DIARY FOR AUGUST.

1. Thurs. *Lammas.*
4. SUN... *7th Sunday after Trinity.*
11. SUN... *8th Sunday after Trinity.*
14. Wed... Last day for service for County Court. Last day for County Clerk to certify county rates to municipalities in counties
18. SUN... *9th Sunday after Trinity.*
21. Wed... Long Vacation ends.
24. Sat. ... *St. Bartholomew.* Declare for County Court.
25. SUN... *10th Sunday after Trinity.*
28. Wed... Appeals from Chancery Chambers.

The Local Courts'

AND

MUNICIPAL GAZETTE.

AUGUST, 1867.

THE LATE HON. SAMUEL BEALEY HARRISON.

It is with feelings of extreme regret that we record the death, after a comparatively short illness, of the Hon. Samuel Bealey Harrison, Judge of the County Court of the County of York, at his residence in Toronto, on the 23rd of July last, in the sixty-sixth year of his age.

This event which inflicts so severe a loss not only upon his immediate relatives and friends, but also on the whole community, calls for more than a passing notice; and though his name is so well known, and his sterling worth so well appreciated, that we can do nothing to add to his reputation or increase the love and respect of all who knew him, we may yet collect some few particulars of a life replete with the gifts that make a man useful in his generation, and blessed with that kindly nature which could not help but win the love of those who might even try to be his enemies.

He was the eldest son of John Harrison, Esq., of Foxley Grove, in Berkshire, and was born in Manchester on the 4th March, 1802. At the age of seventeen, he was admitted to the Honorable Society of the Middle Temple, and after a period of diligent study he commenced his professional career as a special pleader. In this branch he speedily acquired a large and remunerative business which he conducted with much ability for several years. During this time, he had as his students, a number of young men many of whom have since risen to the highest honors in their profession. Amongst the best known of these were, we believe, Lord Chief Justice Cockburn, and the late Mr. Samuel Warren. The late Mr. Esten, one of the Vice-Chancellors of Upper Canada, was also for a short time one of his pupils.

Mr. Harrison subsequently gave up this business to his brother Richard, and being on the 15th June, 1832, called to the bar, he left the lucrative but somewhat monotonous chambers of a special pleader for the more precarious, but more brilliant prospects of the bar. Fortune here also smiled upon him, and his many friends prophesied that he was on the straight road to high professional distinction.

He went the Home Circuit, where his brethren were Montague Chambers, Shee, Channell, Russell Gurney, Gaselee, Dowling, and others.

Ill health and a desire for change, however, induced him, after a few years, to come to this country and try his fortune as a colonist. This he did in the year 1837, and settled at Brontè, in the County of Halton, where he went into milling and farming with his accustomed energy. But he was not long allowed the questionable pleasures or profits of this retirement, for he was most unexpectedly to himself, in June 1839, requested by Sir George Arthur, then Lieutenant Governor of Upper Canada, to act as his private secretary. He filled this office until Mr. Charles Poulett Thompson, afterwards Lord Sydenham, who entertained a high opinion of his capacity, appointed him Provincial Secretary on the 10th February 1841, at the time of the union of the two Canadas, and three days afterwards he was made a member of the Executive Council.

Mr. Harrison was elected member for Kingston in the first Parliament of United Canada, on 1st July 1841, in the room of Mr. Manahan, who resigned the seat and was made collector of customs at Toronto. He continued in office until his resignation on 30th September 1843, on the question of the removal of the seat of government from Kingston to Montreal.

In politics Mr. Harrison was always a reformer, but not extreme in his views, which he expressed with much clearness and force, though without attempt at oratorical display; whilst his strong common sense, clear head and business habits rendered his services of great value to the government. When Mr. Baldwin, in September 1841, introduced his celebrated resolutions on Responsible Government, Mr. Harrison was selected by Lord Sydenham to move the amendments, which though only slightly modifying the original

resolutions, remain on the Journals of the House as the *lex scripta* of Responsible Government in this country.

After his resignation of office in September, 1843, he removed from Kingston to Toronto, and again commenced vigorously the practice of his profession in partnership with Mr. Colley Foster, and a flourishing and increasing business was the result of his labours.

In 1844 he again entered Parliament as member for Kent. On the 4th January 1845, he was appointed Judge of the Surrogate Court for the Home District in the place of Mr. Blake, and on the 29th May 1848, he was made Judge of the District Court for the Home District on the resignation of the late Judge Burns.

He was called to the Bar of Upper Canada in Michaelmas Term, 1839, and was made a Queen's Counsel on 4th January 1845, and was elected a Bencher of the Law Society.

Amongst the numerous other public positions held by this lamented gentleman was that of one of the first appointed members of the Board of Education for Upper Canada, of which, in February, 1848, upon the death of Bishop Power, he was unanimously chosen chairman. His services in the cause of public instruction may best be expressed in a minute adopted at a meeting of the Board shortly after his decease—as follows:—

"That this Council learn with the deepest regret the decease of the Hon. Samuel Bealey Harrison, Q. C., Judge of the County and Surrogate Courts of the county of York, who, as member of Lord Sydenham's administration, and Secretary of the province, introduced and carried through the legislature, in 1841, the first general school bill for united Canada, who was a member of this council since its first organization in 1846, and its chairman during the last nineteen years, and who by his intelligence and enlarged views, and by his interest in public education, conferred great benefits upon the country and contributed largely to the efficiency of the proceedings of the Counsel, while by his courtesy and kindness he added much to the pleasure of its deliberations."

Even during the time devoted to the engrossing care of his professional duties, Mr. Harrison found time to give to the profession several law works which will hand his name down for many years to come. At an early period in his career he published his well known Digest, one of the most useful books ever written, and that not only as to the matter of it, but as to the manner of arrangement adopted. When he commenced it, the making of digests was somewhat of a new thing, and that he had the art of arrangement is evidenced by the fact that his system has been to a great extent followed in later works of the same nature. He edited a second edition in 1837, in three volumes, comprising nearly three thousand pages of closely printed matter. He also published a new edition of Woodfall's Landlord and Tenant, now in general use, largely altering, and in many places adding to and re-writing the original work. In 1835 he published, in connection with his friend Mr. Wollaston, a volume of reports of cases in the King's Bench and Bail Court during that year. In 1838, in conjunction with Mr. F. Edwards, he wrote a practical abridgment of the law of *Nisi Prius*, together with the general principles of law applicable to the civil relation of persons and the subject-matters of legal contention.

He entertained strong views as to the propriety and feasibility of a code of legal proceedings, upon a plan similar to one proposed by Crofton Uniacke. With the object of testing and explaining his ideas on the subject, he compiled in 1825 a small but compact synopsis of the law of evidence, intending eventually to bring his views more prominently before the public. We are not aware, however, that it ever went further than this.

In later days, in the western suburbs of the City of Toronto, he employed his leisure time in the care and management of one of the best kept and most complete little gardens in this country. A walk through the greenhouses and grounds with their pleasant proprietor was something to be remembered.

As a judge he was respected by all—the profession having great confidence in his ability and impartiality and the knowledge which he possessed of the first principles of law, and the public placing unlimited reliance on his strong common sense, keen perception of character and motives, and his intense hatred of anything approaching to meanness or injustice.

These attributes made him eminently successful in his sphere as Judge of Division Courts. He had the happy way of satisfying in a great measure, both parties, or at least of convincing their better judgment that his decisions were founded on true principles of equity, moulded to the habits, customs, and necessities of the people between whom he was called upon to adjudicate.

His courteous disposition combined with a desire to lose nothing that could be advanced in support of an argument or either side, occasionally led to protracted discussions, which a man of rougher mould, or a judge less open to conviction, would not have had the patience to attend to. He had a great, some said, a too great contempt for "case law," and though he was too good a lawyer, and too well acquainted with his duties as a judge to decide contrary to binding decisions cited before him, he was nevertheless bold and able enough to take a comprehensive view of the general current of authorities and was so well versed in the great leading principles of law, combined with much facility of application, that his judgments were seldom appealed from. But whatever his imperfections on the bench as to trifling matters may have been, they are swallowed up and forgotten in the memory of the numberless traits of character which made his presence on the bench beneficial to the country and pleasant to the profession.

