a few of its defects, and in addition to refer to the conduct of *official assignees.*

Every one knows that the profession of the law is being over-crowded in Canada, and this is not a time when lawyers should silently permit persons who are not lawyers to take the business that legitimately belongs to the profession from them. I have waited in hopes that some other person would draw the notice of the profession to the fact, but seeing no person has done it, I will do so.

Every lawyer who has watched closely the actions of official assignees, especially in Toronto, knows well that these individuals are generally selected by the insolvent, to get him through for a certain fee, generally $50! This fee is in fact a retainer, and except in special cases of difficulty, a professional man is never thought of. One would have supposed, and such was certainly the intention of the act, that the assignee was peculiarly the officer of the creditors, or at least one who stood perfectly impartial and unbiased between insolvent and creditors. If the assignee is the paid agent, or rather the *pettifogging paid and unlicensed lawyer* of the insolvent, it is easy to be seen that he will use every means in his power *to slip his client through*, regardless of creditors! The Bankrupt act was passed to enable honest, but unfortunate men, who were willing to give up all their property, and who are not guilty of fraud, to obtain a discharge. A majority, I fear, in Canada who avail themselves of it, and not a few assignees who aid them in it, think that it was an act to white-wash debtors and to enable them to slip through its meshes, with as much property out of their hands, in trustees or corrupt

agents possession, as possible. Many who go through do so honestly, but I verily believe, from a large observation of such things, that a majority of rogues get through, with large secreted funds. One of the essential requisites to a proper discharge of an insolvent, is the certificate of the assignee, that the insolvent has complied with all the provisions of the act, has attended all meetings, has filed a statement of his affairs on oath, fairly showing how he disposed of his property, &c.

This certificate, very improperly, is too often overlooked by judges. See *In re Wilson*, 9 L. T. N. S. 498 ; 12 W. R. 221 ; *Re Brooks*, 5 L. T. N. S. 727 ; Deacon's Law of Bankruptcy, 703–4. Now if the assignee has received his fee beforehand from the insolvent it is not his interest to see closely after such things. It is his interest, in league with his client, to publish his application for discharge, or other notices, in the cheapest and most obscure newspaper he can find, and having no *professional responsibility*, to get his client through, even if all is not right. And I believe yet that many an insolvent will find to his sorrow, that all his papers are not right.

And now as to the defects of the Act. I think it should be distinctly enacted, that if a man has once gone through the Insolvent Court he should not again go through without paying 10s. in the £; or some such clause should exist. It should be distinctly provided, that the insolvent should give personal notice, or at least through the post, to every creditor, of his last application for discharge. It seems this is not required of insolvents. I question the legality of this. It should be distinctly said that *no assignee should act as the agent* of the insolvent under a penalty. It should be enacted that judges should have power to impose terms of costs on assignees, creditors, or insolvents for improper conduct, contempts or delays. It should be enacted that a creditor should have power to appeal against a judge's order of discharge at any time within, say, three months, upon filing security. The eight days now given is too short. It should be enacted that judges should have power to require the insolvent, under certain suspicious circumstances, to pay a certain rate in the £ to his creditors, and in the meantime the discharge to be suspended. It should be enacted distinctly (there is now some doubt on the subject) that the insolvent shall be discharged only from the debts or liabilities mentioned in his schedule of debts, which schedule should be in all cases appended to, and be legally considered, a necessary part of his assignment. It should be enacted that the insolvent should assign to an assignee in the county where he became insolvent. This clause would be only just to creditors.

I might allude to other defects but space will not admit.

SCARBORO.

Toronto, Feb. 20, 1868.

MONTAGUE, March 14, 1868.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—A difference of opinion exists between the Reeve and Councillors of the Township of Montague. The Reeve makes motions and moves resolutions in his own name, and submits them to the Council of which he is Reeve. The Council differ with him ; but he says there has been a decision in the Courts. What is your opinion on the point ?

An answer by you, or one of your correspondents, in the April number, will much oblige,

Yours, &c.,

P. C.

APPOINTMENTS TO OFFICE.

CLERK OF EXECUTIVE COUNCIL.

JOHN SHUTER SMITH, Esquire, to be Clerk of the Executive Council of the Province of Ontario, in the room and stead of Robert G. Dalton, Esquire, resigned. (Gazetted 1st February, 1868.)

COUNTY ATTORNEY.

JULIUS POUSSETT BUCKE, of the City of Ottawa, Esquire, to be County Crown Attorney in and for the County of Lambton, in the room and stead of Timothy Blair Pardee, Esquire, resigned. (Gazetted 1st Feb , 1868.)

DEPUTY CLERK OF THE CROWN.

SAMUEL REYNOLDS, Jun., Esquire, of the Town of Prescott, to be Deputy Clerk of the Crown and Pleas for the United Counties of Leeds and Grenville, in the room and place of W. H. Campbell, resigned. (Gazetted 8th February, 1868.)

POLICE MAGISTRATES.

DONALD BETHUNE, Esquire, Q.C., Barrister-at-Law, to be Police Magistrate in and for the Town of Port Hope. (Gazetted 1st February, 1868.)

NOTARIES PUBLIC.

JAMES F. MACKLEM, of the Village of Chippewa, Gentleman ;

FRANCIS ALEXANDER HALL, of the Town of Perth, Gentleman ;

JAMES FLEMING, of the Town of Brampton, Esquire, Barrister-at-Law, and

SAMUEL McCAMMON, of Gananoque, to be Notaries Public in and for the Province of Ontario. (Gazetted 1st February, 1868.)

CORONERS.

JOHN D'EVELYN, of the Village of Woodbridge, Esquire, M.D., to be Associate Coroner in and for the County of York. (Gazetted 1st February, 1868.)