DIARY FOR MAY.

1. Wed.. *Philip & James.* County Treasurer to make up books, enter arrears, and make yearly settlement.
4. Sat... Articles, &c., to be left with Secretary of Law Society.
5. SUN. *Rogation.*
9. Thur. *Ascension.*
12. SUN. *1st Sunday after Ascension.*
16. Thur. Exm. of Law Stud. for call to Bar with Honors.
17. Fri .. Exam. of Law Students for call to the Bar.
18. Sat.. Exam. of Art. Clerks for certificates of fitness.
19. SUN. *Whit Sunday.*
20. Mon. Easter Term begins. Articled Clerks going up for inter-exam. to file certificates.
23. Thur. Inter-exam. of Law Students and Articled Clerks.
24. Fri.. Paper Day, Q.B. New Trial Day, C.P.
25. Sat.. Paper Day, C.P. New Trial Day, Q.B.
26. SUN. *Trinity Sunday.*
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. Thur. Paper Day, C.P. Open Day, Q.B.
31. Fri.. New Trial Day, Q.B Open Day, C.P.

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The Local Courts'
AND
MUNICIPAL GAZETTE.

MAY, 1872.

THE INSOLVENCY ACTS.

The attempt to do away with the Insolvency laws has come to nought, owing to the firm stand against the Bill by the Senate. We cannot regret that the Bill has been thrown out. We call attention to an interesting article on the subject of bankruptcy laws on another page.

EVIDENCE OF WIVES.

The admissibility of the evidence of wives for or against their husbands has recently been fully discussed in several cases in the Common Pleas. In one of these cases the wife was joined with her husband as a defendant for an assault alleged to have been committed by the wife on the plaintiff. In two cases the husband and wife sued jointly for injuries done to the wife.

The recent history of the law on this subject is thus referred to by one of the judges.

"In England, a Statute was passed in 1851, 14 & 15 Vic., ch. 99, the 2nd section of which is as follows: "On the trial of any issue joined, or of any matter or question, or of any inquiry arising in any suit, action, or other proceeding in any Court of Justice, or by any person having by law or by consent of parties authority to hear, receive, or examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, *except* as hereinafter excepted, be competent and compellable to give evidence either *vivâ voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding." The exception had reference to criminal proceedings, and actions for breach of promise of marriage, and actions or proceedings in cases of adultery, and need not be considered in the discussion of the question now before us. Under the provisions of this Act, the following curious anomaly occurred: it was decided that when husband and wife were parties to the record both could be examined: *Stokehill and Wife* v. *Pettengill*, 21 L. J. Q. B. 249, note; but that where the wife was not a party she could not be examined: *Stapleton* v. *Croft*, 18 Q B. 367; *Barbat* v. *Allen*, 7 Ex. 609. Mr. Taylor in his work on evidence states, at sec. 1219: "On one point the Act of 1851 (of which Mr. Taylor was the author) was essentially defective; for, although it rendered husbands and wives admissible witnesses for or against each other when both were jointly parties as plaintiffs or defendants, it did not further interfere with the common law rule which precluded either husband or wife from giving testimony in a cause in which the other was a party. The Evidence Amendment Act of 1853, 16 & 17 Vic., was passed with universal consent, and the admissibility of the testimony of married persons has at length been placed upon a sound footing. As a general rule, all husbands and wives of parties to the record, excepting the husbands and wives of defendants in criminal proceedings, and the wives of supposed paramours who are respondants in suits for dissolution of marriage, or for damages by reason of adultery, are now

competent and compellable to testify; but they are still privileged from disclosing any communication made to them during the marriage." The words of the Act are the same as those above quoted from 14 & 15 Vic., except that after the words "examine evidence" the husbands and wives of the parties thereto" are inserted. This is now the law of England.

By ch. 32, Consol. Stat. U. C., sec. 3, "No person offered as a witness shall, by reason of incapacity from crime or interest, be excluded from giving testimony." Sec. 4 provides that "Every person so offered shall be permitted and be compellable to give evidence, notwithstanding that such person has or may have an interest in the matter in question," &c., &c. Sec. 5 is the most important in connection with the present discussion: "This Act shall not render competent, or authorize or permit any party to any suit or proceeding individually named on the record, or any claimant or tenant of premises sought to be recovered in ejectment, or the landlord, or any other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate or individual behalf any action may be brought or defended either wholly or in part, or the husband or wife of any such party, to be called as a witness on behalf of such party, but such party may, in any civil proceeding, be called and examined as a witness in any suit or action, at the instance of the opposite party: provided always, that the wife of the party to any suit or proceeding named in the record shall not be liable to be examined as a witness by or at the instance of the opposite party."

This Statute remained in force until the passing of the Act of Ontario, "The Evidence Act of 1869," and under it no person named as a party to the record, nor on whose behalf a suit was brought or defended, could be examined on his own behalf, although he might be called as a witness by the opposite party, and in no case could the wife be called. The Evidence Act of 1869 was passed to amend this state of the law. Sec. 4 is, with the exception I am about to mention, in effect the same as sec. 2 of 14 & 15 Vic., before it was amended by 16 & 17 Vic., which I have already considered. Sec. 5, in sub-secs. *a*, *b*, *c*, *d*, *e*, contains the exceptions to sec. 4. Sub-sec. *a*, on which the case now before us turns, is, "Nothing herein contained shall render any husband competent or compellable to gives evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

Such is a short but intelligible review of the legislation on the subject, both here and in England, and from it we are prepared to follow the judgment of the learned Judge referred to in the beginning of this article, who thus continues:—

"When we remember that until this Act was passed, parties to the record could not be examined on their behalf, although they might be called by the opposite party, and that their wives could not in any case be called, and when we refer to the decisions of the Courts in England on the Act of 1851, of which sec. 4 (saving the exception) is a copy, we can, in my opinion, come to no other conclusion than that our Legislature has deemed it expedient to adopt an entirely different course from that pursued in England, and that the effect of the exception is, in all cases where husband and wife are parties to the record, to render them both incompetent witnesses for any purpose, and that not only cannot they, or either of them, be called on their own behalf, but they cannot, nor can either of them, be called by the opposite party."

By ch. 32, Consol. Stat. U. C., above quoted, it is plain that the wife could not be called either on behalf of her husband or by the opposite party, although the husband might be called by the opposite party. This section has been expressly repealed, and, in place thereof, the Legislature had said that nothing in the Evidence Act of 1869 shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

The same Judge then concludes his judgment by saying:—

"In all cases the suit is the suit of the husband, although the wife may be the meritorious cause of action, or it may be brought for injuries done to her, and, consequently, she may be a necessary party; but the suit is his, and if the wife is called as a witness, it must necessarily be for or against him. On the other hand, if the action is against husband and wife for any matter done by her, the defence is his; and if the wife is called, it must be as a witness for or against him. In the same way, if the wife is a necessary party to the suit, and the husband is called, it must be as a witness for or against her, and in all these cases the Legislature has expressly said that husband and wife shall not be competent witnesses. It may not have been the intention of the Legislature to prevent the opposite party from calling the husband of a female plaintiff or defendent as a witness, nor of depriving the husband of the right to tender himself as a witness, but I can arrive at no other conclusion than that they have done so, and if the law is found to be inexpedient, it rests with the supreme authority to amend it."

Similar language was used by the rest of the Court, and the probable intention of the legislature in using the words alluded to, and the inevitable result of the language of the Statute, is thus stated by the Chief Justice of the Court.

"In making this exception the Legislature excluded the testimony, either on the ground of interest, or for the general mischief likely to arise from the possible appearance of husband and wife contradicting each other on oath. The grant of the privilege to withhold communications between husband and wife, during coverture, favors the probability of the latter view having influenced the Legislature. In that view, and perhaps almost equally in the alternative view, the exclusion of the evidence is perfectly intelligible.

"I do not feel at liberty to refine away plain language, used, as I read it, to carry out an obvious intent. I am therefore of opinion that in actions where husband and wife are co-plaintiffs or defendants, their evidence is necessarily excluded for or against each other."

JUDICIAL APPOINTMENTS.

The appointment of Sir Robert Collier to a vacant judgeship in the Common Pleas in England, for the mere purpose of making him eligible as one of the four paid members of the Judicial Committee of the Privy Council, has been discussed *ad nauseam;* we do not, therefore, propose to add anything to what has already been said, so much better than we could say it, in the English law periodicals on this subject. It may be well, however, to record for future reference the admirable protest of the Lord Chief Justice of England against the high-handed act of Mr. Gladstone and his Chancellor, which was, in the words of Sir Alexander Cockburn, "at once a violation of the spirit of the Act of Parliament, and a degradation of the judicial office." And in connection with this proceeding, we may refer briefly to some other matters of a kindred nature.