It is well known to many that conscientious scruples as to the infliction of the death penalty prevented his accepting a seat on the Superior Court Bench. This has been often regretted; but his sphere of usefulness was scarcely less in the position which he occupied, than it would have been on the upper bench; whilst, so far as he was concerned, the position was more independent, and, at least in the matter alluded to, more in accordance with the humane instincts of his nature.

In private and social life he was the impersonification of kindness and courtesy, and was blessed with an even temper and contented disposition. His varied experience and literary tastes, assisted by a most retentive memory, rendered his conversation pleasant and instructive. And though he expressed his opinions without reserve, he did so with great good humour and pleasantry. His heart was incapable, apparently, of harbouring an evil or even unkind thought, he was beloved by all, and his death was universally regretted.

Mr. Harrison married in England when a young man, and subsequently, after the death of his wife in this country, he was married to the widow of the late Col. Foster, Assistant Adjutant General. He left no children.

At a meeting of the Bar at Osgoode Hall on the 25th July last, the following resolution was passed:—

"That the Bar of the County of York and City of Toronto, desire to express their extreme sorrow at the recent death of the very esteemed Judge of the County Court, the late Hon. S. B. Harrison, and to record their sense of the great loss the Bar have sustained in the death of one who was at once so impartial a Judge and upright a man."

"That the members of the Bar of the county and city, also desire to express their heartfelt sympathy with Mrs. Harrison in the great loss she has sustained in her heavy bereavement."

The funeral was an exceedingly large one, the Chief Justice and the rest of the Judges in town at the time, and the members of the bar (in their robes) being present, together with a large number of citizens, all desirous of testifying their respect to the memory of the deceased.

REGISTRARS AND THEIR DUTIES.

A very important decision on this subject was given last term, by the Court of Queen's Bench, on an application for a mandamus to George Lount, Esq., Registrar of the County of Simcoe, to compel him to endorse on an instrument, the certificate required by the Act. It appeared that a mortgage in duplicate was sent by the attorney for the mortgagee to this Registrar to be recorded; that after some time one of the instruments was returned, with an endorsement upon it in the following words: "No. 44322, purporting to be a duplicate hereof, was recorded at the County of Simcoe Registry Office on the 9th day of January, &c.," but not signed by the Registrar or his deputy. This certificate, if it may be called such, being in no respect a compliance with the act, the document was of course sent back by the attorney to the Registrar, with a request that a proper certificate might be endorsed on the duplicate mortgage of *its* registration—not that a number, purporting to be a duplicate, was recorded. This very proper and reasonable request Mr. Lount thought fit to refuse, alleging that it was no part of the duty of the Registrar to compare documents, but he did think fit to have this meaningless endorsation signed by the Deputy Registrar.

The party interested, unwilling to submit to this view, obtained a rule nisi for a mandamus to compel the Registrar to do his duty and give the certificate the act required.

The Court held the ground taken by the Registrar to be totally untenable, and declared it to be the *duty* of every registrar to compare

the documents left with him, so that he might satisfy himself thereby that he could properly enter thereon the certificate required by law —that the law required him to make himself acquainted with the facts to which he was to certify, and that there was nothing in the act to warrant him in making a qualified certificate.

Among the arguments used by counsel (or rather a plea for mercy, for it would come strictly within the latter term) it was stated, that the Registrar was not paid for comparing documents; but, as was remarked by the Court, that was not a matter with which they had any thing to do, and so long as the law laid down clearly the duty to be done by Registrars, they were bound to enforce the performance of such duty. Considering that these officials do about the least work for the most money, and have the least to do for nothing, of any in the country, this appeal caused some merriment amongst the members of the bar, the Chief Justice remarking that if this Registrar considered the emoluments of the office insufficient, he had no doubt the government would have no difficulty in finding many men quite as competent to fill it, and who would do the duties for the same remuneration.

The court were unanimously of opinion, notwithstanding it was urged by counsel that the point was a new one, that the Registrar should be made to pay the costs, saying that the case was so very clear and the reasons given by the officer for not doing his duty so very untenable, and the proceeding so "wrong headed," that it was just such a case as required the infliction of costs.

This is one of the many instances where several Registrars that could be mentioned (who, for some reasons which other people are unable to discover, look upon themselves as an illused class and fall foul of every body in general, and the profession in particular) have taken upon themselves to put forced constructions upon the various acts affecting their duties and emoluments; but, as was in substance remarked by one of the learned judges in giving judgment, it is rather a curious fact that of the many remarkable constructions placed by Registrars upon the act, they seem to take great care to construe doubtful points in their own favor.

Practitioners and others who have accepted qualified certificates, such as spoken of above, would do well in our judgment to have the proper certificates endorsed without delay.

We may have occasion to refer again to the subject of Registrars' duties on these and other points.

EVIDENCE OF WIFE AGAINST HER HUSBAND.

We return to this subject in consequence of a letter (published on page 93 *ante*) from a much valued correspondent. We cannot, however, find any argument which has changed (and we are always glad to correct errors if made) nor do we think the evidently hard case put by him, ought to change our expressed opinion on this subject. The case put by "Questioner" is a peculiar one, and if the evidence of a wife is to be received at all, it ought to be in such a case as he speaks of, and though we should prefer an adherence to the general rule, we do not undertake to say positively, that it would be illegal to admit her testimony. It would be, under the circumstances, analogous to the rule in Crown cases, where the wife is admitted on a charge of violence against herself by her husband.

The wife could not be examined under the old law—does, then, the Evidence Act (Con. Stat. U. C. p. 402) make any alteration in this respect? The clause touching upon this may be read shortly, thus—"This act shall not render competent or permit any party to a suit, or the husband or wife of such party, to be called on behalf of such party; but such party (the words husband or wife are not used it will be observed) "may be called by the opposite party—provided always that the wife of any party shall not be liable to be examined as a witness by the opposite party." It may be that this latter proviso confers merely a personal privilege on the wife, which she may waive if she chooses; but we incline to think that the act does not bear such a construction. Moreover, upon the broad grounds of public policy, to prevent discord and dissension between husband and wife, we do not think that the evidence of the wife ought to be received.

COMMITTALS UNDER PETTY TRESPASS ACT.

Since writing the hurried note to the question of "a Justice of the Peace" in our June number, we have more thoroughly looked into the statutes referred to than we had at that moment an opportunity of doing, and we have

to come to a somewhat different conclusion from that which was then, though, as was said at the time, with doubt, intimated.

The foundation for a contention that a magistrate has power to commit a defendant to prison after the return of a distress warrant under the Petty Trespass Act, would be under sec. 62 of Con. Stat. C. cap. 103, and one would expect upon examining it to find a general power given, but a careful reading would seem to shew that that section contemplates a provision in the statute *under which the conviction is had* authorising imprisonment; but upon turning back to that we do not find such power given; except so far as it might be implied from reading the two statutes together. We do not, however, upon the whole, think that it would be safe without a more explicit enactment, for a magistrate to proceed by commitment under the act referred to.

SELECTIONS.

PUNISHMENT OF CRIMES OF VIOLENCE.

The manner in which the penalties for crimes are meted out to the guilty, is a matter of the greatest social importance, inasmuch as there is a possibility of every individual being directly or indirectly affected by the process. And this being so, it is vitally necessary that the criminal classes should see by example the various degrees of turpitude which society attaches to their crimes. They should learn, if peace and safety are to be the portion of honest men, the stern and strong determination of the law to avenge outrages against the rights of citizens.

All writers of eminence rank these rights as springing immediately or ultimately from safety of life, limb, and property. These rights stand in order as here written, and such order is the result of common sense. The protection of life and the soundness of limb are of infinitely more importance than the safety of any material property, however valuable.

Yet in these days a certain commercial tinge overcolours almost everything, and assuredly does so as regards the law. In a former article I alluded to the instances of this in the law of slander, and it will be seen that the same feeling affects the administration, though not the spirit, of the criminal law.

No person who studies the newspapers will have omitted to see the enormous disproportion between sentences in various courts for all classes of crimes. This is the first anomaly. The second is that of the reprehensible leniency with which so many offences against the person are punished, and tho needless, and I might say absurd severity with which those against property are punished.

This second anomaly flourishes most in many magistrates' courts, those of stipendiary and unpaid magistracy equally. In a minor degree we find it at Quarter Sessions and sometimes even at the Assizes.

