DIARY FOR NOVEMBER.

1. Wed.... *All Saints.*
4. Sat. ... Articles, &c., to be left with Sec. Law S.
5. SUN ... 21st *Sunday after Trinity.*
12. SUN ... 22nd *Sunday after Trinity.*
15. Wed ... Last day for service for County Court.
19. SUN ... 23rd *Sunday after Trinity.*
20. Mon ... Michaelmas Term begins.
24. Frid.... Paper Day Q. B. New Trial Day C. P.
15. Sat .... Paper Day C. P. N. T. Day Q. B. Declare for [Co. Ct.
26. SUN... 24th *Sunday after Trinity.*
27. Mon ... Paper Day Q. B. New Trial Day C. P.
28. Tues... Paper Day C. P. New Trial Day Q. B.
29. Wed ... Paper Day Q. B. New Trial Day C. P.
30. Thurs. *St. Andrew.* Paper Day C. P.

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.

NOVEMBER, 1865.

THE HON. ARCHIBALD McLEAN.

More than two years and a half ago it was our melancholy duty to chronicle the death of one whose name will ever be remembered with respect and affection by all true hearted Canadians, Sir John Beverley Robinson. Second only to his memory will be that of his tried friend, his brother in arms and his brother judge, the Hon. Archibald McLean who expired at his residence in Toronto on Tuesday, the 24th day of October last, at the advanced age of seventy-five.

The father of Archibald McLean was the Hon. Neil McLean, a member of the Legislative Council for Upper Canada before the Union: his mother was a daughter of Colonel Macdonald. He was born at St. Andrews, near Cornwall, in April, 1791. Like Sir John Robinson and many others who have attained a conspicuous position in Canadian history, he was a pupil of Dr. Strachan, the present venerable Bishop of Toronto, at the town of Cornwall. He left this to study law, which he did in Toronto, then York, in the office of Attorney General Firth. As to his success or application in these early studies we know but little; whatever they were they were cut short by the breaking out of the war of 1812. The son of an officer in the 84th Highlanders, and the grandson on his mother's side of a U. E. Loyalist, it needed no persuasion to induce him to take up arms in defence of his country.

He was identified with the struggles of that eventful period. He was a lieutenant in Captain Cameron's No. 1 flank company of York Militia at the battle of Queenston Heights. No. 2 flank company being on that day commanded by Lieut. John Beverley Robinson. He was severely wounded early in the engagement, during the temporary repulse that preceded the victory, whilst aiding Captain Dennis of the 49th in his endeavours to stop the retreat, but was helped off the field by Lieut. Stanton, the present Clerk of the Process, and other comrades, shortly after Sir Isaac Brock received his mortal wound.

He also behaved very gallantly at the engagement at York, saving the colors of the York Militia. He was present at the battle of Lundy's Lane, where he was taken prisoner, and so remained till the termination of the war.

On the breaking out of the Rebellion of 1837, the old military fire of the then lawyer, but former soldier revived, and on the morning of the day when the attack of the rebels on Toronto was expected, he might have been seen drilling a company of men hastily got together in front of the old City Hall, with the ardour of a quarter of a century before—the then Chief Justice of Upper Canada being in the ranks, shouldering his musket like any private.

He was called to the Bar and admitted as an attorney on 9th April, 1813, and was engaged in the successful practice of his profession until the year 1837, when he was appointed one of the judges of the Court of King's Bench along with the late Mr. Justice Jones, when the number of judges was increased from three to five, under the 7 Wm. IV. cap. 1.

Before his appointment to the Bench he represented his native county for several years in the Legislative Assembly for Upper Canada, and was for some time Speaker of the House, a position for which his dignified bearing and and courteous manners well fitted him.

He was throughout his parliamentary career a consistent advocate for the rights of the Presbyterian Church, of which he was an elder, during the struggle brought about

by the proposed secularization of the clergy reserves. And this was the more creditable to him, as he had to act in opposition to his own personal and political friends. He was violently assailed in the House of Assembly by Mr. Hagerman, then a member of the Government, for his conduct in this matter; but neither the withering language of the eloquent and impassioned speaker, nor the persuasions of his friends could prevent him taking the course which he considered right.

When the Court of Common Pleas was constituted in 1849, the late Sir James Macaulay was made Chief Justice, and Judge McLean and Judge Sullivan puisne judges of that court, by commission dated 15th December, 1849. He continued in this court until the resignation of Chief Justice Macaulay and the appointment of Judge Draper to the vacant office.

This appointment of his junior, which he looked upon as a slight, was a blow to the old judge which he felt acutely, and the consequence was, that in Hilary Term, 1856, he took his seat in the Queen's Bench. The step, however, was considered a judicious one by the profession as well as by the Attorney General, J. A. McDonald, though he, as well as others, expressed and felt much regret at the pain caused by the course which it was considered advisable to take, and all were well pleased to see Mr. McLean made Chief Justice of Upper Canada in the place of Sir John Robinson, who resigned his seat in the Queen's Bench and accepted the Presidency of the Court of Error and Appeal. Upon the death of the latter in January, 1863, Chief Justice McLean, then in failing health, again took his place, which he held till his death.

As a judge, though not perhaps possessing the brilliancy or application of some of his brethren, his opinions were always received with the respect and attention which his experience, and his character for unblemished impartiality and integrity claimed. His views generally coincided with those of his old friend Sir John, in whose judgment he placed the most unbounded confidence, and for whose character he had the greatest admiration. He joined with him when these two dissented from the rest of the Court of Appeal in the well known case of the *The City of Toronto* v. *Bowes*, — the decision, however, of the majority was upheld on an appeal to England.

The judgment of Judge McLean, in opposition to the opinion of Sir John Robinson and Judge Burns, in the celebrated *Anderson* case, is the most prominent feature in his judicial career, and deserves more than a passing notice. The facts of this case are familiar doubtless to most of our readers; they will be found reported in full in 20 U. C. Q. B. 124. Judge McLean took the broad ground, that in administering the laws of a British Province he was not bound "to recognize as law any enactment which could convert into chattels a very large number of the human race," and that a man endeavouring to effect his escape from slavery was entitled to use any means necessary for that purpose, even to taking the life of his pursuer, and that the crime with which Anderson was charged, even if it had been clearly made out, did not come within the Ashburton Treaty. Nor could he "recognise the law of slavery in Missouri to such an extent as to make it murder in Missouri, while it is justifiable in this Province to do precisely the same act."

Whatever may be the strict law of the case, and there are many even amongst lawyers who think that Judge McLean was right, one cannot help admiring the free British spirit so characteristic of the man, whose feelings doubtless were shared by his brethren, but by them kept subject to the rigid dictates of severe and calm judgment.

The manner of the late President of the Court of Appeal upon the Bench was dignified and courteous. Unsuspicious and utterly devoid of anything mean or petty in his own character, his conduct to others was always that which he expected from them.

The profession generally, the young student as well as the old practitioner, will long remember with affection his courtesy and forbearance in Chambers and on the Bench. Others will think of him as an entertaining and agreeable companion and a true friend; whilst others still will call to mind the stately form of the old judge, as he approached and entered St. Andrew's Church, where he was a constant and devout attendant, rain or sunshine, until his last illness, which terminated in death.

Archibald McLean was a man of remarkably handsome and commanding presence; tall, straight, and well formed in person, with a pleasant, handsome face, and a kind and courteous manner, he looked and was, every inch, a man and a gentleman. He belonged

to a race, most of whom have now passed away—the "giants" of Canada's early history. He was one of those honest, brave, enduring, steadfast men sent by Providence to lay the foundation of a country's greatness.

For the last few years Mr. McLean had been afflicted with partial paralysis, which, whilst it impaired his physical powers, left his intellect unclouded. For a long time however his iron frame resisted the attack of man's "last enemy," until having passed the span of life allotted to humanity, a general break up of the system took place, which, combined with his malady, at length carried him off. As he had lived, so did he die; calmly, courageously, and peacefully he went to stand before the Judge of all mankind, in the sure and certain hope of an eternity of joy and peace.

On the second day after his decease a meeting of the Benchers of the Law Society of Upper Canada took place in the Convocation Room at Osgoode Hall, for the purpose of taking such steps as were fitting under the circumstances. The Hon. John Ross was appointed chairman, when the following resolution was passed on the motion of Mr. John Crawford, seconded by Mr. Vankoughnet:

"That this meeting has heard with unfeigned regret of the death of the Honorable Archibald McLean, late President of the Court of Appeal, and as a mark of the high estimation in which he was held by the members of this society—be it resolved therefore, that a deputation do wait upon the family of the late President and request that the funeral do take place from Osgoode Hall and be conducted by this Society, and that the Hon. John Ross, and the mover and seconder compose such deputation."