The following is the text of the letter addressed on the 10th November, 1871, to Mr. Gladstone, by the Chief Justice:—

"Dear Mr. Gladstone,—

"It is universally believed that the appointment of Sir Robert Collier to the seat in the Court of Common Pleas, vacated by Mr. Justice Montagu Smith, has been made, not with a view to the discharge of the duties of a judge of that court, but simply to qualify the late Attorney-General for a seat in the Judicial Committee of the Privy Council, under the recent Act of the 34 & 35 Vict. c. 91.

"I feel warranted in assuming the general belief to which I have referred to be well founded, from the fact that the Lord Chancellor, with a view to contemplated changes in our judicial system, has, notwithstanding my earnest remonstrance, declined for the last two years to fill up the vacant judgeship in the Court of Queen's Bench. I cannot suppose that the Lord Chancellor would fill up the number of the judges of the Court of Common Pleas, while to the great inconvenience of the suitors and the public, the number of the judges of the Queen's Bench is kept incomplete.

"I assume, therefore, that the announcement in the public papers, which has so startled and astounded the legal profession, is true; and, this being so, I feel myself called upon, both as the head of the common law of England, and as a member of the Judicial Committee of the Privy Council, to beg you, if not too late, to reconsider any decision that may have been come to in this matter; or, at all events, to record my emphatic protest against the course proposed—as a judge, because a colourable appointment to a judgeship for the purpose of evading the law appears to me most seriously to compromise the dignity of the judicial office—as a member of the judicial committee, because, while grave doubts as to the legality of the appointment are entertained in many quarters, none seem to exist as to its grievous impropriety as a mere subterfuge and evasion of the statute.

"The statute in question, the 34 & 35 Vict. c. 91, contains in the first section the following enactment: 'Any persons appointed to act under the provisions of this Act as members of the said Judicial Committee must be specially qualified as follows—that is to say, must at the date of their appointment be, or have been, judges of one of Her Majesty's Superior Courts at Westminster, or a Chief Justice of the High Court of Judicature, at Fort William in Bengal, or Madras, or Bombay, or of the late Supreme Court of Judicature in Bengal.'

"Now, the meaning of the Legislature in passing this enactment is plain and unmistakable. It was intended to secure in the constitution of the high appellate tribunal, by which appeals, many of them in cases of vast importance, from our Indian possessions as well as from the rest of our colonial empire, are to be finally decided, the appointment of persons who had already held judicial office as judges of the Superior Courts. Whether wisely or unwisely, it plainly was not intended that the selection might be made from the Bar. It was to be confined to those who were, or had been, judges, and who, in the actual and

practical exercise of judicial functions had acquired and given proof of learning, knowledge, experience, and the other qualifications which constitute judicial excellence. No exception in this respect is made in favour of an Attorney-General or other law officer of the Crown, who, however eminent and distinguished their position, of course remain members of the Bar. Nothing could have been easier, had it been intended to make such an exception, than to have included the law officers of the Crown among the persons specified as eligible. But the eligibility of the law officers does not even appear to have been contemplated by the Government in passing the present Act, a provision enabling the appointment to the Judicial Committee to be made from the Bar, contained in the Bill of the previous year, having been, I presume purposely, omitted from the Bill as introduced in the last session. It is, however, unnecessary to dwell further on this point. No one will be found to say that it was intended to make a law officer, as such, eligible under this Act.

"It being, then plain that the intention of the Legislature was that the selection should be made from the judges, I cannot shut my eyes to the fact that the appointmnt of the Attorney-General, who, as such, was not qualified under the Statute, to a judgeship (the functions of which he is not intended to discharge) in order that he may thus become qualified according to the letter of the Act, cannot be looked upon otherwise than as colourable, as an evasion of the statute, and a palpable violation, if not of its letter, at all events of its spirit and meaning. I cannot help thinking of what would have been the language in which the Court of Queen's Bench would have expressed its opinion if such an evasion of a statute had been attempted for the purpose of qualifying an individual for a municipal office, and the case had been brought before it on an information in the nature of *quo warranto*. In the present instance, the Legislature, having settled the qualification for the newly-created office, momentarily to invest a party otherwi-e not qualified with a qualifying office, not that he shall hold the latter, but that he may be immediately transferred to the former, appears to me, I am bound to say, to be nothing less than the manufacture of a qualification, not very dissimilar in character to the manufacture of qualifications such as we have known practised in other instances in order to evade the law. Forgive me, I pray you, if I ask you to consider whether such a proceeding should be resorted to in a matter intimately connected with the administration of justice in its highest departments.

"It would obviously afford no answer to the objection to the proposed appointment to say that a gentleman who has held the position of a law officer of the Crown must be taken to be qualified to fill any judicial office, however high or important. This might have been a cogent argument to induce the Legislature to include the Attorney-General among the persons 'specially qualified' under the Act; but it can afford no justification for having recourse to what cannot be regarded as anything better than a contrivance to evade the stringency of the statute as it stands. The section in question makes the office of an Indian chief justice a qualification for an appointment to the Judicial Committee. Suppose that, as might easily have happened, an Indian chief justiceship had chanced to be vacant. An attorney-general would, of course, be perfectly qualified for the office. What would have been said if the Attorney-General had been appointed to such a chief justiceship, not with the intention of his proceeding to India to fill the office, but simply for the purpose of his becoming qualified, according to the letter of the statute, for an appointment to the Judicial Committee? What an outcry would have been raised at so palpable an evasion of the Act! But what possible difference, allow me to ask, can there be, in principle, between such an appointment as the one I have just referred to, and an appointment to a judgeship in the Court of Common Pleas, the duties of which it is not intended shall be discharged, for the sole purpose of creating a qualification in a person not otherwise qualified? I cannot refrain from submitting to you that such a proceeding is at once a violation of the spirit of the Act of Parliament and a degradation of the judicial office.

"I ought to add, that from every member of the legal profession with whom I have been brought into contact in the course of the last few days, I have met with but one expression of opinion as to the proposed step—an opinion, to use the mildest terms I can select, of strong and unqualified condemnation. Such, I can take upon myself to say, is the unanimous opinion of the profession. I have never in my time known of so strong an expression, I had almost said explosion of opinion.

"Under these circumstances, I feel myself justified, as Chief Justice of England, in conveying to you what I know to be the opinion of the profession at large, an opinion in which I entirely concur. I feel it to be a duty, not only to the profession, but to the Government itself, to protest—I hope before it is too late—against a step—as to the legality of which I abstain from expressing any opinion, lest I should be called upon to pronounce upon it in my judicial capacity—but the impropriety of which, for the reason I have given, is to my mind strikingly and painfully apparent.

"I beg you to believe that I make these observations in no unfriendly spirit, but from a sense of duty only. I should sincerely rejoice at

the promotion of an Attorney-General who has filled his high office with dignity and honour; but in the position I occupy I feel I ought not to stand by, and, without observation or objection, allow a judicial appointment to be made, which from the peculiar circumstances under which it will take place, is open to such serious objection, and which, as I have abundant reason to believe, will be the subject of universal condemation and regret.—I beg to remain, very faithfully yours,

"A. E. COCKBURN."

To this letter Mr. Gladstone made a curt reply, and handed the matter over to the Lord Chancellor (Hatherley), whose letter to the Chief Justice was only remarkable for its insolent tone and evident desire to burke the question, and snub, not only the Chief Justice, but the whole Bar of England, who in this matter have loudly and unmistakably condemned the unwarrantable action of the Government.

Of course, as all our readers are aware, the whole affair was brought before the House of Commons, by Mr. Cross moving a vote of censure on the appointment of Sir R. Collier, declaring that it was a violation of the intention of the statute and an evil example in the administration of judicial patronage. Many strong supporters of the Government, and prominently so, Mr. Denman, spoke and voted in favor of this motion, which, however, was lost; but the very small majority in favor of the Government—27 in a House of 513—was in itself tantamount to a very strong expression of censure, and we presume will be so accepted by the Chancellor, as it certainly has been by outsiders, and will be so looked upon by historians.