The peculiar class of cases which it is proposed to discuss in this article, comprises—1. Assaults generally. 2. Assaults on women. 3. Inflicting grievous bodily harm. 4. Manslaughter.

1. Assaults. That admirably drawn Act—one of a series of which may be said *O si sic omnia!*—the 24 & 25 Vic. c. 100, has two sections relating to assaults. One of these, the 42nd, deals with "common assaults," and fixes the punishment at a maximum penalty of £5 or two months' hard labour. So far the penalty is severe enough, if properly administered; but in too many cases it is not properly administered. Day after day we read in the papers of brutal assaults punished by fines. Nor even in this case do the punishments reach their full extent of £5. "Forty shillings and costs" is a favourite formula, where the sentence ought to be six weeks' hard labour. Indeed, some magistrates—town and county ones*—appear to think two or three pounds a heavy punishment for a savage assault, while they adjudicate constantly on petty larceny by giving the full sentences of imprisonment under the Criminal Justice Act.

It would only encumber these pages to print examples of this erroneous leniency. Any man may pick out dozens of them from the last six months-old files of newspapers. It seems incredible that the magisterial mind should prove so callous to brutality. A person inoffensively proceeding on his own business is perhaps knocked down, shaken, agitated, and injured by some drunken ruffian. Too often, in place of sharp and swift retribution, comes a solemn decision that the offender shall pay a sovereign, or two sovereigns, as the case may be. He pays it and vanishes, and his victim goes home, his nervous system shattered perhaps for weeks, to meditate on the commercial spirit of the administrator of the law.

We say commercial spirit. If this same ruffian has picked a man's pocket of a cotton handkerchief, he need expect no mercy. At least he will be summarily imprisoned, and he has the chance of indictment, and its corollaries of possible conviction and heavy sentence as well. Yet in the name of common sense and humanity, what proportion does his crime bear to a brutal and savage attack on a peaceable man, either in the spirit which dictates or the consequences which may accompany it? Yet the law is strong enough, its administrators weak.

2. Assaults on women are those which merit and sometimes meet (when the right man is

* Since this was written, a man convicted at a city police-court of knocking down and beating a cabman who asked for his fare, and committing, as the alderman said, "a brutal assault," was fined 40s. and costs.

in the right place) with the heaviest punishments. The 43rd section of the Act above cited fixes a monetary maximum penalty of £20, or six months' imprisonment with hard labour for this class of cases if dealt with summarily. Yet month after month two classes of assaults—violent and indecent—come before the various sessional and stipendary benches, and in too many of them the pecuniary punishment is resorted to, and that most inadequately. Short space has elapsed since a ruffian attacked and struck a woman—a respectable married woman, a perfect stranger to him—more than twenty times, at a railway station, and otherwise roughly used her. His punishment was a fine inflicted by a London magistrate. Also, a young lady near Bolton, was brutally assaulted and thrown down in a footpath crossing some fields, while according to the report, her hair was torn out and head injured, and the bench of magistrates sentenced the ruffian to three months' imprisonment. Many similar instances of misplaced lenity must occur to every reader of police reports. It is unsafe for any girl to walk alone in street or lane; and so it will be till every vagabond who waylays or molests them is doomed to six months' hard labour for each offence.

It is the height of absurdity to doom the perpetrator of small thefts to long terms of carceration, and to allow the criminals who attack defenceless women in any shape to escape with a trumpery fine. Moreover, it offers a premium to well dressed scoundrels to follow, annoy, and attack any female who may be solitary. And lastly, it teaches the lower classes to imagine, that so long as they let stealing alone, they may assault and insult with impunity. One special observation may be made on both classes of assaults, common and aggravated, before we quit this branch of the subject. It is not considered by many magistrates how many after-effects may follow assaults. Even a common attack on a man of business habits and regular life throws him, so to speak, or may throw him, out of gear, and affect his nerves for several days, long after his assailant has paid and forgotten the fine. And with respect to women, the argument is the same. Let our lenient justices consider their own feelings if their wives or daughters were indecently or brutally assaulted. Let them consider the victims' outraged feelings, their terror, their nervous and hysterical tendencies, their constant fear of similar attacks, and the agitation and anger of their male relations. When a paltry fine punishes a brute for attacks on defenceless girls, does it compensate for a thousandth part of these consequences? Even a sentence of six months' hard labour would hardly do it, much less a paltry fine.

And in many cases, even where the full two months or six months are allotted, the case ought to be sent for trial. A practice has grown up among magistrates of dealing summarily with assaults that ought most assuredly to be made the subject of indictment. Whether it be from anxiety to save expense, or whether it be from any other cause I cannot say, but certain it is that many cases are adjudicated on summarily that ought to be brought within the jurisdiction of a court impowered to inflict a heavier sentence. From whatever cause it may proceed, any adjudication by magistrates on a case unfit for summary jurisdiction, should be carefully discountenanced. Most especially is this rule to be followed in all cases of assaults on women; the case of Thompson, 30 L, J., M. C. 19, was one wherein the Court of Exchequer unanimously decided that in a case where conviction for an aggravated assault had taken place and rape had been proved, the justices should not have summarily convicted, but should have committed for trial.

A case of the most astounding description was reported in Feburary last, in some of the London papers. It was one decided at the Aberystwith Petty Sessions. A young woman having been feloniously assaulted by two or three men (proof whereof, the surgeon gave), the chairman of the bench calling the prisoners "blackguards and cowards," sentenced them to short terms (none over four months) of imprisonment. The Welch papers commented indignantly on this case, and it is impossible (so far as the newspapers may be relied on) to understand the decision. At the very least (if the evidence is correct), an indictment and assault with intent &c., should have been preferrred. But beyond this, rape, so far as one understands the report, was proved. If so, it was dealt with not even the maximum for an aggravated assault. No further inquiry has, we believe, been made, and of course our remarks are simply based on the accounts in the local and London papers.

Now, in all these cases, no consideration of expense, no regard for convenience, no undue lenity should be allowed to prevent prisoners being committed to the assizes. Indeed, it is difficult to overrate the importance of punishing crimes against defenceless women with the utmost severity.*

3. Inflicting grievous bodily harm. We deliberately assert, that cases often disposed of by a magistrate under the mild *soubriquet* of "an assault," are properly subjects for indictment under the foregoing phrase. Biting off portions of the human face, knocking teeth out, and breaking noses, are all, in our opinion, inflictions of grievous bodily harm; yet how many cases of this kind are disposed of by magistrates. Now, at the outside, two or six months' incarceration is, as we have shown, all that a magistrate in Petty Sessions can allot for the worse case of this kind. By indictment, such cases are punishable by two years' hard labour or penal servitude.

As sentences of three months' and six months, hard labour are common enough for

* A bench of rural magistrates lately sentenced a man who put his baby on a blazing fire to six months' hard labour. He was charged according to heading of report, with "inflicting grievous bodily harm."

trifling larcenies, any reader of common judgment may imagine the effect. The criminal classes know that for ill-treating a woman, beating a man, or breaking his facial appendages, they are not half so likely to get severe punishment as for stealing bread and coals. It is almost impossible to write with patience on such an idiotic mal-administration of law—a mal-administration which protects primarily insensible property, secondarily sensible and sensitive human frames. The infliction of grievous bodily harm always carries consequences. It may entail heavy medical expenses, loss of income, impaired health, the prosperity of a family, and the sapping of a life. Therefore, it is a mockery—more than that, is a gross public wrong—when any functionary, be he judge, chairman, or magistrate, punishes the brute who smashes flesh and bone—the flesh and bone perhaps of the supporter of a family—lightly or weakly. Long terms of penal servitude—the sharp, bitter slavery of the convict stations and the lash—ought to be the portion of every man convicted of savage attacks, which mutilate and impair the frame and constitution. We say the lash, and we here avow our conviction, that if by the addition of a few words to the statute, the judges were empowered to add a maximum sentence of fifty lashes with a cat to every person being a male convicted of assaults that mutilated or inflicted grievous bodily harm, it would have the best and happiest effect.