A committee was also appointed to draft resolutions expressive of the feelings of respect and affection of the profession to the late President, and the mode of testifying the same.

On Saturday before the funeral a meeting of the Society was held to take into consideration the resolutions which had been accordingly prepared by the committee. The Hon. John Ross being again called to the chair, the following resolutions were passed:

Moved by Mr. Kenneth McKenzie, Q. C., seconded by Mr. Duggan, Q. C., and

"*Resolved*, That the members of the Law Society now assembled, desire to record their feeling of profound regret at the death of the Honorable Archibald McLean, President of the Court of Error and Appeal, and their sincere sympathy with his family in the great bereavement they have sustained. In paying this humble tribute to his virtues as a Judge, and his worth as a man, they are but giving feeble utterance to the sentiments of the whole profession. His great public services, extending over nearly half a century of our country's history, and embracing offices of the highest trust, will cause his loss to be widely mourned, but by no part of the community as much as by the members of the bar, with whom he was so long and so intimately associated. By the upright and conscientious discharge of his judicial duties, he gained the confidence and secured the esteem of his fellow citizens; by a happy union of courtesy with dignity, he inspired affection, as well as respect, in those who practised before him, and thus helped to foster the spirit of mutual regard and cordial coöperation between the bench and the bar, which distinguishes the administration of justice in Upper Canada."

Moved by Mr. Gamble, seconded by Mr. Brough, Q C., and *resolved*,—

"2. That the members of the Law Society shall wear crape on their left arm for a month, as a testimonial of respect and affection for his memory."

Moved by Mr. Crawford, seconded by Mr Alexander Cameron, and *resolved*,—

"3. That the treasurer be requested to transmit a copy of the first resolution to Mrs. McLean."

Moved by. Mr. Roaf, Q. C., seconded by Mr Crooks, Q. C., and *resolved*,—

"That the Treasurer do lay these resolutions before the Convocation, and on behalf of this meeting request their insertion in the minutes of the proceedings of the Society."

The corpse, attended by personal friends, was taken from his residence on Peter Street to Osgoode Hall, where the funeral was arranged under the direction of the Law Society. Shortly after two o'clock the burial service of the Presbyterian Church was performed by the Rev. Dr. Barclay, when the coffin was placed in the hearse and the procession moved off. The pall-bearers were: The Chancellor of Upper Canada, Ex-Chancellor Blake, Mr. Justice Morrison, Mr. Justice Adam Wilson, and Mr. Vice-Chancellor Mowat. The procession was composed of the Bishop of Toronto, such of the Judges of the Superior Court as their duties on circuit permitted to attend, the Hon. S. B. Harrison, and others holding public positions, the Mayor and Corporation, the members of St. Andrew's Society, of which the deceased had been President for several years, and the members of the bar, in their

robes, besides a large number of citizens generally. The funeral was a very large one, and would have been much larger but for the inclemency of the weather, and from the fact that a number of the profession were out of town on circuit, and many from the country were for the same reason prevented from attending.

The funeral cortege proceeded to the Necropolis, where, amidst the sorrow of all who knew him, were deposited the mortal remains of the Honorable Archibald McLean, the brave soldier, the upright judge, and the Christian gentleman.

OLIPHANT v. LESLIE.

This case, decided some short time since, is interesting as affecting questions of interpleader in Division Courts. The facts were these:

In an action of trespass against a Division Court bailiff and one B., for entering plaintiff's close and taking goods, defendants pleaded that one H. having recovered a judgment in a Division Court against O., the plaintiff's mother, and the goods in question having been seized under an execution issued thereon, the plaintiff claimed them; whereupon the bailiff obtained an interpleader summons; on which the judge, after hearing the parties, adjudged that the goods were the property of the said execution creditor, and liable to said execution. The interpleader summons was produced, with a minute endorsed by the judge adjudging that the goods were "the property of the execution creditor," and ordering the costs to be paid by the claimant in fifteen days. The plaintiff called witnesses, who swore that the judge did not decide the matter, but put off the hearing on payment of costs by the plaintiff within fifteen days.

The Court of Queen's Bench held, that the minute of adjudication and order were conclusive to show that the summons was not enlarged, and that the jury should have been so directed; and further, that although the minute was informal, in adjudging that the goods were the property of the execution creditor, instead of saying that they were the claimant's, or not the execution debtor's, yet it was in substance a dismissal of the plaintiff's claim, and a protection to the bailiff.

ACTS OF LAST SESSION.

As there is a reasonable probability that the publication and distribution of the Acts of last Session will be delayed by the removal of the Government offices to Ottawa, we publish hereunder the Act for the better protection of sheep, which will doubtless be found interesting to many of our readers, and particularly to municipal officers and magistrates.

AN ACT TO IMPOSE A TAX ON DOGS, AND TO PROVIDE FOR THE BETTER PROTECTION OF SHEEP IN UPPER CANADA.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1.—There shall be levied annually in every Municipality in Upper Canada, upon the owner of each dog therein, an annual tax of one dollar, for such animal.

2.—The assessors of every Municipality, at the time of making their annual assessments, shall ascertain the number of dogs liable to be taxed, and shall enter in lists to be made by them the name of every person in their respective Municipalities then owning or keeping any dog subject to the above tax, the number of dogs kept by such person, and the whole amount of tax to be paid by him.

3.—The owner or possessor of every dog liable to such tax, shall, when required by the assessor, deliver him a description in writing of every such dog owned or possessed by him, and for every neglect or refusal to do so, and for every false statement made in any description so furnished, such owner or possessor shall incur penalty of five dollars, to be recovered by the clerk of the Municipality before any Court of competent jurisdiction.

4.—The assessors of every Municipalty shall, within the time required by law for the completion of their assessment rolls of real and personal property, make out a duplicate of the lists so by them made, containing the names of the owners and possessors of dogs liable to taxation under this Act, with the amount payable by each person, and shall annex thereto a direction to the collector of the Municipality to levy, raise and collect the several sums in such lists specified of the persons respectively opposite to whose names the said sums shall be set, according to law, and pay over the same to the clerk or treasurer as may be directed by the Municipality; and such lists shall be signed by the assessors and shall be by them immediately delivered to the collector.

5.—The collector to whom any such lists shall be delivered shall proceed to the collection of the sums of money therein specified in the same manner and with the like authority, in all respects, as in the collection of other taxes imposed in the Municipality, and shall

pay the same to the Clerk or Treasurer as may be directed by the Municipality; and the same remedies to compel such collection and the payment of the moneys collected may be had against such collectors and their sureties as in the case of other taxes levied in the Municipality.

6.—The moneys so collected and paid to the Clerk or Treasurer of any Municipality shall constitute a fund for satisfying such damages as may arise in any year, from dogs killing or injuring sheep in such Municipality, and the residue, if any, shall form part of the assets of the Municipality for the general purposes thereof.

7.—The owner or possessor of any dog that shall kill, wound or otherwise injure any sheep or lamb, shall be liable for the value of such sheep or lamb to the owner thereof, without proving notice to the owner or possessor of such dog, or knowledge by him, that his dog was mischievous or disposed to kill sheep.

8.—The owner of any sheep or lamb that may be killed or injured by any dog may apply to any two justices of the peace in the Municipality, who shall enquire into the matter and view the sheep injured or killed, and may examine witnesses upon oath in relation thereto; and if such justices of the peace are satisfied that such sheep or lamb was killed or hurt only by the dogs and in no other way, they shall certify such fact, the number of the sheep or lambs killed or hurt, and the amount of the damages sustained thereby by the owner, together with the value of the sheep or lambs hurt or killed.

9.—Such certificate shall be *primâ facie* evidence of the facts therein contained in any suit that may be brought by the party injured against the owner or possessor of any dog, if it shall appear on the trial of such suit that due notice was given to the owner of the dog of the intended application to the Justices of the Peace.

10.—If the party injured cannot discover the owner or possessor of the dogs by which such damage was done, or shall fail to recover the value of the sheep killed or injured from such owner or possessor, he may apply to the Clerk of the Municipality, and upon production to him of the certificate of the Justices of the Peace, made as aforesaid, and the affidavit of the party injured that he has not been able to discover such owner or possessor, or that he has failed to recover the damages from such owner or possessor, such clerk shall lay the same before the Municipal Council at its next meeting.

11.—The Municipal Council shall issue its order on the treasurer for the amount of the damages appearing by the certificate of the Justices of the Peace to have been sustained by the owner of any sheep killed or injured by dogs, when they shall be satisfied that the owner or possessor of such dogs cannot be discovered, or that the party injured has failed to recover such damages of such owner or possessor; and such amount shall be paid by the treasurer from and out of the fund constituted by the sixth section of this Act, and from no other fund whatsoever.