The *Law Times* thus speaks of the discussion in the House:—

"To us the general results of the debate appear satisfactory, for they show that we still have very many able public men, who will neither sanction nor tolerate an evasion of the law by any Government, whatever its party may be: but, on the other hand, it is by no means reassuring to find the Prime Minister and the Lord Chancellor, after several months of cool reflection, after hearing the most invincible arguments against their view of the construction of the Act of Parliament, come forward and continue to maintain that view by arguments that show a sort of incapacity on their part to understand the distinction between an evasion of, and a full compliance with, the provisions of an Act of Parliament. It is a remarkable fact that neither of the present law officers of the Crown approve of the construction put upon the Act, for we may fairly presume that if they did they would have come forward and said so, and the Government failed to obtain the support of any lawyer of repute in either house except Sir Roundell Palmer, who made a speech for them that was a model of forensic ingenuity, and a perfect epitome of all the fallacies known to logicians; but notwithstanding all this, neither Mr. Gladstone nor the Lord Chancellor said a word that could be construed to mean that they would not pursue exactly the same course as before if the thing had to be done over again. * * * * *

"The answer to these grave charges, so far as they were answered at all, is to be found in the speeches of Mr. Gladstone, the Lord Chancellor and Sir Roundell Palmer, and we have every wish to do justice to their arguments and views. The propositions on which the arguments of Sir R. Palmer and the Lord Chancellor were based, as far as we can understand them, were two. First, that the Act does not specify any definite period of judicial experience, therefore the Act is satisfied by appointing a person who has the name or status of a Judge when the appointment is made, whenever or however that name may have been bestowed; secondly, that Sir R. Collier was a fit and proper person to be made a Judge of the Court of Common Pleas, and therefore there could be no objection to give him that Judgeship as a qualification for the Judicial Committee. With regard to the first of these propositions its advocates evidently shrunk from the consequences it would lead to, and Sir R. Palmer abandoned his whole position in two several parts of his speech when he observed, 'now if this thing were done wantonly, maliciously, or without a *bonâ fide* view to serve the public, or if it were done over and over again, as the honourable gentleman suggested, I should not stand here to defend it;' and again, in reference to a remark previously made with regard to the Indian qualification, he said, 'I think it would have been improper, though it might have been legal, to appoint to the Judicial Committee any person who was not really and truly such an Indian chief judge as to be in that respect a fit representative on the Judicial Committee of the Indian Judicature.' But really to a lawyer, at least, it is hardly necessary to do more than state the first proposition in order to show its absurdity. The Act obviously provides, if its limitations are to be more than a mere nullity, that the person selected for the Judicial Committee shall be, when the selection is made, a Judge, or *ex*-Judge, not that he may be made a Judge after he has been selected to become a member of the Judicial Committee. As to the second proposition it has really nothing to do with the matter. Sir R.

Collier may morally and intellectually be the fittest man in the world to put in the Judicial Committee, but he certainly was not legally fitted for it, unless when selected for the appointment he had *bona fide* the qualification required by the Act. As to the views of Mr. Gladstone, who seems to have been the prime mover in the whole affair, we have some difficulty in understanding what his precise construction of the Act is. One part of his speech almost conveys the impression that he reads the qualification required by the Act not as literally meaning that the appointment should only be given to a Judge or ex-Judge, but as a sort of figurative way of saying that the person appointed should be of a certain standard of fitness and capacity, and upon this view of the Act it would not have been necessary to pass Sir Robert Collier through the Common Pleas at all, before installing him on the Judicial Committee. From the speech, as a whole, we regret to gather, notwithstanding some fine flourishes in it, that Mr. Gladstone is much more concerned about having raised a storm in the House, than having evaded the plain meaning of an Act of Parliament, and we still more regret the tone in which he, as well as the Lord Chancellor, alludes to the Judges. Mr. Denman said in the course of the debate, and we think truly, 'that there was a desire to do something to render our courts less independent, to place them on a lower basis, to prevent them being able to stand between the Crown and the subject, between the Government of the day, or a popular majority in the House of Commons, and the rights of the individual subject, and that there was a disposition on the part of persons now high in authority to destroy some of the securities which we possessed for the independence and high character of our courts of justice.' These remarks we think were fully justified by much that was said on Monday night, and by what fell from the Lord Chancellor on the previous Thursday, when the extraordinary avowal was made that a gentleman had been made a County Court Judge in order that 'he should be restored to competence.' If these are the principles upon which judicial appointments are to be made, and if Judges are to be attacked with sneers and insults whenever they lack subservience to the Government of the day, we fear there is a gloomy future before the bench of England. And we venture to predict that regard for the law will not long survive the decay, if it once sets in, of that feeling of honour and respect in which those who administer it have hitherto been held."

The remark about the County Court Judge refers to the appointment of Mr. Beales, of which the *Law Times* speaks after this fashion:—

"One of the several remarkable theories concerning judicial appointments propounded by the present Government, is that to which, according to Lord Hatherley, the County Court Bench is indebted for the acquisition of Mr. Beales. That learned Judge was deprived of a revising barristership by Chief Justice Erle, on the ground that, by active political agitation, he had disqualified himself for the office, which is one, of course, intimately connected with political matters. Deeming him an injured man, Lord Hatherley makes him a County Court Judge. This is the ostensible reason for an appointment which at the time we condemned most emphatically, disregarding altogether the question of personal merit; but we confess we should not be inclined to go into other motives which *may* have influenced the Government. We now simply desire to record our most energetic protest against County Court Judgeships being used as crumbs of comfort for hardly used barristers."

We heartily concur in this protest, and add to it the further protest, that no appointment to a judicial office, or to any ministerial office, where professional competence or eminence is required, should be made merely to meet the exigencies of party politics. If, however, this must be (though the confession even of the alleged necessity of this is degrading), let the best men be chosen from the political supporters of the Government which may have the patronage to bestow. As a mere question of party politics, it may well be argued that any other course is suicidal in the long run. But we should endeavour to reach the highest standard in such a vital matter as this, and make the selection from the profession as a whole, irrespective of party or personal considerations, throwing aside all questions of political exigency or personal feeling.

Entirely apart from party politics, it may be that the fall of the Gladstone Ministry, rumours of which are afloat, will not be an unmixed evil, in view of the course taken by them in matters pertaining to the Judiciary. Mr. Gladstone and Lord Hatherley have shown themselves incapable of appreciating the high ground that has hitherto been taken in this respect by British statesmen. The motives for, and the method of appointment to judicial positions, should be pure and unassailable, as well as the appointment itself unobjectionable.

Let it not be said of us in this Province, as is said of the Bench in the Province of Quebec (we quote from *La Revue Critique*):—

"Seats on the bench are amongst the prizes offered by political rings for uncompromising support; and it makes very little matter whether *rouge* or *bleu* be in the ascendant, the same principle is acted on by both parties, and generally judgeships are conferred, not on account of fitness for the office, but because it is necessary to provide for a member of the party in power. The system is radically bad; for in lieu of good lawyers, worn-out politicians are placed on the bench. If a man is a political failure, *presto* he is made judge; so that there is a very fair chance of the Bench becoming the recepticle for that favoured class of the community which, fifty years ago, in England, was said to monopolize the Church. Thanks to the system, the Bench of Quebec does not command the respect which is accorded to persons occupying judicial positions in other countries."

The writer of the above article then goes on to suggest a mode of appointment which would secure better men, very properly premising his observations by advocating an increase of salary to Judges. We give his views for what they are worth. We express no opinion as to the advisability of the course advocated: it is scarcely worth while to discuss it, there being no chance of the suggestion being carried out in these days. He says:

"In England it has been proposed to vest the right of nominating the judges in the Lord Chancellor and Chief Justices. Here it may perhaps be permitted to advocate a still greater departure from old principles.

"Who, may it be asked, have a greater interest in securing the appointment of a fit person to be a judge than the Bar and the Bench of the district within which such judge, after his appointment, is to act? Where can there be found persons better qualified to judge of a person's fitness for a seat upon the bench than those who plead against him and those who hear him plead, nearly every day of their lives. Taking, then, the opportunities possessed of judging fairly, considering also their interest in choosing the most fit and proper person for the office, it must be admitted that the Bar and the Bench of the district in which a man practises his profession, should be the best judges of his fitness for promotion to the bench."

SELECTIONS.

BANKRUPTCY LAW AND ADMINISTRATION

Bankruptcy is intended to do two things, to release the bankrupt from liability to arrest for his past debts, and to secure an equitable division of his assets among his creditors. The abolition of the law of arrest for debt, therefore, would not render a bankruptcy code unnecessary. A hasty or friendly creditor might still, by a timely execution, carry away all the assets for himself. Consequently, it seems impossible to get rid of a bankruptcy code as extinguished from the ordinary law of debtor and creditor, unless the legislature is firmly resolved to extinguish credit on its present scale. Accordingly, for a long time past, the principles of bankruptcy legislation have been universally agreed upon, both in the United States and in England. Mercantile men consider that, when a trader has met the unforeseen losses as, for instance, in the case of the Chicago fire, he should not be weighed down during his life by liability for his previous debts. Even where the calamity is not so entirely of the nature of an accident as in the case of the Chicago disaster, yet, traders, who can sympathize with trading ills and infirmities, believe that a speculator should get a bankruptcy discharge and release from debts, provided his losses do not indicate gross negligence or fraud. A practical test, accordingly, of sound and unsound trading was intended to be furnished by the bankruptcy act of 1867. By that statute a ruined trader is not, in most cases, aided in bankruptcy unless his assets realize 50 per cent of his liabilities.

Hard cases make bad laws. This is a very old but very solid saying. The statute referred to, for instance, will operate most severely in the case of the Chicago merchants. Indeed, this effect of the present law of bankruptcy is so obvious that Congress is certain to adopt some of the devices now mooted at Washington and elsewhere for the relief of the ruined traders of Chicago. The best way, perhaps, to act under the circumstances, is to pass a special statute for the Chicagose and to enact, also, a general statute which will not have quite such a hard and fast outline as the statute of 1867.