And be it remembered, while the lash is used in the army and navy, no one can logically object to it for felons. While you punish crimes against discipline with flogging, there is every reason in favour of so punishing crimes against morality. What pity is there for the brutes, without a brute's virtues, who attack women, who mash and pound faces into jelly, who bite off ears, lips, and noses, who put children on fires, who cut open heads with pewter measures, who kick their victims savagely in the most vital parts, and who beat women to death's door? Is any one so really an example of "maudlin sentimentality" as to have one word to say for malefactors like these? Savages as they are, without any of a savages' redeeming points, they merit the only punishment they understand—the sting of a lash. If pity be evoked, let it be so for the inoffensive people maimed, bleeding, racked with pain and stayed from their daily occupation by the attacks which merciful magistrates seem to consider far less henious than paltry robberies.

Even as it stands, the law is strong. Why is it that in all cases where grievous bodily harm is proved to have been occasioned, a long term of penal servitude does not fall to the offender's lot? Why is it that watches and purses are guarded more sternly than heads and limbs? What in the name of common reason is their relative value? And when will the administrators of the law learn to deal their sternest measure out to the foes of life and limb, rather than the foes of the pocket?

4. Manslaughter. Making all allowance for the vast difference between murder and manslaughter—between homicides committed in cold and in hot blood—there is still a certain amount of severity to be shown towards any one convicted of homicide under the influence of evil passions. Now it cannot be denied that of late years, several instances have occurred of strange lenity towards persons convicted of this offence. Perhaps, one of the strangest instances (with all respect to the learned judge who tried the case) occurred at the last gaol delivery for Maidstone. A man was convicted of the manslaughter of his wife. The evidence proved that he repeatedly kicked the wretched woman (with threats and curses) till she fell insensible, and shortly died. A surgeon deposed that she had apoplectic tendencies, and might have died—or did die—from that. A sentence of three months' imprisonment was passed. Now, granting the surgeon's opinion to have been correct, it is certain that an assault was proved in evidence, which was about as aggravated as any could be. At petty sessions, the perpetrator would have been liable to six months' and before a judge, to twelve months' imprisonment for an assault simply. And the witnesses deposed to expressions of the convict, which conclusively showed a brutal and savage intention to injure. This case was commented on severely by the press, and it seems in our humble opinion an inexplicable one.

It is all very well to draw and preserve a keen distinction between murder and manslaughter; but in all cases where any bad blood is shown, there should be a long sentence of imprisonment; I except cases of defence and gross provication, of course, but in all others there ought to be a long term of imprisonment. Trivial sentences are very injurious to the estimation of the law in the eyes of people generally. The object of all the criminal sentences should be to show that life, limb, and property are to be protected, but the former much before the latter. Discrimination of this kind, properly carried out would be a most valuable social improvement. What then are the suggestions to which the foregoing brief remarks are prefatory? They are four in number, and very brief, but the working out is respectfully recommended to the present Home Secretary, for the writer naturally feels confidence from the tried legal reforms which have emanated from his own party.

1. A circular from the Home Office to every bench of magistrates, pointing out to them the punitory powers of imprisonment, given by the 24 & 25 Vict., c. 100; and the heinousness of bad assaults over larcenies.

2. A clause in such circular recommending full terms of imprisonment wherever slight personal mutilation has been inflicted.

3. An Act of one section empowering the judges of assize to sentence all persons convicted of effecting grievous bodily harm, where there is permanent serious mutilation certified by a surgeon, to the penalties of the lash.

The same power has worked admirably in garotte robberies.

4. A more liberal scale of expenses allowable in conviction at quarter sessions and assize.

It is our earnest and sincere hope that the grave and paramount subject so imperfectly touched on in this little paper may meet with the consideration of those most learned in the law. A crying evil exists—one attacked by the press continually—and until official action is taken in the matter it will not be remedied. As the remedy implies safety and security for all, and more especially for women, the sooner and more effectually it is applied, the sooner will such police reports as now disgrace our country, cease to appear.

WILLIAM READE, jun.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

MASTER AND SERVANT—RAILWAY COMPANY, LIABILITY OF.—Action for assault and false imprisonment.

The plaintiff had taken a horse by the defendants' railway to an agricultural show at Salisbury. By the arrangements advertised by the defendants, the plaintiff was entitled to take the horse back free of charge on producing a certificate that he was unsold. After the show the plaintiff produced the proper certificate, and the horse was accordingly put into a box without any payment or booking, and the plaintiff having taken a third-class ticket for himself travelled by the same train. On his arrival at his destination, Romsey station, he gave up his ticket and the certificate, and was taking the horse away along the road when the station-master sent after him and demanded 6s. 10d. for the carriage of the horse, and on the plaintiff explaining the circumstances and refusing to pay, he was detained and taken back to the station by two policemen acting under the orders of the station-master. After he had been detained half-an-hour, the station-master telegraphed to Salisbury, and, on receipt of a telegram "All right," the plaintiff was allowed to proceed.

The jury returned a verdict for £10; leave being reserved to move to enter the verdict for the defendants, on the ground that the station-master had no authority from the defendants to take the plaintiff into custody.

The Court (Blackburn, Mellor, and Shoe, JJ.) made the rule absolute. A railway company has power, under 8 Vict. c. 20, ss. 103, 104, to apprehend a person travelling on the line without having paid his fare, but has power only to detain the goods themselves for non-payment of the carriage (s. 97); consequently, as the defendants themselves could not have apprehended the plaintiff (assuming him to have wrongfully taken the horse by the train without paying), there could be no authority implied from them to the station-master to arrest the plaintiff on that assumption, and they could not be made liable for his acts; and the Court distinguished *Goff* v. *Great Northern Railway Company*, 30 L. J. Q. B. 148; 3 E. & E. 672, and other cases on this ground.—*Poulton* v. *London and South Western Railway Company*, W. N. (1867) 210.

WARRANTY ON THE SALE OF A CHATTEL—RIGHT OF REMOVAL.—The plaintiff purchased a boiler of the defendant under the following circumstances:—The boiler, which was embedded in brickwork, and was so large that it could not be got out of the building entire, without taking down part of the wall and injuring the premises, but which might be removed by taking it to pieces, had been seized and sold under a distress for poor-rate. The defendant had purchased it at the sale for £19, and afterwards sold it to the plaintiff for £29. The plaintiff was aware of the circumstances under which the defendant had bought the boiler, and after he had purchased it saw the boiler, and also had an interview with the auctioneer, who sold it to the defendant, and, having paid for the boiler, was allowed by him fourteen days' time for its removal. The tenant of the premises, however, refused to allow the plaintiff to take the boiler away.

The question was whether there was any evidence which ought to have been submitted to the jury of a warranty or engagement by the defendant that he had a good title to the boiler, and that he would deliver it to the plaintiff, or that the latter should be permitted to remove it.

The judges who heard the argument were divided in opinion:

BOVILL, C.J., and MONTAGUE SMITH, J., holding that, inasmuch as both parties were aware of the circumstances under which the boiler had been sold, no warranty of title could be inferred.

WILKES, J., holding that the defendant impliedly warranted that he had a right to sell, and that the buyer should have a right to remove the boiler.—*Baguley and another* v. *Hawley*, W. N. (1867) 222.

PARTNERSHIP—LIABILITY OF ESTATE OF A DECEASED PARTNER FROM FRAUDULENT ACT OF ANOTHER PARTNER.—Where W., a partner in the firm of C. & Co., solicitors, in negotiating a mortgage falsified the abstract of title delivered to the mortgagees for the purpose of concealing prior incumbrances, and substituted in the

schedule of the draft of the mortgage deed for an unincumbered farm the name of a farm which he knew to be encumbered.

Held on a claim by the mortgagees to prove against the estate of one of the other deceased partners for any deficiency in their security.

That the profits of the transaction being for the general benefit of the firm, and that all the partners were liable for the fraudulent act of W. —*Sawyer* v. *Goodwin*, 15 W. R. 1008.

HIGH TREASON—LIABILITY OF DEFENDANT FOR ACTS OF CO-CONSPIRACIES DONE AFTER HIS ARREST—STATUTE OF TREASONS.—The defendant was indicted for high treason with overt acts of levying against the Queen, and of conspiracy to depose the Queen. He was proved to have been a member of a treasonable conspiracy having these objects, and also of a Directory or governing body of that conspiracy, formed to bring about a levying of war against the Queen in Ireland. The Directory was proved to have been actively engaged during the month of February in preparing for a rising to take place at an early date in Ireland. The defendant was arrested on the 23rd February; a rising took place in Dublin on the 5th March. There was evidence that this rising was the result of the incitement of the Directory.