12.—If, after receiving the amount of such damages from the Treasurer of the Municipality, the owner of the sheep so killed or injured shall recover the value thereof, or any part of such value from the owner or possessor of any dog, he shall refund and repay to the treasurer of the municipality the sum so received from him, and it shall be the duty of the clerk of the municipality to bring an action against such owner to recover such amount, and such amount when recovered shall form part of the fund constituted by the sixth section of this Act.

13.—Any person may kill any dog which he may see chasing, worrying or wounding any sheep, unless the same shall be done by the direction or permission of the owner of the sheep or of his servant.

14.—The owner or possessor of any dog, to whom notice shall be given of any injury done by his dog to any sheep, or of his dog having chased or worried any sheep, shall, within forty-eight hours after such notice, cause such dog to be killed; and for every neglect so to do he shall forfeit a sum of two dollars and fifty cents, and a further sum of one dollar and twenty-five cents for every forty-eight hours thereafter until such dog be killed: Provided that it shall be proved to the satisfaction of the court before which a suit shall be brought for the recovery of such penalties, that such dog has chased, worried or otherwi e injured such sheep; and provided also, that no such penalties shall be enforced in case it shall appear to the satisfaction of such court, that it was not in the power of such owner or possessor to kill such dog.

15.—Upon compl int being made to the clerk of any municipality of any penalties imposed by this Act having been incurred, he shall commence a suit for the recovery thereof, in his name of office, and shall prosecute the same with due diligence; and all moneys recovered shall be by him added to the fund constituted by the sixth section of this Act for the satisfaction of damages sustained by owners of sheep.

16.—Every person in possession of any dog, or who shall suffer any dog to remain about his house or premises for the space of twenty days previous to the assessment of a tax, or previous to any injury, chasing or worrying of sheep, or any such attack made by such dog, shall be deemed the owner of such dog for all the purposes of this Act.

17.—This Act shall apply only to Upper Canada.

SELECTIONS.

THE SCOTTISH PAROCHIAL SCHOOLS.

The germ of the Scottish national system of education is to be found in the scheme prepared by the energetic and sagacious reformer John Knox. At an earlier period, indeed, the universities of St. Andrews, Aberdeen, and Glasgow had been founded, grammar schools had been established in some of the principal towns, and in the reign of James IV. it was enacted by the Parliament that, under a penalty of twenty pounds Scots, all barons and substantial freeholders should send their eldest sons to school to be instructed in classical literature, and afterwards to other seminaries to obtain a knowledge of the laws of the realm. No provision, however, was made for educating the great mass of the people, who were therefore sunk in a state of gross ignorance. When the Reformation took place, Knox was well aware that if the principles of a pure and spiritual religion were to be maintained and extended, it was indispensably necessary that the community should be educated. He therefore proposed in his "Book of Discipline," that a school should be established in every parish, a grammar school in every town, and a university in every city. But the turbulent and rapacious barons who had laid their grasping hands on the ancient patrimony of the church scoffed at the wise and far-seeing schemes of the great reformer "as a devout imagination," and the education of the people had to wait for better times. The grammar schools, however, provided a good education for the children of the upper classes, who were there instructed in the Sacred Scriptures and Catechism, in the French and Latin languages, in music, archery, and other athletic exercises; and the Presbyterian clergy had, by their own disinterested efforts, established common schools in various parts of Scotland. But they were without the means of endowing them, and amid the general poverty and distracted state of the country, comparatively little could be effected for the education of the masses. At length, in 1616, the Privy Council exerted its authority for this purpose, and empowered the bishops, in conjunction with the heritors, to see that "in every parish in this kingdom where convenient means may be had for establishing a school, a school shall be established, and a fit person appointed to teach the same upon the expense of the parishioners, according to the quality and quantity of the parish," for the advancement of true religion, and the training of children "in civility, godliness, knowledge, and learning."

This Act of the Council, however, does not seem to have been vigorously carried out by the bishops. Ten years later, a proclamation was made by Charles I., enjoining all ministers, with the assistance of two or three of their most intelligent parishioners, to report as to the educational condition of their parishes. From these returns, which have been published by the Maitland Club, it is evident that there was no school in the great majority of the parishes of Scotland, and that not a few were in the condition of Mordington, of which it is significantly reported, "There is ane greit necessitie for ane skule, for not ane of the paroche can reid nor wryt except the minister; but no fundation." The Act of the Privy Council of 1616 was ratified by the Parliament of 1633, and under its authority schools began to be built and endowed in the more cultivated districts of the country. Five years later, the General Assembly of the Scottish Church gave directions for "the settling of schools in every parish, and providing entertainment for men able for the charge of teaching youth." A representation was made to His Majesty that "the means hitherto appointed for schools of all sorts have both been little and ill-paid;" and in 1642 Presbyteries were enjoined to see that every parish should have a school where children are "to be bred in reading, writing, and grounds of religion." The dissensions which soon after broke out in Scotland unfortunately prevented the nation from reaping the fruits of these judicious enactments, and it was not until the revolution of 1688 had established peace and order in the kingdom, that a national system of education was fully established in Scotland. In 1696 an Act was passed by the Parliament rendering it imperative upon the heritors of every parish to erect a school, and to provide a dwelling-house and a salary for the schoolmaster. And the General Assembly followed this Act up by an injunction to Presbyteries to see that the law was obeyed. The maximum salary of the teachers was fixed at two hundred marks (£11 2s. 2d), and the minimum at one hundred marks. The right of electing the teacher and superintending the school was vested in the heritors. This famous Act laid the foundation of Scotland's proudest distinction, and proved the great source of her subsequent prosperity. And it is owing, not indeed solely, but principally to the national system of education which this Act established that Scotland, as Lord Macaulay remarks, "in spite of the barrenness of her soil, and the severity of her climate, made such progress in agriculture, in manufactures, in commerce, in letters, in science, in all that constitutes civilization, as the Old World has never seen equalled, and as even the New World has scarcely seen surpassed."

For more than a century after the Revolution the Scottish parochial schools were wholly neglected by the Legislature. The emoluments therefore remained stationary, while those of every other profession increased; and, in consequence, the social status, the acquirements, and influence of the schoolmaster were greatly deteriorated. Their depressed condition at length attracted the attention of the Legislature, and in 1803 an Act was passed which raised the maximum salary to £22 4s. 5d, and the minimum to £16 13s. 4d, exclusive of fees, and declared that a dwelling house of *not*

more than two rooms should be provided for the schoolmaster. At the same time, the election of the schoolmaster and the management of the school were vested, not as before, in the whole body of heritors, but in those alone who possessed an hundred pounds of valued rent; the minister of the parish was conjoined with them in authority, and the teachers were placed entirely under the jurisdiction of the Presbyteries, without any right of appeal. The Act further provided, that the salaries were to be revised every twenty-five years, the average price of grain during the preceding twenty-five regulating the salary during the succeeding twenty-five. At the first revision in 1828, the maximum salary was raised to £34 4s. 4d., and the minimum to £25 13s. 3d.; but at the second revision in 1853 these sums were reduced by nearly one-third. Repeated attempts were made in Parliament to increase the endowments of the schoolmasters, and to adopt the parochial system of education to the existing condition of the country, but these efforts were frustrated by petty sectarian jealousies and dissensions.

At length, in 1861, an Act was passed, almost without opposition, through both Houses of Parliament, which has produced an important change in the position of the parochial teachers, and will no doubt ere long greatly elevate their professional requirements. By this Act it is provided that the salary of every schoolmaster, in any parochial school, shall not be less than £25, nor more than £70 per annum; and if there should be two or more schools established in any parish the total amount of the salary payable to the schoolmasters shall not be less than £50, nor more than £80, to be apportioned among the schoolmasters as the heritors may determine. The house provided for the schoolmaster must consist of at least four apartments. Authority is given to the heritors or minister of the parish to establish female schools for instruction in household and industrial learning, as well as in elementary education; and to provide a retiring allowance for any teacher who, through infirmity or old age, has become unfit for the duties of his office, as well as to compel the resignation of a negligent and inefficient teacher. The examination of the teachers elect is transferred from the Presbyteries to a committee of six Professors in each of the four Universities of Scotland, three of whom must be Professors of Divinity, and three Professors in the Faculty of Arts. The law which required the schoolmaster to subscribe the Confession of Faith, and to promise conformity to the worship, and submission to the government and discipline, of the Established Church of Scotland is abolished; and before induction to office, he is now required merely to declare that in the exercise of his office "he will never endeavour, directly or indirectly, to teach or inculcate any opinion opposed to the Holy Scriptures or the Shorter Catechism, and that he will not exercise the functions of his office to the prejudice or subversion of the Church of Scotland." The Presbytery of the bounds, or the heritors, may, if they see cause, present a complaint to the Secretary of State against any schoolmaster who has violated the above declaration, and the Secretary may appoint a commission to "inquire into the charge, and to censure, suspend, or deprive such schoolmaster as they shall find to be just." But the jurisdiction of the Presbytery, in cases of immoral conduct, or of cruelty on the part of the schoolmaster, is transferred to the Sheriff, before whom complaints may be brought by the heritors and minister of, or any six heads of families in the parish, whose children are attending the school, provided that the authority of the Presbytery of the bounds has been previously obtained.