The most unpleasant part of bankruptcy, however, is the tediousness and expense of administering the assets. In England the cost has usually been 33 per cent on the total realized. In that country the battle between creditors and official assignees was fought out to the bitter end, until by the last bankruptcy statute the creditors' assignee triumphed. The first system adopted in that country was to administer the assets through the creditors. This was found to result in every fraudulent trader manufacturing a number of nominal creditors, who outvoted the *bona fide* creditors on every material point. This family council was knocked on the head by Lord Brougham in 1831. The bankruptcy act of that year,

passed through his instrumentality, introduced the official assignee to the trading public. That personage, however, far surpassed the worst records of the corruption of the creditors' assignee. A compromise was adopted, and both creditors and official assignees were appointed to work together in harmony. The official assignee took possession of the assets, and even when a creditor's assignee was appointed, the official still collected all debts under £10. This dualism only made confusion worse confounded. Each of the two assignees could not have the bankrupt's books in his office, while the double range of expenses left the creditors so despondent that many often wholly ceased to look after the bankrupt's estate, once that it was reposing *in gremio legis*.

Book debts of the bankrupt were authorized to be sold, in order to avoid the expense of collecting them. But this statutory provision only led to frequent litigation in order to determine whether a bill of exchange, a bond, a mortgage, or a bill of sale, belonging to the bankrupt, was a book debt. At last the creditors have triumphed, and now hold in England the full control of the administration. Whoever wishes to discover the relative merits or demerits of official and trade assignees, will find the whole matter discussed to the most minute details in a report by a special committee of the House of Commons, issued in 1861. The calamity at Chicago will now bring the whole question on the boards at congress, to which the constitution has delegated legislative jurisdiction in bankruptcy. Congressmen will do well to consider what England has done in this matter before they pass any new bankruptcy statute.—*Exchange.*

DOUBTFUL CLEMENCY.

The sentence of death passed upon John Selby Watson has been commuted by the Secretary of State, into pnal servitude for life. It is stated that this resolution was taken by Mr. Bruce after consultation with, and upon the advice of, the Lord Chief Justice of England and Mr Justice Byles. The defence, therefore of insanity has been discredited and overruled as fully by the Secretary of State as it was by the jury. The conviction for wilful murder stands altogether unimpeached. But the penalty which the law has prescribed for that crime is not to be exacted.

Every man who entertains a profound regard for the sanctity of human life must admire the firm wisdom with which the Secretary of State and his advisers have refused to allow themselves to be overborne by the theory set up of Watson's madness. The public has escaped no inconsiderable peril to the cause of justice by this decision. Indeed, in our judgment it was high time that the authorities who control and exercise the clemency of the Crown should upon this question take up a strong position. We are satisfied that the public mind will acknowledge their courage and discretion.

It may be asked why, if the plea of insanity is discarded, should the life of the convict be spared? It is true that the jury recommended Watson to mercy on the grounds of his great age and previous good character. But it can hardly be contended that the recommendation of the jury is *per se* to be conclusive. We are bound to assume that the Sceretary of State and the two judges acted on reasons of their own and not on the opinion of the jury. What, then, were those reasons? Watson was a clergyman, he was aged, he had throughout life borne before the world a good character, and he received great provocation from his wife. In all that we have read or heard concerning the case, we have never come across a suggestion of a reason other than these four. Are they, or is one of them, valid? He was a clergyman; but is not the fact that a man has exercised the functions and lead the life of a clergyman for thirty or forty years the strongest argument for holding him responsible for the commission of a crime most abhorrent to his holy office, in that it is a crime founded on cruel and furious passion? Watson was aged, but surely mankind are less prone to rage in the gentle decline of life than in the ardent growth of youth. As to good character, it increases the improbability of crime, but it also increases the atrocity of it when committed. As to provocation, we think it an awful and a dangerous doctrine in a country disgraced more than any country in Europe by domestic outrages to admit for one moment that the words of a wife can, under any conceivable circumstances, form an excuse or palliative for her murder.

We do not conceal from ourselves that we have been saying what to many minds may appear harsh, and inconsistent with the respect justly due to the great experience of the judges upon whose recommendation the mercy of the Crown has been extended to the convict. But, in our judgment, the persons to be commiserated are the victims, not the doers of murder, and leniency towards the latter may turn out to be cruelty to the former. When next some low and vulgar fellow, swaggering to his home at midnight, is there received by the bitter gibes of his wife, one or both of them soured by bad times, by long course of quarrel, or by drink, and under the provocation of the pestilent tongue, the violence of the man breaks forth into murder, how will the clemency of the Crown be denied to the ruffians in face of the precedent set in the case of John Selby Watson? — *Law Journal.*

A man with the small-pox had the additional misfortune to be clapped into the Logansport jail, one Sunday evening last month. Court came in on Monday morning when Judge Biddle suggested the propriety of adjourning for one week, but remarked that he would take the sense of the attorneys present, *if they had any.* It seems they had, or else they were not all vaccinated, for the adjournment took place.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES

JURISDICTION.

The Court of Chancery has no jurisdiction in a case involving a less sum than £10.

Where the Referee dismissed a bill on the ground that the amount involved was only $24, his order was sustained by the Court in rehearing term.—*Gilbert* v. *Braithwait*, 3 Chan. Cham. R. 413.

RAILWAY W. Co.—RECEIPT OF GOODS.

Certain bars and bundles of iron came by ship from Glasgow to Montreal, consigned to the plaintiff. His agent gave to defendants' agent an order to get it from the ship, and afterwards received from the latter a receipt, specifying the number of bars and bundles and the gross weight, but with a printed notice at the top of it that "rates and weights entered in receipts or shipping bills will not be acknowledged." All the iron received by defendants for the plaintiff was delivered at Guelph, but there was a very considerable deficiency in the weight. So far as appeared, the iron had not been weighed either on being taken from the ship or afterwards. *Held*, that defendants were not estopped by their statement of weight in the receipt, and were not liable to the plaintiff.—*Horseman* v. *Grand Trunk Railway Co. of Canada*, 31 U. C. Q. B. 535.

INSURANCE—NOTICE OF ANOTHER POLICY.

One of the conditions of an insurance policy was: "Persons who have insured property with this company shall give notice of any other insurance already made or which shall afterwards be made elsewhere on the same property, so that a memorandum of such other insurance may be indorsed on the policy or policies effected with this company," &c.

After the policy had been assigned, the assignees effected another insurance, of which the only notice given, if any, was a verbal one to P., the agent of the company at Sarnia, their head office being in Montreal, and not endorsed on the policy, which was not pro duced at the time. *Held*, affirming the judgment of the Queen's Bench, that such notice was insufficient, RICHARDS, C. J., MOWAT, V. C., and STRONG, V. C., dissenting.—*Hendrickson* v. *The Queen Insurance Company*, 31 U. C. Q. B. 547.

LANDLORD AND TENANT—YEARLY TENANCY.

Where D., being tenant for life of two lots, gave M. verbal permission to occupy one lot and build upon it, on condition he should pay the taxes on both lots; and M. accordingly went on, and built, and paid the taxes for several years. *Held*, that a yearly tenancy had been created, and that D. could not eject M.'s sub-tenant without notice to quit.—*Davis* v. *McKinnon*, 31 U. C. Q. B. 564.

VENDOR AND PURCHASER—INTEREST.

Notwithstanding that a decree declares that the defendant "has accepted the title of the plaintiff," the defendant has a right to object to a conveyance by the plaintiff alone if it appears that the legal estate is partly out of him.

Interest on purchase money runs from the date when, after the acceptance of the title, the purchaser could have safely taken possession, and a difficulty respecting the conveyance may justify his not taking possession.—*Rae* v. *Geddes*, 3 Chan. Cham. R. 404.

CONVEYANCE TO HUSBAND AND WIFE—RIGHT OF APPEAL.

The effect of Consol. Stat. U. C. ch. 82, sec. 10, is to create a tenancy in common only in cases where before the 1st July, 1834, there would have been a joint tenancy. *Held*, therefore, that a conveyance of land to a husband and wife in fee did not make them tenants in common; but that they held, as before the statute, by entireties, and that on the husband's death the wife took the whole estate.

An appeal will lie under the Partition Act, 32 Vic. ch. 33, O., from the judgment of a County Court Judge on a special case stated.—*In the matter of Partition between Shaver et al, and Hart et al.*, 31 U. C. Q. B. 603.

LEGISLATIVE ASSEMBLY—RESIGNATION.

Secs. 10 & 12 of 32 Vic. ch. 4, O, provide that a member may resign, 1, by giving notice in his place of his intention, 2, by delivering to the Speaker a declaration of such intention, either during a session or in the interval between two sessions; or, 3, by delivering it to any two members, in case there is no Speaker, and the resignation is made in the interval between two sessions. *Held*, to mean only an interval between two sessions of the same Assembly, and not to apply to the interval between the last general election and the election of a Speaker.