Held, that evidence of the rising of the 5th March was admissible against the defendant.

Also, that his responsibility for that rising (whatever it amounted to) was not affected by his arrest, he having made no attempt after his arrest to disaffirm these acts.

Also (*dubitante* PIGOT, C.B.), that the jury were rightly told that an overt act of levying war in the County of Dublin was proved against the defendant if they were of opinion that the events of the 5th March were the result of the commands or incitement of the Directory of which he was a member.

Where an overt act requires two witnesses under the Statute of Treasons, and the act is compounded of several stages and circumstances, it is not necessary to have two witnesses to every stage and every circumstance if the act be established by the joint testimony of two or more witnesses.—*Reg.* v. *McCafferty*, 15 W. R. 1022.

RAILWAY COMPANY LIABILITIES.—A ferry-boat or other means to cross a body of water on the line of a railroad, whether in the middle or at the end of the route, is part of the railroad; and the company is liable for neglect to carry a passenger across this, as well as any other part o the route.

It is settled that a railroad company may contract to carry passengers or freight beyond its own route, and the liability as a common carrier continues through the whole distance contracted for.—*Wheeler* v. *San Francisco and Alameda Railroad Company*, 6 Am. Law Reg. 606.

UPPER CANADA REPORTS.

ELECTION CASE.

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

THE QUEEN UPON THE RELATION OF ANDREW GREGORY HILL v. MOSES BETTS.

Municipal law—Disqualification of candidate—Contract with corporation—Effect of acquittance from, in equity.

A person cannot be said to be disqualified as a member of a Municipal Corporation as having a contract, &c., with it if he be plainly acquitted in equity from such contract, and a sealed instrument is all that is required to perfect his discharge at law.

The rights of the candidate must be looked upon as they are in substance and effect at the time of the election.

[Chambers, May 27th, 29th, 1867.]

This was a quo warranto summons.

It was alleged that Moses Betts had not been duly elected, and that he unjustly usurped the office of Reeve in the village of Welland and county of Welland, under pretence of an election held on the 26th of March, 1867, because at the time of his election he had a contract with the corporation of the county of Welland, as one of the bondsmen or sureties of James McGlashen, treasurer of the county, not discharged or released.

The facts were, that Moses Betts became a surety for McGlashen, the county treasurer to the county, on the 24th of July, 1865, in the sum of $2,000; that he offered himself for election as reeve of the village, and was elected in January last.

That his election was moved against, and was vacated because of his suretyship for the treasurer with the county.

That another election was ordered to be held, and was held on the 26th of March, when he was again elected to be reeve.

That after the avoidance of the first election, and before the holding of the second, the County Council agreed to release him from his liability as surety, and on the 14th of March passed a resolution to the effect: "That Hugh N. Rose be, and is hereby approved and accepted as security for the county treasurer, in the sum of $2000, in the room and stead of Moses Betts; and that the clerk be directed to prepare and have executed the necessary bond, which shall be subject to the approval of the warden; and from the date when such bond shall be executed and approved and filed with the county clerk, the liability of Moses Betts to the county, under his bond, shall cease and determine."

That the bond of Hugh N. Rose was prepared and executed and was approved by the warden, and was filed with the county clerk on the 23rd of March.

That Betts received 59 votes; and the relator, who is a lawyer, only 16 votes; and it was asserted that many more would have voted for

Betts if they had not looked upon his election as sure.

That Betts thought he was discharged from his liability under the bond, and that the whole public of the village thought so to.

That the auditors of the county, on the 7th of May instant, reported on the accounts of the treasurer to the 31st of December last, and found them and certified them to be correct; and since the issuing of the writ in this matter, the auditors have also reported on the accounts of the treasurer up to and inclusive of the 24th of March last, and have found the same and certified them to be correct.

That there was no default from the making of the bond up to the 24th of March last, for which Betts was liable to the county; and that the whole security, which was all along furnished by the trearurer to the county, was to the extent of $36,000, of which sum Mr. Betts was liable only to the amount of $2000.

It was also shewn that the bond was destroyed by erasure of the signature and destruction of the seal—though when this was done was not stated.

Dalton shewed cause, and contended that Betts had been absolutely discharged from all liability to the county, in equity, by what had taken place; and if, by application there, Betts could compel the county to give him a release under seal, so as to be available at law, he was at liberty to set up his absolute right to a discharge in answer to this objection, which was made for a collateral purpose, and by a person who was almost, if not altogether, a stranger to the transaction.

That Betts had been, in fact, discharged from "all liability under his bond," according to the terms of the resolution; and not merely from all liability from the time of his acquittal, leaving him yet liable for any supposed default which might be discovered against his principal up to that time; and that the bond, by the removal of the signature and seal, had actually been destroyed, which is equal to a release.

Robt. A. Harrison, contra.

The disqualification created by statute is the "having by himself or his partner an interest in any contract with or on behalf of the corporation."

Now, firstly, this person has a contract in fact, because it is still undischarged; and we have only to deal with legal rights.

Secondly, if the contract can in one sense be said to be determined by reason of the alleged equitable claims put forward for that purpose, it is quite clear he has yet an interest in that contract—an interest to have a legal acquittance procured from the corporation against it.

And, thirdly, at the most Betts is only entitled to be discharged from liability from the 23rd of March last, and he remains liable for anything which has happened upon it up to that time.

ADAM WILSON, J.—Assuming that a person having a contract with the county is disqualified from being elected a member of council of a village within the county, I am of opinion that if he be plainly acquitted in equity from his contract, and only wants the ceremonial of a sealed instrument to perfect his discharge at law,—he cannot be said to be a person having a contract, or an interest in a contract with the corporation. I make no distinction between a contract and an *interest*, for although there is a difference between them, that difference does not apply here.

I have no doubt that Betts could, in an action on the bond, plead an equitable plea in discharge upon the facts stated—which are not denied; and if he could, and should succeed upon it, which he would, that would certainly determine his liability on that bond.

I think I should look upon his rights as they are in substance and effect, and as he can make and perfect them to meet every requirement of rigid law; rather than by the mere imperfect form in which they happened to be at the time of his election.

I think, if Betts had contracted for the purchase of land, or for the grant of a lease for years, and had completed those acts of part performance which a Court of Chancery receives as sufficient for its jurisdiction, in lieu of the formal written contract required at law, I should hold that he was disqualified from being elected by reason of such a contract, though he could maintain no action upon it at law, and his remedy lie only in equity.

If, therefore, this disqualification includes such a case, it should exclude the case of a person nominally and formally a contractor at law, but not so in truth, and able to be declared not to be so, even at law.

I am also of opinion that the facts show that Betts was entirely discharged from all liability upon his bond, and not only from further liability upon it from and after the 23rd of March.

I must discharge this proceeding, with costs, to be paid by the relator.

Summons discharged.

COUNTY COURTS.

(*Reported by* WARREN TOTTEN, Esq., *Barrister-at-Law*)

GORE BANK v. EATON, ET AL.

Insolvent Act of 1864—*Compulsory liquidation by secured creditor—Merger of liability in higher security—Requirements of sub s.c.* 7, *of sec.* 3, *of Insolvent Act—Setting aside attachment.*

The above named Andrew Eaton and James McWhirter, miller and commission merchant, having respectively drawn and accepted bills of exchange, and discounted them with the Gore Bank to the amount of $18,000, the Bank, on the 30th day of November, 1866, took a mortgage from Eaton to secure the whole indebtedness. On the 11th of March, 1867, the Gore Bank put their debtors above named into insolvency. The *fiat* for the writ of attachment was made upon two affidavits of Robert Park, Esq., manager at Woodstock, and two corroborative affidavits. The manager stated in substance the indebtedness, reciting the several bills of exchange, and that to the best of his knowledge and belief, the defendants were insolvent within the true intent and meaning of the Insolvent Act of 1864, and have rendered themselves liable to have their estates placed in compulsory liquidation, and gives as his reason for so believing, that the bills of exchange are all due and unpaid and have been due and have remained unpaid from the times they respectively matured, and that he has frequently applied for payment thereof and that he believes

the defendants have not the means or property sufficient to pay the said claims in full. In his other affidavit he says that the defendants have a considerable quantity of grain in a warehouse in Woodstock. That he had good reason to believe and verily did believe that the defendants were immediately about to remove and dispose of the said grain with intent and design to defraud the plaintiffs. The corroborative affidavits stated that they were acquainted with the defendants and were aware of the indebtedness, and that to the best of their knowledge and belief they were wholly unable to pay the amount of the indebtedness, and had not sufficient property or means to pay the same, and that the defendants were insolvent to the best of their knowledge and belief.