The religious test had long fallen into disuetude in the case of the teachers of burgh schools, but a law-suit having been undertaken by the clergy of Elgin for the purpose of compelling the teachers of the grammar school of that burgh, either to subscribe the Confession of Faith and the formula of the Established Church, or to resign their offices, a clause was inserted in this Act entirely abolishing the test in the case of all burgh teachers.

During the four years which have elapsed since the Parochial and Burgh Schoolmasters' Act became law, it has greatly improved both the social status and the efficiency of the parochial teachers, and has amply fulfilled the expectations of its promoters. In not a few parishes the heritors have with praiseworthy liberality increased the salary of the school-masters beyond the maximum prescribed by law, and have otherwise sought to promote their comfort and usefulness. The Act, however, made no provision for the extension of the parochial system, so as to render it commensurate with the educational wants of the country, and there is a great deficiency in the means of education, both in the crowded seats of manufactures and commerce, and in the large, thinly peopled, and poor parishes of the Highlands and islands. The grants of public money made under the authority and management of the Committee of the Privy Council have stimulated the various religious bodies to establish denominational schools for the education of their own adherents; but they have done comparatively little for the great seats of manufacturing and commercial industry, or for the really necessitous districts of the country. The essential principle of the system is to help those who are able and willing to help themselves. Where party spirit, therefore, is strong, and the people appreciate the value of education, and are able and willing to pay for it, the Privy Council system has effected a great deal. But where the people are apathetic through ignorance, or helpless through poverty, it has proved entirely inefficient. The conviction that this system is quite inadequate to overtake the educational wants of the community has be-

come almost universal among Scotchmen, and the attempt to introduce the revised code into Scotland has tended still farther to increase their dislike to the Privy Council scheme. The government was induced, by the urgent representations of the school-masters, and of a number of the most zealous friends of education, to appoint, at the close of the Session of 1864, a Royal Commission, composed of eminent statesmen, lawyers, and philanthropists, to inquire into the state of education in Scotland. A considerable number of witnesses selected from eminent divines, teachers, and inspectors of schools have been examined before this Commission, and their evidence has been published in a report which was laid before Parliament in the course of last Session. The perusal of that evidence is sufficient to show that there is no formidable difficulty to prevent the reform and extension of the Scottish parochial system, so as to adapt it to the present condition of the country. It is made evident that the great body of the Scottish people are favourable to a national system of education, and are agreed as to the principles on which such a system ought to be conducted. They have still the same form of church government, the same order of worship, the same Confession of Faith, the same Catechism, and they differ only respecting matters which cannot be introduced into any scheme of instruction for children. In these circumstances there is good reason to believe that the Commissioners will be able to devise a plan for the extension and improvement of the existing plans, which will satisfy moderate men of all parties, and will bring a sound education within the reach of all classes of the Scottish people in every district of the country.—*Scottish Law Mag.*

LIBERAL LAW PRACTICE.

The undersigned, after having vainly endeavored, for some years, to practice law for his own convenience and profit, has, in view of the expected brisk season next fall, concluded to pursue his profession for the convenience and profit of other people.

Experience has shown that in this city, especially among wealthy and influential citizens, many impediments have checked their litigious propensities. It is a fact, the notoriety of which is indisputable, that with all the vaunted ability and courtesy of our Bar, the most influential client has never been able to secure professional counsel or assistance for *nothing*. This certainly is an error in practice, which saps the very foundations of public convenience.

Whether in the shape of the sugar-coated *retainer*, or the *vi et armis* fee, the evil scowls like a horrid spectre at every victim whom fraud forces into a lawyer's office. Poverty cannot beguile it, friendship cannot escape it, flattery cannot soften it, impudence cannot terrify it: there it stands, the inexorable tyrant of a liberal hearted community.

In the various transactions of every day business, all are aware that exigencies will arise, in which a few words of written or spoken legal advice, may, in preventing or correcting serious financial losses, be of incalculable service. Yet with full cognizance of such facts, what, in such exigencies, has been the practice of our Bar. Has it comported with the duty of a generous, dignified, and public-spirited profession? Has there ever been a time when the wealthiest merchant, the dearest friend, the most distant relation could solicit legal advice or service, even in the most urgent necessity, without a *fee*, the magnitude of which seemed only limited by the patience of the victim?

Nor is this all, clients must advance costs, must deposit *retainers*, and not unfrequently, enter security for the attorney's expected charges. Papers, of vast account to their owners, have more than once been withheld as hostages for fees, and commissions are actually deducted before the proceeds of collections are remitted.

To correct these heavy wrongs, to redeem, if possible, the selfish and ungenerous character of his profession, the subscriber, having every reason to believe that it will be acceptable to clients, proposes to establish, for the coming fall, a *gratuitous* system of legal practice.

In making this announcement, he hopes he may be permitted to say in all humility, that, to him, such a system is not *entirely* new. During his professional career, he has had abundant opportunity to see more or less, (especially more) of its practical workings. After such extended observation, he feels constrained to admit, somewhat against his private choice, it is true, that in this progressive age and city, he knows not the reform, which must more perfectly accord with the popular taste, or enlist a larger measure of the popular patronage, than the *gratuitous practice of the law*.

Far be it from the subscriber's aim, to blot a line from the epitaphs of the honored dead, or to wrest a laurel from the brows of the distinguished living members of the Philadelphia Bar. They have pursued, and pursue their professions with the sordid intuitions of a ruder era. Now, to the subscriber, humble though he may be, it may remain to elevate a loftier standard of professional ethics, to plant in the rich soil of legal intellect, a germ of professional philanthropy, which nurtured by genial public patronage, may bloom and fructify without money and without price, for the healing of the fortunes of clients not a few.

With approaching fall, the subscriber will secure at least two commodious and communicating offices, the locality of which will be in every way attractive and accessible to the business gentlemen of Philadelphia. No pains or expense will be spared to have said offices so lighted, heated, and ventilated, that they will at once be marts of business or halls of pleasure, as clients choose to regard them.

In the selection of furniture the subscriber will be greatly influenced by what he believes to be peculiar ideas of comfort on the part of most people, chairs will be especially adapted to tilting back, and in no case will a client be expected to use less than *two* at any single sitting, while the carpeting will be of rare pattern and texture, under no circumstances will the patrons of the offices be annoyed by the antiquated presence of mats and spittoons, when in connection with this, it is remembered that there will be no tyrannical restrictions as to the use of tobacco, the public must at once appreciate the rare facilities here offered for business enjoyment. All tables and book-cases will be of exquisite design, and admirably suited to clients who invariably select a graceful and luxurious posture. It is by no means unlikely that capacious lounges will be interspersed for the benefit of those who, having no particular business, often need a little rest in business hours from the natural *ennui* of the preceding night's entertainment. After adequate trial, if his business prove not *too* expensive, the subscriber may occasionally supply some of those creature comforts, which clients not unfrequently expect.

Notwithstanding these inducements, the subscriber desires it to be distinctly understood, that no avarice or greed of gain shall ever mar his business recreations. He takes pleasure in advising his prospective patrons (if any such he may expect), that all the ancient dodges for getting gratuitous advice or service, will, under this new and liberal regime, be totally unnecessary. *In no case will a fee be received.* Advice, at all times and upon all matters, will be freely given, and trivial matters brought to his extended notice at meal-times will receive special attention. He will invariably advance *costs*, and in some cases, allow six per cent. on the same, to regular clients.

Parties desiring advice will never be limited in their explanations to the matter under consideration, but any digression, whether as to family history or personal misfortune, "no matter of how long standing," or how irrelevant, will not only be listened to and excused, but will be absolutely encouraged (this feature must command the attention of old ladies).

Whenever parties entertain a remote idea of prosecuting a claim, they will be patiently advised, and in event of their subsequently abandoning the case, a liberal commission will be paid for their intention.