Sec. 13 provides for a new election in case of a vacancy happening by the death of any member, or by his accepting any office, or by his becoming a party to any contract, as mentioned in the third section. And sec. 14, for the case of a vacancy arising subsequently to a general election, and before the first meeting

of the Assembly thereafter, "by reason of the death or other of the causes aforesaid."

Held, that the "other of the causes aforesaid" were the two other causes besides death mentioned in sec. 13; and that a voluntary resignation, therefore, did not create a vacancy within sec. 14.—*In re the Election for the West Riding of Durham*, 6 U. C. R. 404.

MORTGAGE—PRIORITY.

An assignee of a mortgage cannot as against a prior equity set up the plea of purchase without notice.

The registered owner of land mortgaged the same, and afterwards conveyed the property absolutely to a purchaser, who registered before such mortgage, giving back a mortgage to secure purchase money; and subsequently the vendor assigned his mortgage to a purchaser who had no notice of the prior mortgage.

Held, that the purchaser's mortgage in the hands of the assignee was subject to the lien or charge of the vendor's mortgagee.—*Smart* v. *McEwan*, 18 Chan. Rep. 623.

CANADA REPORTS.

ONTARIO.

QUEEN'S BENCH.

McDONALD *v.* STUCKEY.

Notice of Action—Necessity for quashing conviction.

Held, following *Neill* v. *McMillan*, 25 U. C. R 485, that a notice of action describing the plaintiff's residence as of the township of B., in the county of P., was sufficient.

Held, also, following *Haacke* v. *Adamson*, 14 C. P. 201, that an order or conviction not under seal need not be quashed, under C. S. U. C. ch. 126, sec. 3, before action brought, for any thing done under it.

The alleged conviction in this case was made under the supposed authority of C. S. U. C., ch. 75; but nothing appeared on the proceedings to shew the relation of master and servant, or any offence punishable under the Act.

[31 U. C. R., 577.]

The first count of the declaration charged that defendant, on the 2nd December, 1870, caused the plaintiff to be assaulted and imprisoned, and kept him in prison for a long time.

Second count: that defendant, being a Justice of the Peace, without any authority, and maliciously, and without reasonable or probable cause, caused the plaintiff to be assaulted, and to go and be conveyed through divers public streets, &c., to defendant's residence, and there imprisoned and kept him in custody, without any reasonable or probable cause, for a long time, at the expiration whereof defendant caused the plaintiff to be conveyed in custody to the common gaol, and there again imprisoned for, to wit, five hours, under a false charge that the plaintiff had committed an offence, to wit, that he did owe to James Thompson the sum of $51.08 for labour, and would not pay or settle the same, and that James Thompson swore that he believed the plaintiff was about leaving the country, whereby, &c. Damages laid at $1,000.

Plea, not guilty, by statute 16 Vic., ch. 180, sections 1 to 18, both inclusive; Consol. Stat. U. C. ch. 126, sections 1 to 20, both inclusive. Public Acts.

The case was tried at Guelph, before Hagarty, C.J., C.P., in March, 1871.

It was proved that the plaintiff was committed to the county gaol at Guelph, on a warrant under the hand and seal of the defendant, which recited that the plaintiff was charged before the defendant, for that he "did owe to James Thompson the sum of $51.08 for labour, and would not pay or settle the same, and that the said James Thompson swears that he believes that the said Alexander McDonald is about leaving the country." Dated 2nd December, 1870.

The plaintiff swore that he was brought under a warrant before defendant, at Fergus, and kept in that place in custody all night. Defendant told the constable to take him (plaintiff) to Guelph, to gaol, on the following day. The constable had defendant's warrant to take him there. The constable delivered the warrant and the plaintiff to the turnkey. Defendant said it was for his owing $50 the plaintiff was to go to gaol. Plaintiff said he would pay it, but not till pay-day. Plaintiff was five or six hours in gaol.

On the defence the Clerk of the Peace produced certain papers, which had been transmitted to him by the defendant on the 20th of January, 1871. On the morning of the day of trial, a conviction was filed with him. The papers returned on the 20th of January were, 1. An information; 2. An order for the payment of money; and 3. Examination of witnesses before the defendant. This last paper contained little more than the reiterated statement of the defendant that he did not owe Thompson so much as he claimed by $5: that he had offered Thompson a note on Ellice, the Engineer, for his pay, and Thompson would not take it; and now that he would sooner go to gaol than pay Thompson one cent.

The order for payment stated that on the 1st of December, 1870, complaint was made before the defendant (not saying by whom) that the plaintiff owed to James Thompson the sum of $51.08, and refused to pay, "and the said Thompson swears that he believes him to be leaving the country;" that the parties aforesaid appeared before the defendant, and that defendant did adjudge the plaintiff to pay to James Thompson the sum of $51.08" (a blank was left as to costs, and no adjudication thereof,) "and if the said several sums be not paid" (another blank) "then I adjudge the said Alexander McDonald to be imprisoned in the common gaol of the said county of Wellington (and there kept to hard labour) for the space of" (another blank) "unless the said several sums, and all costs and charges of the commitment and conveying of the said" (another blank) "to the said common gaol shall be sooner paid." This instrument was not under seal.

It was admitted that a sum of $10 was tendered by defendant's attorney to the plaintiff's

attorney before action in compensation, as a tender of amends.

The indorsement of the name, &c., of plaintiff's attorney, and of the plaintiff himself, on the notice of action was, "Edward O'Connor, of Office No. 8, Day's Block, Wyndham Street, in the town of Guelph, in the county of Wellington, attorney for Alexander McDonald, of the township of Blanshard, in the county of Perth."

It was objected for defendant that no action would lie, the conviction not having been quashed, and that the indorsement of the plaintiff's residence on the notice of action was insufficient.

Leave was reserved to defendant to move on these objections; and the jury found a verdict for the plaintiff, and $75.

In Easter Term last, *S. Richards*, Q.C., obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered, pursuant to the leave reserved, on the ground that the conviction or order relied upon or proved at the trial had not been quashed before this action brought, and that the notice of action was insufficient.

Anderson shewed cause. The notice of action is sufficient: *Neill* v. *McMillan*, 25 U. C. R. 485. *Haacke* v. *Adamson*, 14 C. P. 201, shews that the alleged conviction or order here not being under seal, it was unnecessary to quash it before action, for it was in point of law no conviction: Consol. Stat. C., ch. 103, sec. 42. But at all events it is not such an order or conviction as it could have been intended should be quashed. In *Graham* v. *McArthur*, 25 U. C. R. 478, it was held that a conviction made by one magistrate, when two only had jurisdiction, must be quashed, although void. But this was a conviction which no magistrate, nor any number of magistrates, had a right to make. Suppose the magistrate had ordered the constable to take the plaintiff out of Court and give him a thrashing; it surely could not be necessary to quash such an order before suing, and this is in effect the same case.

S. Richards, Q C., contra. The order should have been quashed. It is not a case where there is no semblance of jurisdiction. Consol. Stat. U. C., ch 75, secs. 3, 4, 7, 12, give the magistrate summary jurisdiction in matters between master and servant; and though this order may not have been authorized, it was not the extreme case supposed. In *Graham* v. *McArthur* the one magistrate had no jurisdiction whatever in the matter, under any circumstances: *Ramney qui tam* v. *Jones*, 21 U. C. R. 370; *Lindsay* v. *Leigh*, 11 Q. B. 455.

DRAPER, C. J. OF APPEAL, delivered the judgment of the Court.

As to the notice of action, we think this case cannot be distinguished from that of *Neill* v. *McMillan*, 25 U. C. R. 485, cited by Mr. Anderson. We refer also to *Oram* v. *Cole*, 18 C. B. N. S. 1.

Then as to the alleged conviction, it is not under seal, and no application was therefore necessary, according to *Haacke* v. *Adamson*, 14 C. P. 201, to quash it.

The defendant's counsel referred to sec. 12 of Consol. Stat. U. C., ch. 75, as giving authority and jurisdiction. This Act authorizes a justice of the peace, on complaint of any servant or labourer against his employer for non-payment of wages, among other things, to take cognizance of the matter, and on due proof of the complaint to discharge the complainant from the service, and to direct the payment to him of any wages found to be due, not exceeding $40, and to make such order for the payment as to him seems just, with costs; and, in case of non-payment for twenty-one days after such order, to issue a warrant of distress to levy the same.

But it does not appear from the complaint, the order or conviction, or the commitment, that Thompson was either servant or labourer of the plaintiff, nor is the word "wages," or its equivalent, once used in any of these proceedings. The defendant's order, which is relied on as a conviction, refers to the complaint on which it professes to be based in these words: "The information and complaint of James Thompson," who saith "that Alexander McDonald owes him $51 08, and the said James Thompson *belives*" (*sic*) "him to be leaving this part of the country, and not paying or settling the same."

The rule must be discharged.

Rule discharged.

REGINA v. CURRIE.