This was an application by petition presented to the judge of this court, to set aside the order and writ of attachment issued in this cause, upon various grounds stated below.

Beard, in support of the petition, objected,

1st. That the attachment was irregular in not being made returnable properly. It being made returnable on a day certain, instead of after the expiration of five days from the service.

2nd. That there were no sufficient grounds stated in any of the affidavits to warrant the issuing of the attachment, that the facts and circumstances charging the act of insolvency should be positively stated, and not according to belief.

3rd. That the plaintiffs do not show themselves to be creditors, and that they could not proceed jointly in bankruptcy on these bills. He cited Con. Stat. U. C. cap. 42, sec. 23, contending that the proceedings being in *rem* and not in *personam*, they were not authorized by this act.

4th. That there was not any debt due, because the liability on the bills was merged in the mortgage given by the defendant Eaton, 30th Nov., 1866. He cited *Price* v. *Moulton*, 10 C. B. 573; *Mattheson* v. *Brouse*, 1 U. C. Q. B. 272.

5th. That after an adjudication the grounds cannot be shifted, 30 L. T. O. S. 106; 10 Ves. 286; 9 Ves. 207; 10 Ves. 290; Ex. Sa. 9 L. T. N. S. 120.

6th. That the adjudication cannot be supported because the debt has been secured to plaintiffs to the full amount. Sec. 5, sub-sec. 5 of the Act of 1864. That the plaintiffs are out of court, having full security. As to the value of the security, he referred to the affidavits filed, that the plaintiffs required it to be insured to the amount of $7,000, which showed the value they placed upon it. That our act was *pari materia* with the English Act, 24 and 25 Vic. cap. 134, sec. 97, sub-sec. 1. That these securities, being recent, repelled any presumption of fraud as to the dealings of the defendants with regard to the rest of their property.

7th. That the plaintiffs cannot maintain the adjudication, because they have given time, and that the short form of mortgage given in the statute 27 and 28 Vic. cap. 31, shows that time was given, Tudor's L. C. 260; that the clause showing that the mortgagee is to have possession, pp. 220, 216, 223 of the Act, shows that the plaintiffs did give twelve months time, and the proviso means that they would give further time after the expiration of the twelve months.

8th. That the affidavits show that the Royal Canadian Bank was to make certain advances, and the affidavit of Mr. Burns, shows, that under the warehouse receipts, the grain in store was secured to the Royal Canadian Bank for advances. That the sale was valid under the two acts recited therein, and vested the property in the Royal Canadian Bank, and showed there was no fraud. As to what is an act of bankruptcy, he cited *Tims* v. *Smith*, 1 Hil. & C. 849; *Whitman* v. *Claridge*, 9 L. T. N. S. 451; *Exp. Colmaere* v. *Colmaere*, 13 L. T. N. S. 621; *Buckliston* v. *Cook*, 6 Coll. & B. 297; *Farrell* v. *Reynolds*, 11 C. B. N. S. 709. That the sale was not a sale of all the property, but of part, and not to secure an antecedent debt, but to secure advances.

Ball, and with him, *Richardson*, contra, contended that under the amended act, the judge may name a day for the return of the attachment, but if the return day was wrong, he asked to amend, as in *Re Owens*, 3 U. C. L. J. N. S. 22; that the form "F." only requires the party to swear to his belief, as to the facts and circumstances, and that having complied with the requirements of the act in this respect, the affidavits were sufficient; that the defendants had an interest in the grain which might be attached; that the statute 22 Vic. 642, shews that the defendants were jointly liable on the bills, and the affidavits showed that they were partners as to the grain. (Mr. Ball put in two bills of sale, one made by McWhirter to White for $250, and one by Eaton to T. J. Clark for $600, to which Mr. Beard objected, on the ground that they did not relate to any question in issue. Mr. Ball cited *In re Lilbun*, 12 L. T. N. S. 209; *Graham* v. *Chapman*, 12 C. B. 85.) That as to the merger the bank had the right, under 25 Vic. cap. 416, to take additional security for the payment of their bills, without loosing their remedy on the bills; that the grain did not become the property of the Royal Canadian Bank, till the debt becomes due; that the warehousemen were the parties removing the grain; that the receipts were not indorsed as meant by the statute; that the stuff must be in store, and that the bank cannot take security on property not in *esse*. See schedule H.

McQueen, Co.J.—I do not see that the petitioners have been in any way prejudiced by the attachment being made returnable on the 22nd March, a day certain instead of after the expiring of five days from the service thereof, as the Amendment Act 29 Vic. cap. 18, sec. 8, provides, as it appears from the date of the service thereof on the petitioners. They have had the advantage of having the period for presenting their petition extended, by the irregularity. The irregularity may now be amended, and the plaintiffs are at liberty to amend if they think proper to do so. *Re Owens*, 3 U. C. L. J. N. S. 22.

The adjudication, if the *fiat* for the attachment may be termed such, is not, I am inclined to think, founded on sufficient materials to support it. The 7th sub-sec. of sec. 3, is, that in case any creditor by affidavit (form F.) shews to the satisfaction of the judge that he is a creditor of the insolvent for a sum of not less than $200, and also shews by the affidavit of two credible persons, such facts and circumstances as satisfy such judge that the debtor is an insolvent within the meaning of this Act, and that his estate has become subject to compulsory liquidation, such judge may order the issue of a writ of attachment, &c. Sec. 3 and its sub-sec., and sub-sec. 2 and 3 of sec. 3, point out the different cases in which a debtor shall be deemed insolvent and his estate shall become subject to compulsory liquidation.

The requirements of sec. 3, sub-sec. 7, are, 1st. That the creditor shall satisfy the judge by his own affidavit, or that of his agent, that *he* is a creditor for a sum of not less than $200. 2nd. He must shew by the affidavits of two credible persons, such facts and circumstances as satisfy such judge, that the debtor is insolvent within the meaning of the Act, and that his estate has become subject to compulsory liquidation.

The statements in the affidavits as to the facts and circumstances, must, I think, concur in relating to some one or more of the acts of insolvency, designated in the different classes of cases pointed out in the Act. As subjecting the estate of the debtor to compulsory liquidation, see sub sec. 8 of sec. 3.

It was admitted on the argument, as I understood, that the proceedings of the plaintiffs were founded on sub-sec. 6 of sec. 3, and that the act relied upon as subjecting the estate of the defendants to compulsory liquidation, rested upon the facts and circumstances of the defendants being possessed of a considerable quantity of grain in a warehouse in the Town of Woodstock, which they were immediately about to remove and dispose of with intent and design to defraud the plaintiffs. Now such being the case, the affidavit of Mr. Park to support the act of insolvency relied upon for these proceedings is, I think, insufficient, as his statement of the facts and circumstances has not been corroborated, as it seems to me the act requires, by the affidavit of another credible person. The evidence then being insufficient as to the act of insolvency relied upon, the adjudication cannot be sustained, and the attachment must be superseded. I cite as authorities upon this point, *In re Gillespie*, a bankrupt, 2 U. C. Jurist 2; *In re Rose*, a bankrupt, Ib. 14, in addition to the authorities quoted by Mr. Beard.

Various other objections have been raised as to the validity of the adjudication and the writ of attachment, and some of them are, I am constrained to say, very formidable. Entertaining the views I have endeavoured to express, as to the right of the defendants to have this attachment set aside, I need not I think allude to all of the objections urged, but there are some of them that call for particular observation, on account of the important interests involved in this case. The petitioners, besides disputing any act of insolvency committed by them, impeach the validity of the plaintiffs claim on several grounds, and some of those grounds are entitled to the most attentive consideration.