A full supply of legal forms, adapted to every conceivable variety of mercantile transaction, will be constantly kept on hand for the free accommodation of applicants.

Every facility will be afforded clients to inspect and disarrange the subscriber's papers, and to overhear and repeat his most confidential communications. He would also say that, for the benefit of the public at large, he has been for some time sedulously memorizing "*McElroy's Philadelphia City Directory*," with a view of being able at all times to answer all questions to everybody and about everybody.

The subscriber hopes, perhaps vainly, that this novel system of law practice will certainly conduce to one thing, the perfect satisfaction of clients with attorneys. He believes that thereby much of the bitterness heretofore existing against his honoured profession will be assuaged, and though he is not entirely assured that said system will to himself be either pleasurable or profitable, he is not without an abiding faith that it will be no less satisfactory to his clients (at least on his account). "DO IT CHEAP,"

Att'y and Coun'r at Law. Philadelphia.
—*Legal Intelligencer.*

USURIOUS PAWNBROKERS.

Before the alteration in the usury laws many peculiar modes of evading them were adopted by the bill-discounting fraternity, and it was no uncommon thing, on discounting say an accommodation bill for a hundred pounds, to charge five per cent. interest and thirty pounds for doing it. The long continued acquiescence of the public in such and similar tricks, and the fact that the risk which was run by the usurer had ultimately to be paid for in some form or other by the borrower, have at last convinced the public mind in this country that to attempt to regulate the price of money by Act of Parliament is as futile as to think that the old *assiza panis et cervisiæ* could be enforced to keep down the price of food, or that any other marketable commodity could be effectually made the subject of sumptuary laws.

There is this difference between the bill-discounter and the pawnbroker, that the one holds in his power a valuable security for the money he has advanced and for a years' interest, and can, at the end of the time limited, effectually obtain re-payment by simply selling the pledge; that is to say, the moment payment is due he has it within his own immediate possession, whereas the mere bill-discounter rarely has more than a *chose in action.* Were this all, there would, perhaps, be no more reason for continuing restrictive enactments in the one case than in the other. But the favourable position of the pawnbroker is liable to this peculiar evil: that the pledge is not always the property of the pledger, and it is to guard against the too fatal facility of those who are ready to deal for any valuable commodity, "and no question asked," that the Legislature has edged the pawnbroker round with restrictions and regulations, to ensure, as far as possible, that his trade shall be carried on with honesty. He is obliged to take out a licence; he is limited as to the hours during which he may carry on his business, and he is restricted in the amount of interest he may charge.

Attention has been directed to a pawnbroker who, to eke out what he may have considered a poor amount of interest, has been charging

warehouse-room for some pictures pledged with him. We are happy to find that the magistrate before whom the complainant came, expressed a decided opinion that this was an unwarrantable extortion. He said "After looking at the Pawnbrokers' Act, I find there nothing respecting warehouse-room, and I consider it a dangerous matter for a pawnbroker to make additions to an Act of Parliament, which was intended to protect persons who pledge property with him. I do not think that even the consent of the person pledging an article would make the transaction legal."

Were such a change to be allowed, we should very soon hear that persons whose course of business now inconveniently exposes them to actions of trover, to say the least, would indemnify themselves against risk by demands of heavy payments under the name of warehouse-room for every small article pledged. Such an attempt at evasion of the Act was rightly treated by the magistrate by the infliction of a fine of five pounds on the offender.

We do not suggest that the particular pawnbroker in question had been dealing otherwise than honestly, but it is evident that his practice, if recognized and followed, could be easily perverted to the establishment of an "indemnity fund." Those who deal with honest customers might find a difficulty in imposing such exorbitant terms, but the thief would be ready to take what the pawnbroker chose to give him, and if he could afterwards justify the charge in cases which were not proved to have been dishonest he might make himself practically safe from loss by detection in those cases where he had to disgorge the stolen goods.—*Solicitors' Journal*.

MAGISTRATES, MUNICIPAL & COMMON SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

False Pretences — Larceny. — A servant whose duty it was to obtain from his master's cashier so much money as he required for the payment of dues, asked for and obtained more than he knew was necessary, and applied the surplus to his own use. This was not larceny, but false pretences: (*The Queen* v. *H. Thompson*, 32 L. J. N. S.; Mag. Cas. 57.)

Magistrate — Trespass—Joint Tort—Evidence.—The warrant of a magistrate is only *primâ facie*, not conclusive evidence of its contents; as, for instance, of an information on oath and in writing having been laid before him. Such information must be under Con. Stats. C. cap. 102, sec. 8, not only on oath, but in writing; and, except on an information *thus* laid, there is no authority to issue the warrant. In this case, the magistrate having acted in direct contravention of the statute, in issuing a warrant without the proper information under the statute, or without even a verbal charge having been laid against the plaintiff, and there being no evidence of *bona fides* on his part, the court held that he was not entitled to notice of action. *Semble*, 1. That the fact of a magistrate issuing a warrant without the limits of the county for which he acts does not necessarily disentitle him to notice of action. 2. That such notice will be bad, if it omit the time and place of the alleged trespass. A general verdict, on a declaration containing one count in trespass and another in case, is not bad in law. But in this case, the court being of opinion that there was only one joint cause o action against the defendants, that is the arrest, restricted the verdict to that count. *Held*, also, that a joint tort was sufficiently established against the defendants by evidence that one procured the warrant to be issued and the other issued it; that both knew no charge had been made against plaintiff; that tho warrant was given by the one to the other for the arrest of plaintiff, who was accordingly arrested upon it, and that illegally. *Held*, also, that the effect of this evidence was not destroyed by the fact, that the arrest was made in another county and under the authority of another magistrate's endorsation upon the warrant; for that that endorsation was not strictly the authority to arrest, but merely to execute the original warrant; and that the arrest was wrongful not from the endorsation, but from the antecedent illegal proceedings of the defendants; and that the defendant who issued the warrant was as much responsible as if the arrest had been made in his own county. *Semble*, 1. That if it had appeared that defendant who issued the warrant, was liable in *case* only, and malice of some special kind, personal to himself, in which his co-defendant was not, and could not be a partaker, had been proved, a joint action would not lie against both. 2. That one defendant might have been convicted in trespass and the other in case: (*Friel* v. *Ferguson et al.*, 15 U. C. C. P. 584.)

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Railway Ticket "good for twenty days"—Right to stop at intermediate Stations. — The plaintiff purchased from defendants a ticket from Buffalo to Detroit, marked, "Good only for twenty days from date." He took defen-

dants' afternoon accommodation train at the Suspension Bridge, which ran only as far as London, but he left it at St. Catharines, an intermediate station, and defendants refused to let him go from thence by the night express. *Held*, that they were justified in so doing: that the defendants' contract bound them to convey the plaintiff in one continuous journey from the Suspension Bridge to Detroit, giving him the option of taking any passenger train from the point of commencement, and that if that train did not go the whole distance, to be conveyed the residue in some other train,—the whole journey to be completed in twenty days: but that it did not give a right to stop at any or every intermediate station. *Quære*, whether if he had gone on to London by the accommodation train, he would have been bound to take the next through train from thence: (*Craig* v. *The Great Western Railway Company*, 24 U. C. Q. B. 504.)

"Ticket Good for this day only"—Time Tables.—The declaration stated that defendants contracted to carry the plaintiff as a passenger from G. (Gananoque) to T. (Toronto), but wrongfully expelled him from the cars. Defendants pleaded, that on the 8th of December, 1864, they sold to plaintiff at G. a ticket from thence to T., "good for this day only:" that he thereupon took the train at G., which proceeded to T. by a continuous journey, but left it without defendants' consent at C. (Colborne), and on the 10th of December entered another of their trains going to T., by which they refused to carry him, which was the grievance complained of. To this the plaintiff replied, that before his purchase of the ticket on the 8th of December, defendants had publicly advertised, by their time table, that a passenger train would leave G. at 3.5 p.m., and arrive in Toronto at midnight: that he purchased his ticket before the arrival of the train at G. on that day, on its way to T., on the faith of such representation; but the train did not leave G. until 6 p.m., and defendants well knew that it would not, and it did not, arrive at T. until the morning of the 9th: that on its arrival at C. the plaintiff, finding the train could not reach T. until the 9th, left it, and defendants waived the terms of their ticket, and the plaintiff on the 10th claimed to go on by the morning train passing C. for T. on this ticket, but was prevented. *Held*, on demurrer; 1st. That the plea, without reference to the replication, was a good defence, for the ticket was a contract by defendants to convey the plaintiff from G. to T. in one *continuous* journey, to commence on the day of issuing it. 2nd. That the replication was bad, for even if the time table could be construed as incorporating a condition as to time into the contract, yet as the contract was partially executed for the plaintiff's benefit for his conveyance to C., the breach could only entitle him to compensation in damages. 3rd. That the time table could not be treated as part of the contract, but amounted to a representation only; and in that view the plaintiff should have averred that he bought his ticket on the faith of such representation before the time specified for the train to leave G., not merely before the arrival of the train there, for if after the time specified, he knew as well as defendants that the time table had been departed from. *Quære*, whether the plaintiff, by leaving the train at C., and thus making it impossible for defendants to perform the substantial part of their contract, by conveying him in one continuous journey to T., had not forfeited all right under it: (*Briggs* v. *The Grand Trunk Railwag Co.*, 24 U. C. Q. B. 510.)