Perjury—Jurisdiction—32-33 Vic. ch. 23, sec. 8, D—Construction of.

Sec. 8 of 32-32 Vic., ch. 23, sec. 8, D, applies to all cases of perjury, not merely to "Perjuries in Insurance cases," which is the heading under which secs. 4 to 12 are placed in the Act.

Held, therefore, that a magistrate in the County of Halton had jurisdiction to take an information, and to apprehend and bind over a person charged with perjury committed in the County of Wellington.

Held, also, that a recognizance to appear for trial on such charge at the Sessions was wrong, as that Court has no jurisdiction in perjury; but a *certiorari* to remove it was refused, as the time for appearance of the party had gone by.

[31 U. C. R., 582.]

Harrison, Q.C., moved for a *certiorari* directed to W. D. Lyon, Esquire, one of the justices of the peace in and for the County of Halton, and other the justices and keepers of the peace in the said County, and to John Dewar, Esquire, Clerk of the Peace and County Crown Attorney for the same County, for the removal of the information, depositions, commitment, and recognizance, and other papers in the above matter, into this Court; on the ground that the Magistrate had no authority to take the information, or to arrest, and had no jurisdiction whatever, because the alleged perjury complained of appeared to have been committed in the County of Wellington, and not in the County of Halton, where the proceedings were taken; and on the ground that the recognizance was that John Currie should appear at the next Court of General Sessions for the County of Halton, and plead and take his trial for the said offence; and a charge for perjury could not be tried at the Sessions of the Peace.

Ferguson appeared on the notice of motion, and shewed cause for the Magistrate and County Attorney. The Dominion Act, 32-33 Vic., ch. 23, sec. 8, shews that the Magistrate of and in Halton had authority to receive the information and apprehend John Currie, for it is expressly enacted that "any person accused of perjury may be tried, convicted and punished in any district, County or place where he is appre-

hended or is in custody;" and John Currie, it appears, was apprehended in Halton. He referred also to the Dominion Acts of the same session, ch. 30, secs. 1, 11, 46; and ch 29, sec. 7. The recognizance was probably not correct in binding the party to appear and take his trial at the Sessions of the Peace.

Harrison, Q.C., in reply. Section 8 of chapter 23 is under a general heading of "Perjuries in Insurance Cases," and this is not an insurance case. Such headings may be referred to to determine the meaning and application of the sections where any doubt exists: *Hammersmith R. W. Co.* v. *Brand*, L. R. 4 H. L. 171. The defendant is entitled at any rate to have the recognizance removed and quashed: *Regina* v. *The Justices of the West Riding of Yorkshire*, 7 A. & E. 583; *Regina* v. *Groves* 8 L. T. N. S. 311; for the Sessions of the Peace could not try the offence of perjury: *Rex* v. *Haynes*, R. and M 298; *Burn's* Justice of the Peace, 30th Ed., "Perjury," V.; "Sessions of the Peace," IV. 1. See also *Regina* v. *McDonald*, 31 U.C.R. 337. He also referred to *Symonds* v. *Dimsdale*, 2 Ex. 533; *Regina* v. *Hodgson*, 12 W. R. 423.

WILSON, J. delivered the judgment of the Court.

Notwithstanding the sections of chapter 23, from 4 to the end of the statute, being under the heading of "Perjuries in Insurance cases," it is manifest, on a perusal of these different sections, that only sections 4 and 5 at all relate to insurance cases. Not one of the other sections is governed or affected in the least by that heading.

If these other sections could be held to be within the operation of that heading, then the last, or 12th section, must also be within it, which declares that "this Act shall commence and take effect on the first day of January, 1871," for that is not more dissimilar from the heading than the provisions of the sixth and following sections are.

The magistrate had full authority to take the information, and to apprehend and bind over the person charged, under the eighth section of the Act.

The recognizance, however, to appear at the Sessions of the Peace for his trial, we think was not the proper recognizance to take, as we think the Sessions of the Peace have not authority to try the offence of perjury—*Regina* v. *Haynes*, R. & M. 298; and *Ex parte Bartlett*, 7 Jur. 649—as it is not an offence which at the common law is, or is accompanied by, a breach of the peace.

There can be no object in granting the writ now, as the time for appearance of the party has gone by, and it cannot now be enforced against him. We probably should not have granted it even if the day had not elapsed, if an undertaking from the proper authority had been given that it would not be enforced. It is said the granting of a *certiorari* is not of right, but is grantable in the exercise of a sound legal discretion: *Re Mayo County*, 14 Ir. C. L. Rep. 392.

The rule will therefore be refused, and without costs.

Rule refused.

CHANCERY.

WILKIE *v* THE CORPORATION OF THE VILLAGE OF CLINTON.

Municipal Council—Rates—Injunction—Separate accounts.

The limit of two cents in the dollar demanded by the Municipal Act of 1866 as the maximum of assessment, includes the special sinking fund rate to be levied in respect of past debts.

Where, for the purpose of erecting a market house, a municipal council would require to levy a rate which would exceed the amount of two cents in the dollar allowed to be imposed by section 225 of the Act, it was *held* that a ratepayer was entitled to an injunction restraining the erection of the building by the council.

It is culpable neglect of duty on the part of municipal officers not to see that separate accounts for special rate, sinking fund, and assessments for general purposes are kept as directed by the statute.

[C. R., 557.]

Motion for injunction to restrain the defendants the Corporation from paying, and the other defendants (the contractors) from receiving any moneys on account of the contract for the erection of the market house and town hall in the said village; and also restraining the Corporation from proceeding to collect or receive the rates imposed for the payment of such building.

S. Blake and *D. McDonald*, for the motion.

C. Moss, contra.

SPRAGGE, C.—In my view of this case it may be conceded to the defendants that a by-law for the expenditure of moneys for the putting up of a market place, the money expended to be paid within the year, was within the competence of the Town Council.

The case seems to turn upon this: whether the limit of two cents in the dollar imposed by the Municipal Act of 1866, section 225, as the maximum of assessment, comprises under the terms "debts of the Corporation, whether of principal or interest, falling due within the year," the special sinking fund rate required by the statute to be imposed when money is borrowed upon the credit of the Municipality under section 226.

The statute of 1849 contained clauses similar to section 225 and 226 in the Act of 1866, except that no limit was placed to the assessment and levy by the Council upon the ratable property of the Municipality. In the former as in the latter statute, it was made the duty of the Municipal Council to assess and levy each year a sufficient sum to pay all valid debts of the Corporation, whether of principal or interest, falling due within the year: then follows the restriction, "but no such council shall assess and levy in any one year more than an aggregate rate of two cents in the dollar on the actual value, exclusive of school rates; and if in any municipality the aggregate amount of the rates necessary for the payment of the current annual expenses of the municipality, and the interest and principal of the debts contracted by such municipality, at the time of the passing of this Act shall exceed the said aggregate rate of two cents in the dollar on the actual value of such ratable property, the council of such municipality shall levy such further rates as may be necessary to discharge obligations already incurred, but shall contract no further debts until the annual rates required to be levied within such

municipality are reduced within the aggregate rate aforesaid." If the sinking fund rate falls within this restriction, the two cents in the dollar will be exceeded by the expenditure which is sought to be restrained.

The words of the Act are "valid debts of the corporation, whether of principal or interest;" and it is contended that the sum, which the municipality is required by law to raise and set apart yearly as a sinking fund for the gradual repayment of moneys borrowed, is not a debt within the meaning of the Act. I do not agree in this. I think the word must be taken as used in its most comprehensive sense, as something due from one to another. I find it defined in the Imperial Dictionary as "that which is due from one to another, whether money, goods, or service, which one person is bound to pay or perform to another." I take the word to be used in the same sense as the word "obligations," in the latter part of the clause.

It is an incident of the money borrowed, part of the contract of lending; it is due to the creditor, that so much shall be set apart yearly towards his eventual payment. Its being done, adds to his security; its omission impairs it. I cannot doubt that he has such an interest in its being done as would entitle him to compel its being done. It is something incident, as I have said, to the debt, which the municipality is bound to provide for. Its nature is to create a trust fund; and the municipality is a debtor to the fund year by year as moneys become payable to that fund. It is, in my opinion, a debt of the municipality in the most proper sense of the term, and without giving to the word used any strained construction.

That it is used in this sense in the Act is further apparent from this, that it is the only clause in the Act by which it is made the duty of municipal councils, or by which they are empowered to assess and levy upon the ratable property of the municipality. It is the mode pointed out by the statute for providing means for carrying on the affairs of the municipality. If funds are not raised in this way they cannot, so far as the Act goes, be raised at all.

It appears to me the proper solution of the question is this: the sinking fund is comprehended in that, to meet which the council is to assess and levy upon the ratable property. The limit of that assessment is two cents in the dollar, and the expenditure in question overruns that amount, and ratepayers therefore are entitled to an injunction. I do not think, looking at all that has occurred, that there has been any such lying by or delay as should disentitle the plaintiffs to what they ask.