The objection that the plaintiffs cannot maintain this suit—1st. Because the defendants liability on the bills of exchange was merged in the mortgage given by the defendant Eaton 30th November, 1866, reciting these bills, 2nd. Because the proviso in the mortgage, with a covenant for payment, extends the time of payment of these bills. 3rd. Because the plaintiffs are creditors holding security and are only entitled to prove on the estate for the difference between the value of the security and the amount of their claim,—seems to me to be unanswered. Undoubtedly the plaintiffs in their corporate capacity may take mortgages on real and personal estate by way of further or additional security for debts contracted to the bank in the course of its dealings, but the enactments conferring upon banks such privileges, only places them on a footing, in these respects, with private persons, and do not, to favor them, abrogate that general rule of law which prohibits inconsistent remedies on distinct securities of different degrees for the same debt. The same principle of law governs all transactions.

The question then is, whether upon the facts appearing as stated, the taking of the mortgage from the defendant Eaton for the amount intended to be secured to the bank by the bills of the defendants attached to the mortgage security, does not extinguish the claim of the plaintiffs upon the bills; the debt in both cases being identical. I have not failed to notice that only two of the bills were due, when the mortgage was given.

The doctrine with regard to such questions appears to me to be pretty clear, and I think the authority cited, *Price* v. *Moulton*, 10 C. B. 573, and *Mattheson* v. *Brouse*, 1 U. C. Q. B. 272, govern this case. In the former, Maule, J., after remarking on the facts of the case before the court, says, "I think it is quite clear that a man cannot have a remedy by covenant and by assumpsit, for the same debt, the two are wholly incompatible and cannot co-exist. If the promise was made before the covenant, the latter must prevail. *The intention of the parties has nothing to do with that.* I entirely agree with the *dictum* of Park, B., in the case of the *Norfolk Railway Co.* v. *McNamara*, when he says, if the bond or covenant had been for the identical debt, the plea would have been a good answer without the additional allegation that the instrument was given in satisfaction." The policy of the law is that there shall not be two subsisting remedies, one upon the covenant and another upon the simple contract, by the same person against the same person for the same demand. And in the latter case, Robinson, C. J., in delivering the judgment of the court, says, "If B. on the 11th of November had made a note to M. for the sum due him, payable on the 14th February, and had afterwards given him a mortgage for the same debt, with a covenant to pay the money on the 4th of March, it is clear that the debt due on the simple contract would be merged in the higher security, and there would no longer remain a remedy to M. on the note. But I see no substantial difference between that case and the present."

And I may now remark that I can see no substantial difference between the case just cited and the present. Then, again, I think the plaintiffs are seeking too much. They, being creditors holding security, could only, according to the rules of law in England and which should prevail here, proceed and rank on the estate for the difference between the value of the security and the amount of the claim.

What that difference would be, would be rather difficult to determine upon the contradictory statements contained in the affidavits as to the value of the property. I may very possibly be wrong in the conclusions I have come to, and if so I shall only be too glad to be corrected by an appeal to a superior court.

As I do not know what has been done since the writ of attachment was issued that may effect this property, the order will be to set aside the *fiat* and the writ of attachment, see *Smalcoun* v. *Oliver*, 8 Jurist 606.

ENGLISH REPORTS.

LILLYWHITE v. TRIMMER.

Nuisance—Sewage—Injunction—Material injury.

An injunction which would interfere with an important public object, such as draining a town, will not be granted on the ground of nuisance to a private individual, unless there is an existing nuisance which materially diminishes the enjoyment of health or the value of property. But, some nuisance at the time of filing the bill being admitted, the dismissal was without costs.

[V. C. M, April 29, 30.]

This was a suit by the owner and occupier of a mill, dwelling-house, and premises, on the banks of the river Wey, to restrain the Local Board of Health for the district of Alton, in Hampshire, from causing or permitting a nuisance to his premises, or injury to the health of himself and his family, by pouring the sewage of the district into the said river, and from diverting the rainfall and the spring-water which would have flowed into the river into their sewers. The defendant was clerk to the local board.

It appeared that the river Wey rose between two and three miles above the plaintiff's mill, and after passing through Alton, a town with the adjacent parish containing about 4,000 inhabitants, was checked in its course by three mills, which may be designated by the numbers 1, 2, and 3, before it reached the mill of the plaintiff. Between mills No. 2 and No. 3 a stream of some size flowed into the river. Above the town the Wey was admitted to be a clear and rapid stream, but between the mills its flow became sluggish, and the mud and weeds in it increased. The average width, exclusive of the mill-ponds, was about fifteen feet, and depth three or four feet in the middle of the stream.

The drainage works of which the plaintiff complained consisted of a main pipe or sewer proceeding from the town near and almost parallel to the course of the river to some tanks a short distance above mill No. 2, whence the sewage matter passed through filters composed of stones and charcoal into the river.

The plaintiff complained of the nuisance in July, 1863, by a letter to the defendant, and receiving an answer to the effect that the board were making considerable alterations in the filter tank at the outfall, which, when completed, they trusted would obviate all ground of complaint, he alleged in his bill that, relying on such representation, he made no further complaint until March, 1865. Some correspondence then ensued between the plaintiff's solicitor and the defendant with reference to a plan then contemplated for irrigating certain meadows adjoining the river with the sewage, instead of discharging it directly into the river, but the plaintiff was the owner of some and occupier of others of these meadows, and refused to consent, and for this reason, and on account of the low level of the meadows, the plan was given up. The bill was filed on the 5th June, 1865.

The plaintiff's case was, that before the construction of the drainage works in 1862, the water of the river down to his mill was perfectly pure, and abounded with fish, especially trout; that it was until then used not only for watering cattle, but for drinking, washing, and other domestic purposes; that the weeds growing in the stream were clean and easy to cut, and when cut floated away without causing any offensive smell; and that the mud deposited in the channel of the stream and mill-pond was not offensive; that the sewers made in the year 1862 diverted much of the rain and spring water which would have found its way into the river in a pure state; that soon after the construction of the works the river became so foul by reason of the sewage poured into it, that a peculiar fungus and scum floated upon it; that the numbers of the fish had been greatly reduced, the trout had almost entirely disappeared, the character of the weeds had changed, the channel being nearly choked by masses of the *anacharis* or American weed, which was very difficult to cut, and when cut gave off a most offensive gaseous vapour, so that it was very difficult to induce any labourers to undertake the work of cleaning the stream; and that the health of the plaintiff and his family had been seriously affected, and that they were no longer able to drink or use the water even for watering cattle.

The defendant's answer was in substance to the effect that the river had always within the memory of persons living been polluted by drains and refuse from the houses in Alton, and in particular from the paper-mill No. 1, and been quite unfit for drinking, brewing, or cooking; that in 1840 a large brick sewer was constructed, and a quantity of filth thereby discharged into the King's mill-pond, and that actions having been brought in 1860 by the owners and occupiers of mill No. 1 on account of the nuisance, the board was constituted for the purpose of effectually draining the town; that in consequence of the use of chloride of lime, and other chemicals, at the paper-mill No. 1, and the sheep-washing and poaching, the fish had diminished in numbers some years previous to 1862. The defendant admitted that some subsoil and percolating water might be intercepted by the main sewer, but believed that below the outfall the river was fuller than before. After the plaintiff's complaint, and in August, 1863, the board made some considerable improvements in the filter-tanks, and believed that they were satisfactory, the effect being that all solid matter was arrested, and the liquid passed into the river almost colourless and inodorous. The discharge of the sewage might have had a trifling effect on the weeds, but not a material one. That the vicinity of the plaintiff's house and premises were affected in some degree by the works of the board was admitted, but the injury was denied to be excessive, and the occupiers of mills 2 and 3, the effect on which must have been far greater, had not complained, nor had the rents of those mills (held on yearly tenancies) been raised. The board had abandaned their scheme of irrigation, and in June, 1865, by the advice of the Local Government, Act Office in London, called in the assistance of Mr. Lawson, C. E. He recommended another pipe for the sewage, and that the subsoil water passing through the existing pipe should be used to work a turbine for pumping up the sewage to a higher level, whence it might be applied for purposes of irrigation. This plan was not adopted, the water power being considered insufficient, and several other plans were considered and rejected. The board claimed to have consulted the interests of the inhabitants of Alton, and that the sewerage works had been and were acknowledged to be very beneficial.