Contract—Defect in Goods—Fraud.—The manufacturer of an article to order is not guilty of fraud in not pointing out a patent defect, which might have been discovered by the purchaser, had he examined it with care. What would amount to fraud in such a case? (*Horsfall* v. *Thomas*, 1 Hurl. & Colt. 90.)

Vicious Horse—Liability of Owner.—The owner of a horse that had strayed along a public road and had kicked a person is not liable on that account, unless it be proved that the owner knew that the horse was vicious: (*Cox* v. *Burbidge*, 9 W. R. 435.)

Jury—Influence.—A jury in considering the amount of damages should not allow the question of costs to influence them. New trial granted on that account: (*Poole* v. *Whitcomb*, 12 C. B. N. S. 770.)

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

Dickson v. Crabb.

Action against J. P.—C. S. C. ch. 103, *sec.* 67—*C. S. U. C. ch.* 126

Defendant, a Justice of the Peace, issued his warrant, under Consol. Stat. C. ch. 103, sec. 67, to commit the plaintiff for nonpayment of the costs of an appeal to the Quarter Sessions, unless such sum and all costs of the distress and commitment and conveying the plaintiff to gaol should be sooner paid; but he omitted to state in the warrant the amount of the costs of the distress and commitment. The plaintiff having been committed on this warrant, sued defendant for false imprisonment.

Held, that though it was the duty of the Justice to ascertain and state such amount, yet the omission to do so, though it might have occasioned the plaintiff's discharge, did not

shew either a want or an excess of jurisdiction, but rather an irregular exercise of it; and that defendant therefore was not liable in trespass.

Held, also, that the determination as to these costs was clearly a judicial and not merely a ministerial act.

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

Trespass and false imprisonment against the defendant "acting as one of Her Majesty's Justice of the Peace."

Plea, not guilty by statute.

The trial took place at Goderich, in March, 1865, before John Wilson, J.

The plaintiff put in evidence a warrant signed by defendant, dated 20th May, 1864, which recited that Laughlan McDonald and seven other persons were on the 21st of November, 1863, convicted before two justices for malicious trespass on the plaintiff's land, and were for that offence each fined $2, and adjudged to pay $20 costs; and it was also adjudged that Laughlan McDonald should pay to the plaintiff $200 for damages; and if these several sums were not paid before the 1st of December, 1863, that they should be imprisoned in the County Jail of Huron and Bruce for six days at hard labour, unless, &c.:—that these parties so convicted appealed to the General Quarter Sessions of the Peace at Goderich, which court on the 8th of March, 1864, ordered that the conviction should be quashed, and that the respondent (the now plaintiff) should pay the appellants £6 11s. 9d., costs of their appeal, to be paid to the Clerk of the Peace within twenty days, to be by him paid over to the appellants: that the clerk of the peace on the 7th of April, 1864, certified these costs had not been paid: that on the 7th of April, 1864, the defendant issued a warrant to the proper officers to levy that sum by distress and sale of the plaintiff's goods, but no sufficient distress was found;—and then the present warrant was issued, commanding the constables to take the plaintiff, and deliver him to the keeper of the common goal at Goderich, and commanding the keeper to keep the plaintiff imprisoned for thirty days, unless the said sum, and all costs and charges of the distress and of the commitment and conveying the plaintiff to gaol, should be sooner paid.

Upon this warrant the plaintiff was committed to gaol on the 21st of May, and discharged upon *habeas Corpus* on the 8th of June, 1864.

It was objected that on this evidence the action should have been case, and that trespass would not lie; and the learned judge being of that opinion nonsuited the plaintiff, with leave to move.

In Easter Term *K. McKenzie*, Q.C., obtained a rule calling on the defendant to shew cause why the nonsuit should not be set aside. He cited *Linford* v. *Fitzroy*, 13 Q. B. 240; *Leary* v. *Patrick*, 15 Q. B. 266.

In this term *S. Richards*, Q.C., shewed cause, citing *Skingley* v. *Surridge*, 11 M. & W. 503; *George Goff's* case, 3 M. & S. 203; *Barton* v. *Bricknell*, 13 Q. B. 396; *Connors* v. *Darling*, 23 U. C. Q. B. 541; *Bott* v. *Ackroyd*, 5 Jur. N. S. 1053.

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

The order recited in this warrant as having been made by the Court of Quarter Sessions, that the plaintiff should pay costs, appears to be in conformity with Consol. Stat. C. ch. 103, sec. 66. The 67th section of that act provides that if the same be not paid within the time limited, the clerk of the peace, on application of the party entitled, shall grant to such party a certificate that such costs have not been paid, and upon production of such certificate to any justice of the peace for the same territorial division, he may enforce the payment by warrant of distress, and in default of distress may commit the party against whom such warrant has issued for any time not exceeding two months, unless the amount of such costs and all costs and charges of the distress, and also the costs of the commitment and conveying of the said party to prison, if such justice think fit so to order, (the amount thereof being ascertained and stated in such commitmemt) be sooner paid.

The defendant relies on the Consol. Stat. U. C. ch. 126, sec. 1, which enacts that every action brought against a justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case. The plaintiff contends this is an act done under a warrant issued by the defendant, in a matter in which by law he had not jurisdiction, or (and this we presume was really relied upon) in which he exceeded his jurisdiction, and therefore that trespass will lie.

The objection taken to the warrant is, that neither the costs and charges of the distress nor of the commitment, nor of the conveyance of the plaintiff to gaol were stated in the warrant; and it was insisted that it was the duty of the justice to ascertain all these, and to fix the amount upon payment of which, together with the previously ascertained sum, the plaintiff was to be discharged.

We agree so far in the argument for the plaintiff, and think it not improbable that this omission on the part of the justice led to the plaintiff's discharge, but we are unable to arrive at the conclusion that it establishes either that the justice had no jurisdiction or exceeded his jurisdiction.

As to the first, the Statute of Canada above cited expressly gives jurisdiction to issue a warrant, and because the warrant is not framed throughout in accordance with that act we do not conclude that there is an excess of jurisdiction.

The very argument for the plaintiff is that the justice had authority and jurisdiction over the subject matter, but exercised it defectively: that it was his duty in issuing this warrant to have determined the amount of costs attending the ineffectual attempt at distress, of the charge for commitment, and the distance the plaintiff would have to be conveyed to gaol, and the proper charge allowable for that service. This involved inquiry into facts, the determination of those facts, and the application of the law which fixes the costs thereupon.

We think the case therefore shews an irregular exercise of jurisdiction rather than an excess of it, and that we should not sustain the argument, that the law having only conferred jurisdiction to be exercised in a particular formal manner, the omission of some part of what is prescribed makes the whole act an excess of jurisdiction; for the justice had power to commit until everything stated in his warrant was

done which the warrant made a condition precedent to the plaintiff's discharge within the thirty days. We do not hold that the irregular form of a warrant, when the justice has jurisdiction over every subject matter to which the warrant relates, should be constructed to be an excess of jurisdiction, so as to deprive him of the protection of the act.

Nor do we concur in the argument that the defendant was acting ministerially only, for the determination of these questions as to costs was we think clearly an act of adjudication. The case of *Linford* v. *Fitzroy* 13 Q. B. 240 cited by Mr. McKenzie, was argued before the passing of the Imperial Statute, 11 & 12 Vic. ch. 44, on which our Stat. of U. C. ch. 126, above referred to, was framed.

This case appears to us to come within the spirit and meaning of that act. If the defendant had acted maliciously and without reasonable or probable cause he would be liable in an action on the case, but he is not a trespasser, since that act, if he had jurisdiction and has not exceeded it.

The case of *Leary* v. *Patrick* 15 Q. B. 266 is the most strongly in favour of Mr. McKenzie's argument, but it is quite distinguishable. There the plaintiff was arrested on a warrant for a penalty and 12s. costs. It appeared in evidence there never had been any adjudication for costs, and the court, without entering into the question whether costs were recoverable or not, held the plaintiff was unlawfully arrested for costs which had never been adjudged against him.