The matter may not be of any great practical importance, as the by-law which is to be submitted to the ratepayers during the present month may solve the difficulty.

I think I ought not to dispose of this case without observing upon the utter disregard of the provisions of the statute, disclosed in the evidence, on the part of those officers of the municipality whose duty it is to see to the keeping of its accounts. The separate accounts, so pointedly required by section 230 of the Act, seem not to have been kept; but special rates, sinking fund account, and rates and assessments for general purposes, appear to have been mixed up together. The directions of the statute are so explicit, that it was nothing less than most culpable neglect of duty not to follow them.

Wallace v. Moore.

Dower—Mode of Estimating Damages.

The mere fact that at the death of, or alienation by, the husband, his lands were of no rentable value, is not alone sufficient to disentitle the widow to claim damages if the land has been subsequently made rentable, by reason of improvements or otherwise, either by the heir or vendee; as in such a case a portion of the rent is attributable to the land.

[18 Chan. Rep. 560.]

Appeal by the defendant from the report of the Master, at Brantford. The grounds of appeal appear in the judgment.

McGregor, for the appeal.

E. B. Wood, contra.

Spragge, C.—In my opinion the Master has taken the value of the dower of Mrs. Moore upon an erroneous principle, so far as the arrears of dower are concerned. It is evident from the terms of his report, that he has taken the value of the land as the basis of his calculation, and fixed the value of the dower by a rate, as to one portion six per cent., as to another five per cent. upon the value of the land. It is manifest that the result arrived at may be very different from the annual value.

The mode adopted by the Master is not reasonable, nor is it in accordance with the statute. The 21st section of the Act 32 Victoria, chapter 7, speaks of the mode of arriving at the allowance for arrears of dower, or fixing a yearly sum in lieu of an assignment of dower by metes and bounds, as "estimating damages for the detention of dower or the yearly value of the lands." The damages for the detention of dower must be the loss sustained by the widow by reason of her proportion of rents, or of the value of occupation, not having been paid to her. The words "yearly value" speak for themselves; and the third sub-section of section 31 makes the meaning of the Act, if possible, still more clear. It provides, that in cases where from circumstances an assignment by metes and bounds cannot be made, there shall be assessed "a yearly sum of money, being as near as may be one-third of the clear yearly rents of the premises, after deducting any rates or assessments payable thereon." Nothing can indicate more clearly the intention of the Legislature that the compensation to the widow shall be one-third of the yearly value or yearly rents received—not a per centage upon the gross value. I need hardly say that the principle of compensation prescribed by sub-section 3 of section 31 is to be observed wherever an assessment is to be made, whether of arrears of dower or in lieu of an assignment by metes and bounds.

A portion of the property of which the widow in this case is dowable consists of village lots in Norwichville, a considerable and increasing village. Of these lots only one had buildings upon it at the death of the husband; the rest were vacant and of no annual value, producing no rents or profits; but the Master has taken the gross value of the whole of them and upon that value has fixed a per centage. In regard to the arrears of dower this is, so far as the vacant lots

are concerned, compensating the widow, where she has sustained no loss, So far therefore as the arrears of dower are concerned, I think the Master has proceeded upon an erroneous principle. The 21st section does not in terms deal with such a case as is presented by the decree in this suit. It provides for arrears of dower, and for fixing the value of future dower in lieu of assignment by metes and bounds; but does not provide for fixing a gross sum in lieu of an annual payment for future dower. Here the decree directs the Master to find the value of the dower as well as the arrears. This value of the dower must mean its value for the future. This admits of different considerations, and I do not see what principle can be adopted in the case of the village lots other than that which the Master has taken, and no other has been suggested. Her right, independently of the decreee, would be to have her dower assigned by metes and bounds or by parcels, upon the principle prescribed in sub-section 2 of section 31. The value directed by the decree to be ascertained is in lieu of that right and palpably unjust to say, because certain property has yielded no annual profit hitherto, her dower in it is of no value. Obviously it is of some value. Suppose buildings put upon these lots, the rentable value would be compounded in part of the value of the buildings, and in part of the value of the land, and so much of the rentable value of the whole as is properly attributable to the land is the rentable value of the land. It may be the building that gives the rentable value to the land, but still it is the rentable value of the house and land, and not of the house only; for the house elsewhere than on the land might be of much less annual value than the house and lands together, and would be certainly of some less annual value.

Then as to the farm property Section 21 of the Act deals with arrears of dower, and also prescribes the mode of fixing the yearly value of the dower for the time to come; but, as I have said, it makes no provision for ascertaining the gross value of one sum That I apprehend must still be done by taking the value of the life of the doweress. The yearly value of the land must be taken in the mode pointed out by the 21st section. It may be that in this case at the date of the death of the husband, the farm property was in so bad a condition that its annual value was very small; one witness puts it as worth nothing at that date. I do not think that this clause of the Act calls for an estimate of value based upon the actual condition and productiveness of the property at the date of the husband's death Such a construction would lead to consequences certainly not contemplated by the Act. For instance, farm property might, from bad husbandry, from neglect of land, buildings and fences, have fallen into such a condition that its productiveness would not at the time repay the cost of cultivation; and yet with repair and good husbandry, the annual value might be very considerable. And so with house property, it might at the death of the husband be in such a state of dilapidation as to be literally untenantable; and its rental value while in that condition scarcely anything; while, if put in repair or let upon an improving lease, it might bring a large rental.

It would be at once unjust, and not according to the spirit of the Act, in any such case to compute the allowance to the widow upon the actual annual value at the date of the death of her husband. The mischief to be remedied was, the widow, under the law as it then stood, being dowable of permanent improvements: usually buildings upon the land by the heir or dvisee, or alience of the husband. This was felt to be unjust as well as against public policy in deterring the proprietor of the land from improving his property; and so the clause enacts, in the first place, that the value of permanent improvements made after death or alienation shall not be taken into account. It is upon the concluding part of the clause that any doubt can exist. It enacts that the estimate shall be made upon the "state of the property" at the time of alienation or death, allowing for rise in value. The "state of the property" here spoken of means, as I read the clause, its state without permanent improvements as distinguished from its state with permanent improvements. Reading the whole together, and looking at the mischief it was intended to remedy, I think it would be pushing this clause beyond its object and meaning if it were interpreted to mean anything more than that permanent improvements made after the death of, or alienation by the husband should be excluded from consideration—in the words of the first part of the clause, should "not be taken into account." Any other interpretation would operate unjustly against the doweress; for instance, the case of farm or house property in a dilapidated condition at the the time of death or alienation. The clause applies to arrears of dower as well as to fixing a money value in lieu of an assignment by metes and bounds, and this case might occur; land might descend or be devised, being at the time of death in a dilapidated condition, and the heirs or devisee might lease, allowing the first year's rent to the tenant for restoration and repair, and reserving a good money rental for the residue of the term. It would be most unjust if the doweress, coming after some years for her arrears of dower, should be confined to what the land would actually produce in the way of ground rental or profit at the death of her husband. Instead of getting one-third she might not get one-tenth of what had come to the hands of the heirs or devisees since the death of her husband, if the Act were to receive a more strict interpretation against the doweress, than that which I put upon it. Regard, too, should be had to the character of the improvements made. The language of the Act is "permanent" improvements, and it is the value of the land apart from improvements of that character that is to be estimated.

I do not think it well to attempt to define more particularly how the estimate of value should be made. What I mean to decide is, that the actual productiveness of property at the date of alienation or death is not, in my judgment, necessarily its yearly value within the meaning of the Act.

It must be referred back to the Master to review his report. It is not a case in which I thing it proper to give costs of this appeal to either party.

ENGLISH REPORTS.

CROWN CASES RESERVED.

REG. *v.* PAYNE.

Evidence—Joint charge—Incompetency of fellow prisoners as witnesses for one another.

After several prisoners jointly indicted are given in charge to the jury, one, while in such charge, cannot be called as a witness for another.

The 14 & 15 Vict. c. 99, does not apply to criminal proceedings.

[26 L. T., N. S., 42.]

Case reserved by Keating, J. for the opinion of the Court for the Consideration of Crown Cases Reserved, and directed by that court to be argued before all the Judges.

John Payne, George Owen, Isaac Owen, and Joseph Curtis were indicted before me at the Winter Assizes for the county of Worcester 1871, for that they to the number of three or more, armed with offensive weapons by night, did enter in and were on land belonging to Earl Dudley for the purpose of taking or destroying game.

It appeared that at one o'clock on the morning of the 4th Oct., 1871, the keepers of Earl Dudley discovered a number of poachers upon the Earl's lands taking game. They were armed with stones, bludgeons, &c., and advanced upon the keepers with whom they had a desperate struggle. Ultimately the keepers were forced to retire, one keeper being dangerously and another severely wounded.

The prisoner Payne and the two Owens were first apprehended, and on being brought before the magistrates each set up an *alibi* by way of defence, and called witnesses in support. Amongst the witnesses called by Payne was the prisoner Curtis, not then in custody, and he proved having been with Payne at the time in question at a place so distant from the scene of the affray as to render it impossible he could have been one of the poachers. Curtis with the other witnesses for the prisoners were bound over by the magistrates, under 30 & 31 Vict. c. 35, but having been afterwards identified as one of the party of poachers he was committed and indicted with the other three prisoners.

On the trial all four prisoners were sworn to by various witnesses as having formed part of the gang of poachers on the night in question. The defence by each was, as before the magistrate, an *alibi*, and the counsel for Payne proposed to call the prisoner Curtis to prove what he had deposed to before the justices. I held that he was incompetent and could not be called. All the prisoners were convicted and sentence passed.

I desire the opinion of the Court of Crown Cases Reserved, first, whether a prisoner jointly indicted with another can after they have been given in charge to the jury be called as a witness for the other without having been either acquitted or convicted, or a *nolle prosequi* entered: (*Winsor v. The Queen*, 35 L. J. 161, M. C.; 14 L. T Rep. N. S. 195; *Reg. v. Deeley*, 11 Cox C. C. 607.) Secondly, whether upon the present form of indictment, and under the circumstances of the case, the prisoner Curtis was competent, and ought to have been called as a witness for the prisoner Payne: (See Russell on Crimes, by Greaves, 626-7, 4th edit.; Taylor on Evidence, 1178-9.)

If the prisoner Curtis was a competent witness and might have been called on behalf of Payne in the present case, then the conviction is to be quashed or the prisoner to be discharged, otherwise the judgment is to stand.

H. S. KEATING.

T. S. Pritchard (*E. H. Selfe* with him) for the prisoner.—The question mainly depends on the construction of the 14 & 15 Vict. c. 99, s. 3. Sect. 1 of that Act repeals so much of the 6 & 7 Vict. c. 85, as provides that that Act shall not render competent any party to any suit, action, or proceeding individually named in the record, &c. Then sect. 2 enacts, that on the trial of any issue joined, or of any matter or question, or on an inquiry arising in any suit, action, or other proceeding in any court of justice, &c., the parties thereto and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall except as hereinafter excepted, be compelled and compellable to give evidence. And then sect. 3 provides that nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." Now, under the 1st section the prisoner Curtis was a competent witness for the prisoner Payne, and there is nothing in the 3rd section which prevents him from being a witness. Since that Act in *Reg. v. Deeley* 11 Cox C. C 607 where three prisoners were jointly indicted for robbery with violence, and were given in charge to the jury, Mellor, J. allowed two of the prisoners to be called as witnesses for the other one. And in a case at the Shropshire Assizes Pigott, B. also allowed one prisoner to be called as a witness for another on a joint indictment after they were given in charge to the jury. The same course has also been followed by Lush, J. The reason for the incompetency was the ground of interest, and not of being a party to the suit or proceeding: 1 Phil. on Ev 68, 8th edit. In *Worrall v. Jones* 7 Bing 395 Tindal, C. J. says that a party to the record would be an admissible witness if he were not interested. [MARTIN, B.—Suppose two persons jointly indicted for murder, what legal interest has one in the conviction or acquittal of the other? Was not the rule that parties to the proceeding were excluded? BRAMWELL, B.—If it was on the ground of interest, that was an objection for the benefit of the party interested which might be waived and the party called, but did anyone ever hear of such a thing being done?] It may be that the rule is qualified to the extent that a party to the immediate inquiry is not admissible. [BLACKBURN, J.—If a prisoner is competent to give evidence for a fellow prisoner, on cross-examination he may be forced to give evidence against himself.] He would be privileged from answering questions tending to criminate him-

self. In Taylor on Evidence, 1096, it is said that the 14 & 15 Vict. c. 99, which was intended to remove a doubt, has instead created one by the words "Except as hereinafter is excepted" in section 2. [BRAMWELL, B.—My brother, Cleasby B. suggests that that exception points to section 4. Is not the rule of construction, that where the Crown is not referred to in Acts of Parliament they do not apply to the Crown, for the Crown is the prosecutor? COCKBURN, C. J.—The words, "other proceeding," in the statute must be construed as *ejusdem generis* with the words preceding "suit, action," and would mean other civil proceeding. The exception in the proviso was introduced (probably in committee), *ex abundanti cautelâ*, and was not intended to enlarge the enactment.] The words of sect. 2 are, any "suit action or other proceeding in any court of justice, or before any person," &c.; and then, sect. 3 goes beyond civil proceedings. The learned counsel then referred to 1 Rus. on Crimes 625. In *Reg.* v. *Smith* 1 Mood. C. C. 289, the wife of one prisoner was held inadmissable to prove an *alibi* for another prisoner with whom her husband was jointly indicted, on the ground that by shaking the evidence of a witness who had identified both prisoners, she would weaken the case against her husband. But in *Reg.* v. *Moore*, 1 Cox. C. C. 59, Maule, J. said, of course a wife could not be examined for her husband, but for another prisoner jointly indicted with him for a burglary she might, and admitted her as a witness. And Wightman, J. so held in *Reg.* v. *Bartlett* 1 Cox C. C. 105. The modern legislation encourages the calling of witnesses for prisoners; and to facilitate this the 30 & 31 Vict. c. 35, s. 3, provides for their being bound over, and sect. 5 for the allowance of their expenses. It would be a dangerous rule to exclude co-prisoners as witnesses, as evidence might be shut out by vindictive persons procuring their committal as accomplices. [COCKBURN, C. J.—This danger may be obviated by asking permission to have the prisoners tried separately; and then there would be no objection to calling one prisoner as a witness for another with whom he was jointly indicted.] It ought to be a matter of right for a prisoner to be enabled to call a joint co-prisoner as a witness. The giving of the prisoners in charge ought not to raise any difficulty, for the issue is joined when the prisoners plead: *Reg.* v. *Winsor*, 35 L. J. 121, M. C.; 10 Cox C. C. 276. [BLACKBURN, J.—The material thing is when the prisoners are given in charge to a jury who are to say whether they are guilty or not guilty. They are the persons who are to determine the issue as well as to hear the evidence. If one prisoner is admissible for another, he must also be admissible against him. The competency of one prisoner as a witness for another is one thing—the privilege not to answer questions tending to criminate himself is another. The refusal to answer only goes to the credit of the witness. Taylor on Evidence, 627 (note), and *Reg* v. *Jackson and Cracknell* 6 Cox C. C. 525, were then referred to.

Streeten (*Jelf* with him) for the prosecution.—The witness was properly rejected. In *Hawksworth* v. *Showler*, 12 M. & W. 47. Lord Abinger says: "Nothing is clearer than this, that a person cannot be a witness who is a party to the record, and affected by the determination of the issue, and that the wife of such a person is equally incapable of being a witness." And Alderson, B., said, "The rule is, that a party upon the record against whom the jury have to pronounce a verdict, cannot be a witness before that verdict is pronounced." The modern statutes have not altered that principle. The 14 & 15 Vict. c. 99, only applies to civil proceedings; and sect. 3 was introduced, lest it should otherwise be thought to extend to criminal proceedings. If Curtis had been allowed to be called as a witness, every word that he said must have been in his own favour as well as in favour of Payne. If a co-prisoner is admissible at all, his fellow-prisoner or the prosecutor may compel him to be a witness. [LUSH, J.—If he was allowed to be called, he must be cross-examined, and if he declines to answer on the ground that his answers would tend to criminate him, that might have the effect of leading to his conviction. COCKBURN, C. J.—Or he might be cross-examined as to his past life, and the result might seriously injure his case. BRETT, J.—Is it not a fundamental rule of the law of England that when a prisoner is on his trial, he shall not be examined or cross-examined for or against himself?]

Pritchard in reply, cited *Reg.* v. *Stewart* 1 Cox. C. C. 174.

COCKBURN, C. J.—We are all of opinion that the witness was properly rejected at the trial; and we all agree that the proviso in the 14 & 15 Vict. c. 99, on which the prisoners' counsel relied, was only intended to prevent the statute being supposed to contradict or alter the rule of law as it has existed from the earliest times, according to which rule a party on his trial could not be examined or cross-examined as a witness for or against himself. It is impossible that the Legislature could have intended by such a proviso to do so. And the old law of England in that respect still remains unaltered.

Conviction affirmed.

In *Bowles* v. *Lambert*, 53 Ill. 237, it was held that the following writing was not a promissory note:

"I owe the estate of Zenas Warden one hundred ninety 15-100 dollars. May 13, 1863.

"JOSEPH BOWLES."

It appeared that Bowles (now dead) in his lifetime was in the habit of giving to those who had accounts with him similar papers as statements, merely, of their accounes, and not as promissory notes; and, inasmuch as there was no person named in the instrument in suit as payee, the court inferred that it was intended only as a statement of the balance of his account with the estate of Warden.—*Albany Law Journal.*