We think the rule should be discharged.

Rule discharged.

COMMON PLEAS.

(*Reported by* S. J. Vankoughnet, Esq., M.A., *Barrister-at-Law, Reporter to the Court.*)

Stephens v. Berry.

Unstamped bill of exchange—Time for affixing double stamp—Evidence—Bill payable in American currency—Damages—Account Stated—White v. Baker, 15 U.C.C.P. 292, *followed.*

When a party becomes the holder of an unstamped bill of exchange he must, in order to make it valid in his hands, affix the double stamp to it *before* commencing an action upon it.

Per Richards, C.J., that the holder of such a bill can only be considered safe by affixing the proper stamp at the time when in law he would be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter.

The view expressed in *Baxter* v. *Baynes*, 15 U.C.C.P. 237, as to the most convenient mode of raising the question of the invalidity of a bill for want of a stamp, (*i. e.* by a special plea) adhered to. In this case, however, as no objection had been taken at the trial to the absence of a special plea, and express leave had been given to enter a nonsuit, if the court should be of opinion that plaintiff was not entitled to recover on account of the bill not having been properly stamped in due time, and the case having been argued on that ground, the court did not consider it necessary to discuss the question as to the propriety of such ground of defence being set up under the plea of non-acceptance.

Held, also, that the bill of exchange was no evidence of an account stated between the plaintiff and defendant (indorsee and acceptor) as there was no privity between them; nor were certain letters which referred only to the bill, for if the latter was void, an acknowledgment of it and promise to pay in a particular way could raise no promise to pay on the account stated, because there would in any event be no legal or valid consideration for the promise.

White v. *Baker*, 15 U.C.C.P. 292, followed as to the damages in the shape of exchange, to which the holder of a bill is entitled against the acceptor.

Quære, whether an instrument purporting to be a bill of exchange, payable in New York "with current funds," if it mean other than lawful money of the United States, is a bill of exchange.

[C. P., T. T., 1865.]

The first count of the declaration alleged that one William Young, on 11th January, 1865, by his bill of exchange, then overdue, directed to the defendant under the name and firm of E. Berry & Co., required the defendant to pay to his order the sum of fifteen thousand dollars in New York, with current funds, sixty days after date thereof; and defendant, under the name and style of E. Berry & Co., accepted the bill payable at the Bank of America, in New York, and the said William Young then endorsed and delivered the said bill to the Metropolitan Bank, or order, for account of the said plaintiff; and the said Metropolitan Bank then endorsed the same to the plaintiff; and the said bill was duly presented for payment thereof at the said Bank of America, in New York, and was dishonoured.

The declaration also contained the common counts for money payable by the defendant to the plaintiff for goods bargained and sold by plaintiff to defendant; for goods sold and delivered; work, labour, and materials; for money paid, money received by defendant to the use of plaintiff, for interest, and for money due on an account stated.

The defendant pleaded on 18th April, 1865,

1. That he did not accept the bill.
2. Plea to second count, never indebted.

On these pleas issued was joined.

The cause was taken down to trial at the last spring assizes for the county of Victoria, before Mr. Justice Adam Wilson.

The bill sued on was given in evidence. It was dated at Milwaukee, 11th January, 1856, drawn by William Young on Messrs. E. Berry & Co., Kingston, C.W., payable to the order of the drawer, sixty days after date, for fifteen thousand dollars, in New York, with current funds. It was endorsed by the drawer, "Pay Metropolitan Bank, or order, for account of R. H. Stephens, Esq., or order," and by Romeo H. Stephens. On the face of the bill, it was accepted payable at Bank of America, New York, by E. Berry.

A letter from E. Berry & Co. to the plaintiff, dated 24th March, 1865, was also put in, stating they would substitute their draft on Jacques Tracy & Co., at three months date, to mature $\frac{1}{3}$. $\frac{15}{18}$ June and $\frac{1}{3}$ July, for $15,000 and interest on the whole, to be in place of Young's draft on them, held by the plaintiff. The notes were to carry interest at 7 per cent. from 15th March, to be made in three equal amounts. Mr. Young's note was to be returned to him on the above notes being handed over to plaintiff. There was also another letter from E. Berry & Co. to plaintiff, dated, Kingston, 28th March, 1865, in which they acknowledged the receipt of plaintiff's letter of the 25th March, and said they had written Mr. Jacques that their proposal of the 24th March had not been accepted, and that they should not have occasion to trouble them. The letter proceeded, "We think we can make you a substantial payment as soon as navigation opens in May, and the remainder early in June, if that will suit you. We have at the moment no one whom we should like to ask to endorse for us; we never endorse ourselves for any one." The plaintiff contended that these letters were evi-

dence of an account stated between the parties, of a debt of $15,000.

For defendant it was contended that the bill was drawn at Milwaukee, in the United States, upon defendant at Kingston, in Canada, payable in the city of New York; that at the time of the acceptance there were no stamps on the bill under our Prov. Stat. of 1864, and no stamps were placed on it until after the commencement of this action; that after the commencement of this suit, Canadian stamps to the amount of $9, being double the amount required at the time of the acceptance, were placed on the bill when the plaintiff put his name on it as endorser, and *Sproule* v. *Legge*, 1 B. & C. 161, was referred to.

It was also urged that the money in the declaration must be presumed to be Canadian currency; but it was not so in fact, because when the bill was produced, it was shown to be currency of the United States.

It was admitted that at the time the bill became due, on the 15th of March, 1865, if payable in current funds of the United States [as distinct from a gold value] the Canadian value of the bill was $8,510 64; while if current funds were valued, as of the 6th of May, 1865, the day of the trial, the value of the bill in Canada funds would be $10,628 88. The three following modes of stating the value and damages, if plaintiff was entitled to recover, were made up:

1. Considering the value...............	$15,000 00
Interest, $160; Protest, $1 10...	161 10
	$15,161 10
2. Value of American funds as Canada funds, on 15th of March, 1865...	$8,510 64
Interest, $90 72; Protest, $1 10.	91 82
	$8,602 82
3. Value in American funds as Canada funds, on the 6th of May, the day of trial	$10,628 88
Interest, $113 36; Protest, $1 10.	114 46
	$10,743 34

For the defendant it was contended that there was no evidence of an account stated.

It was agreed that a verdict should be entered for the plaintiff for $8,602 46, with leave to move to increase it, on either or both of the counts of the declaration, to either of the other two sums above noted, if the court should think him entitled to a larger sum than that for which the verdict had been entered.

Leave was also given to the defendant to move to enter a nonsuit, if the court should be of opinion that the plaintiff was not entitled to recover, because the bill was not stamped with Canadian stamps in due time to enable him to do so.

Defendant also had leave to move to enter a verdict for him on the account stated, and on the common counts, if the plaintiff retained his verdict on the first count. It was also admitted that the firm of Jacques, Tracey & Co., mentioned in the letters, resided and did business in Montreal.

In Easter Term last the defendant obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, on the ground that the bill of exchange offered in evidence, and the acceptance thereof, were invalid and of no effect for want of the necessary revenue stamps being affixed thereto; or because such stamps were not affixed at such time, or by such person or persons, as would give validity to such bill or acceptance, or entitle the plaintiff to maintain his suit.

Or why, pursuant to such leave, a verdict should not be entered for the defendant upon the second issue joined, there having been no evidence to warrant a verdict for the plaintiff thereon. Or, why the verdict should not be set aside and a new trial had, because the same was contrary to the evidence, the declaration being upon a bill of exchange payable in lawful money of Canada, and the evidence being of a bill payable in money of a foreign country.

(*To be continued.*)

CHANCERY.

(*Reported by* Alex. Grant Esq., *Barrister at Law, Reporter to the Court.*)

Hagarty v. Hagarty.

Alimony.

The purpose of allotting alimony to a wife is to afford her the means of supporting herself whilst living apart from her husband; but as the law does not contemplate the parties living apart for life, but looks forward to a reconciliation between them, the court will not sanction the payment by the husband of a sum in gross, in lieu of an annual sum by way of such alimony,

This was a suit for alimony in which a decree had been made declaring the plaintiff entitled to an allowance by way of alimony, and referring it to the Master to settle what sum should be paid by the defendant to his wife (the plaintiff). In proceeding under the decree, the Master, with the assent of both parties, found that a sum in gross should be paid by defendant to the plaintiff, and which was to be accepted by her in full of all future claims under the decree.

The cause afterwards came on to be heard for further directions.

J. McLennan for plaintiff.

Bull for defendant.

Spragge, V. C.—In this case the Master, with the assent of the parties, fixed the alimony to be allowed to his wife at a gross sum, instead of at so much per annum, to be paid monthly, or quarterly, as is usual: and counsel for both parties ask the sanction of the court to this allowance.

If the parties choose to make any arrangement out of court, the court has nothing to say to it, but, when the sanction of the court is asked, it is incumbent on the court to see that it sanctions nothing that is not in accordance with the law of the court.

When this matter was before me on further directions, I said, it struck me that the arrangement sanctioned by the Master was objectionable, as against public policy; and after further consideration that is still my opinion. In the books I find no instance of any such order; but I find alimony treated as due to the wife for her daily support. In Mr. Pitchard's book it is stated to be the ordinary rule of the court to decree it to be paid quarterly, and in *Wilson* v. *Wilson* Eccl. R. 329, where the application was to

enforce the payment of the same for several years, the court said "Alimony is allotted for the maintenance of a wife from year to year."

In favour of the arrangement it is said that it makes the wife secure for so much money, whereas if payable from year to year the husband might evade payment: that is a reason of convenience; against which it may be said that if a sum be paid in gross to the wife she would be apt to live upon her capital; and at no very distant period probably be left destitute.

But the reasons against this arrangement, on grounds of public policy, appear to me to be very strong. The law does not contemplate that the husband and wife will live apart for life; but looks forward to their reconciliation; and so the sentence of divorce *a mensa et thoro* by the ecclesiastical courts was only "until they shall be reconciled to each other," and the sentence of judicial separation under the present law is doubtless in similar terms. The arrangement in question buys off the wife for life; it takes away one inducement on the part of the husband for reconciliation; its tendency is perpetual separation.

It is open to this further serious objection. The wife is entitled to her alimony only so long as she leads a chaste life. A wife separated from her husband is exposed to great temptations, every provision that tends to keep her from falling is valuable; this arrangement would remove one safeguard.

Under the Imperial Divorce and Matrimonial Causes Act, the court when decreeing a *dissolution* of marriage, which can only be by reason of adultery, may order the husband to secure to the wife a gross sum of money or an annual sum; but in those clauses of the statute which relate to *judicial separation* there is no such provision; but the enactment is simply this, that the court may order the payment of alimony; which I understand to mean alimony according to the ordinary course of the ecclesiastical courts, and not a gross sum.

The distinction is marked—where the woman ceases to be a wife a gross sum may be paid to her; but where she remains a wife there is no authority for such a payment. I must add that the reasons against it appear to me so weighty, that in my judgment the court ought not to approve of the arrangement proposed. There must be a reference back to the Master to allow alimony in the usual way.

CORRESPONDENCE.

Assessment—Con. Stat. U. C., cap. 55, *s.* 96.

To the Editors of the Local Courts Gazette.

Gentlemen,—Will you be so good as to inform your readers whether there has been any legal decision on the meaning of the words, "*Who ought to pay the same,*" as used in the 96th section of the Assessment Act (Con. Stat. U. C. cap. 55.)

Our local authorities here seem to think that any person whose name happens to be on the assessment roll for the year, in connection with any *real* estate, is liable to be distrained on for taxes due on said real estate, under the authority of the above quoted section. Now you can easily imagine cases in which this interpretation would work a monstrous wrong to innocent parties. Assessments having been hitherto made just before the usual time for changing tenements, persons may be, and have been assessed for properties which they occupied for only a few weeks of the year for which the assessment was made, and having no longer any connection with the property, or any interest in it, it seems hard that they should be compelled to pay taxes for the owner or present occupant, from whom special circumstances, easily conceived, may prevent the possibility of their recovering the amount so paid. Section 24 provides that taxes may be recovered from either owner or occupant, &c., &c. *Query*—Does not that mean occupant, &c., at time of *collection*, or can it refer to *previous* occupants who are not mentioned as are *future?* Section 26 provides *easy* redress for any "*occupaut*" (evidently meaning *actual* occupier at time of levy) paying unduly taxes. And sections 97 and 107 provide ample recourse for collection of taxes on *real estate*, shewing at the same time that it is the *realty*, if I may use the term, which is intended to be taxed, or more accurately speaking the *owner* of the property.

The common sense inference would, therefore be, that the person "*who ought to pay*" the taxes is he who owns the property, real or personal, or who enjoys the use of it when the taxes are collectable, and not the person whose name may happen to appear on the roll in connection with it. And to such owner or possessor at the time indicated the power of levying or distress would seem to be limited.

Your opinion or any information you can give on these points, will be thankfully received by,

Gentlemen, your humble servant,

An Over-Taxed Rate-Payer.

Ottawa, October 10th, 1865.

[There are many "hard cases" which the law does not and cannot provide for. Our correspondent's case may be one of these. It would be impossible for tax collectors to constitute themselves judges of who is really bound to pay the taxes which they find chargeable against a property or the owner or occupant of it. Taxes are supposed to be

collected for the public good and individual inconvenience must give way, and with this in view section 24 of the Assessment Act provides that the taxes may be recovered from the "owner" or the "occupant" or either, or from any future owner or occupant, "saving his recourse against any other person." These last words point out the remedy which the law looks upon as the proper one for any loss or damage in the premises.—Eds. L. C. G.]

Dunkin's Act—Information including two or more offences—Conviction.

To the Editors of the Local Courts' Gazette.

Gentlemen,—You will oblige your many readers here by giving your opinion on the following question: An information is laid for a violation of the provisions of the Dunkin Temperance Act of 1864. It contains several charges. Assuming them all to be true, can the convicting justices equally adjudicate upon all in the one conviction? You will observe the seventeenth section allows "two or more offences" to be included "in any such complaint," but does the Act interfere with the salutary rule of law that a conviction is invalid if it contains an adjudication on more than one offence?

Yours, Lex.

Goderich, 16th October, 1865.

[We incline to the opinion that the rule of law referred to by our correspondent would not be abrogated by the equivocal wording of the two clauses of the 17th section, and that each conviction should be for only one distinct offence. There are many weighty objections to all the offences being adjudicated upon in one conviction, which would seem to counterbalance the apparent, though not conclusive assumption in clause 2, that the total penalty for a number of offences refers to one conviction.—Eds. L. C. G.]

REVIEW.

An Act to amend the Insolvent Act of 1864, with Annotations, Notes of Decisions, and a full Index. By J. D. Edgar, Esq., of Osgoode Hall, Barrister-at-Law. Rollo & Adam, Law Publishers, Toronto, 1865.

The above, from the industrious pen of Mr. Edgar, the annotator of the Insolvent Act of 1864, will be found a useful postscript to his former book. The act of 1864 was found defective in many respects, and it became necessary to amend it, which was done by the act of last session, which Mr. Edgar gives in full, with notes explanatory of the defects intended to be remedied, and of decisions which tend to interpret the enactments. It is only necessary to say that these notes seem to have been prepared with the same care as those to the act of 1864.

He gives also a collection of "notes of decisions," which he prefaces with the following observations:

"Since the first of September, 1864, when the Insolvent Act came into force, a great many questions have arisen as to its interpretation, and a number of valuable decisions on doubtful points have been made. These cases, unfortunately, have rarely been reported, from the fact that they came only before our County Court Judges. The Editors of the *Upper Canada Law Journal* have made commendable efforts, however, to preserve these decisions, and most of the following are taken from their reports. Very few appeals have been made to the Superior Courts, considering the number of insolvency cases. It is thought advisable to put the cases below upon record as useful, although they may not all be found to be unimpeachable decisions."

We may mention here that *all* these cases will be found in the *Law Journal*, *Willson* v. *Cramp* (the note of which case is taken by Mr. Edgar from 11 Grant) having been reported expressly for the *Law Journal*, and is on page 217 of the current volume.

With respect to the above remarks of Mr. Edgar, we are only sorry that we have been unable, owing to the want of thought (we shall not call it *apathy*) of some of those who might well have helped us, to give more reports of cases decided under the Insolvency Act than have already appeared in our columns. We trust that this hint may not be in vain.

The pamphlet winds up with a full and most useful index.

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

JAMES HOSSACK, of the town of Cobourg, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted October 7, 1865.)

CORONERS.

WILLIAM BURR TERRY, of the township of North Gwillimbury, Esquire, to be an Associate Coroner for the United Counties of York and Peel. (Gazetted Oct. 7, 1865.)

PETER DAVY DAVIS, of Adolphustown, Esquire, to be an Associate Coroner for the County of Lennox and Addington. (Gazetted October 7, 1865.)

TO CORRESPONDENTS.

"A Subscriber"—"Utile Dulci"—"E."—"Constable."—Too late—will appear next month.

"An Over-taxed Rate-payer"—"Lex"—Under "Correspondence."