There was a conflict of evidence both as to the former and existing condition of the Wey, the occupiers of mills Nos. 2 and 3 (to whom however the discharge of the sewage water appeared to be sometimes an advantage, when the river above the outfall was dry) supported the defendant's case. Drs. Letheby and Frankland gave evidence for the defendant, and there was no scientific evidence for the plaintiff, whose case rested mainly on the evidence of himself and his servants. Weeds had for some years been allowed to accumulate in the plaintiff's pond, and the scientific as well as local witnesses attributed any offensive smell from the river in summer to this cause. The cause came on for hearing on the 20th February, but as it appeared that some operations were going on which would considerably abate the nuisance, if any then existed, and that much had been done since the evidence was closed, it was on the suggestion of his Honour agreed that a reference should be made to Mr. Bazalgette, to report on the present state of the drainage works and of the river, and whether the latter was in such a condition as to be a nuisance to the plaintiff, and if so to advise what should be done, and that the cause should stand over for that purpose. Mr. Bazalgette accordingly made his report, the substance of which was, that at the time of his visit (in March), no part of the river could be termed offensive so as to create a nuisance, but that he was informed that in summer, when there was little water in the stream, and the weeds and slime rising to the surface accumulated at the mill heads, they were very offensive The quantity of sewage entering the tanks was estimated at from 80,000 to 125,000 gallons per diem. The sewage was so much purified before its discharge into the river that it could not be said to create a nuisance, but, as the filters were apt to become clogged, he recommended that to prevent its becoming injurious hereafter, it should be utilized by way of irrigation on the lands near to the outfall, for which purpose it might be pumped up to a higher level by a small steam engine. Some bottles filled with water taken by him from the outfall were produced, and it appeared to be clear and pure.

Baily, Q. C., *Pearson, J.*, Q. C., and *Stevens*, for the plaintiff. The nuisance might be less at certain periods of the year and in some conditions of the atmosphere than in others, but if there was any nuisance the plaintiff had the right to an injunction: *Attorney General* v. *Council of the Borough of Birmingham*, 4 K. & J. 536, 6 W. R. 811; *Cator* v. *Lewisham Board of Works*, 13 W. R. 254. Referring to Mr. Bazalgette's reports, there is at any rate a prospective nuisance: *Goldsmid* v. *Tunbridge Wells Commissioners*, 14 W.R. 562. The delay was material only when the application was interlocutory: *Johnson* v. *Wyatt*, 2 D. J. & S. 18, 12 W. R. 234. They also referred to *Attorney General* v. *Richmond*, 14 W. R. 686.

Osborne, Q. C., and *Jason Smith* (for *Surrage*), insisted that there was no nuisance except that caused by the plaintiff's neglect in cleaning his pond. The court would not interfere on the ground of anticipated nuisance: *Attorney General* v. *Mayor of Kingston-on-Thames*, 13 W. R. 889. In the cases in which injunctions had been granted there had been no filtering and deodorising works as there were here.

Baily, in reply, relied on the admission in the answer of there being some nuisance, which gave the plaintiff a right to an injunction; and, if the nuisance were not abated, such injunction would do the defendant's board no harm.

MALINS, V. C., said that the principles involved in this case were well settled; that however desirable public improvements might be, if you could not effect them without interfering with private rights, private rights must prevail, and those who desired such improvements must effect them as best they could; but that, on the other hand, if there was any great and important public object to be effected, such as the drainage of a town, one of the difficulties and increasing difficulties of the present age, such objects should not be wholly overlooked, and the court ought not to put any difficulty in the way of effecting such object if it could be avoided. As to the case before him, he was satisfied that the sewage poured in by the sewer constructed in 1840 was of a most offensive character, and that it was a gross exaggeration to say that before 1862 the stream below the town was a perfectly pure stream, the water of which was fit for drinking and domestic purposes, and that such a misstatement by the plaintiff, and the circumstance that against a most important public work being carried out he stood alone in his opposition, were not to be disregarded. Every fact stated by him with regard to the injuries he sustained was contradicted by witnesses who, if he did sustain those injuries, must in the nature of things sustain still greater injuries. In answer to the suggestion of the plaintiff's counsel that there were other means of draining the town, as that recommended by Mr. Bazalgette, no evidence had been brought to show that the Board could acquire the land necessary for that purpose, and when they had previously sought to do so, the plaintiff had stood in their way. It had been pressed upon him that it was a mere question whether there was a nuisance or not; that if there was, he was bound to interfere, and not to regard the extent of the nuisance. He had, however, always understood it to be the doctrine of the court that in all these matters you must have some regard to the balance of inconvenience, and if the extent of inconvenience sustained by the plaintiff was of a trifling nature, such as might be readily compensated for in money, you could not and ought not to interfere with the rights of others in a matter of so much importance as the drainage of a not inconsiderable town.

His Honour then referred to the decision in *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, in which case he considered the injunction to have been granted because they were causing an unmistakable nuisance by pouring refuse into a stream which they had no occasion to use for that purpose, or which they could have used in such a manner as to produce no material effect, and after reading a portion of the judgment of Lord Justice Turner in that case, continued:—Now, in an analogous case, for it is an analogous case, the interference with ancient lights, we have the rule laid down by Lord Eldon in the case of *Attorney General* v. *Nichol*, and since, after some fluctuation of opinion, established, that you are not to interfere with the operations of the defendant unless you

can show that they affect the enjoyment of the plaintiff's property to such an extent that the damages at law will be an insufficient compensation. Upon the same principle the court will not interfere in these matters of public works, unless it can be shewn that there is such an extensive nuisance as materially to interfere with the enjoyment of health or the value of the property. His Honour then referred to the evidence, and said that upon the weight of evidence he was compelled to come to the conclusion that there was not such an extent of nuisance or injury to the plaintiff as would justify the interference of the court. There was also strong concurrent testimony that the nuisance, so far as it existed, was due to the gross neglect of the plaintiff in the cleanliness of his property, and at the suit of such a plaintiff, who had made a most exaggerated statement of his injury, he could not prevent by injunction such an important work as that of the defendant's board. The scientific evidence must, he admitted, be received with caution; but here it was all on one side, and showed that there is less impurity in the water flowing by the plaintiff's mill than in that taken from the Thames above Teddington Lock. He considered that Mr. Bazalgette's report corresponded with the weight of evidence in the case, and that without disregarding the principle laid down in *Attorney General* v. *The Council of the Borough of Birmingham*, where there was a material private injury, he should, unless such were the case, refuse to grant an injunction which would have the effect of fettering the most important operation of cleansing a town and removing the sewage, done merely for the purpose of producing public health and as conducive to public convenience. The bill must be dismissed, but having regard to all the facts and the admissions in the answer, that there was then some injury produced by the works, and the strength of authorities on the subject, there was not a total want of justification for filing the bill, and the dismissal must be without costs.

CORRESPONDENCE.

Lists of Voters at Parliamentary Elections.

To the Editors of the Local Courts' Gazette.

Gentlemen,—I would like to ascertain your opinion as to the following question upon the Act relating to Parliamentary Elections:—

The *first* section of Chap. VI. of the Con. Stats. Canada, names certain persons as those "who shall not vote at elections;" the *fourth* section, those "who may vote at elections" (this was amended as to the amount of qualification, last year); and, finally, the *sixth* section says the Clerk is to make out a list of persons "who are entitled to vote."

Now, what I wish to know is, am I right in leaving off the list the names of those persons who are on the Assessment Roll, and named in the *first* section just referred to.

Your views on the above points will confer a favour on myself as well as others.

I am, &c.,

Town Clerk.

[Strictly speaking, perhaps the Clerk should only put upon the list the names of persons "entitled to vote," and therefore not include names of persons who come under the disqualifying clause. But the question immediately arises, how is he to know who are, and who are not disqualified? And even if he could ascertain this without fear of a mistake, might not circumstances, such for example as a judge or custom officer giving up his office before the election, entitle such person, if otherwise qualified, to vote? and if such course were adopted in making the list, the name of such person would not appear. But, however this may be, the practice is, so far as we know, and as in Toronto, for the Clerk not to take upon himself the responsibility of deciding what names are to be left off the list; and this would seem upon the whole, though the subject is not free from doubt, to be the safer course.—Eds. L. C. G.]

The Question of Division Court Costs.

To the Editors of the Local Courts' Gazette.

Gentlemen,—The communicated article in your July number, on the subject of "Division Court Costs," suggests a question of serious importance. I allude more particularly to the following paragraph:—

"As the business begins to fall off in these Courts very perceptibly everywhere, many officers appear to exert every possible ingenuity to charge what they legally can, and some, it is feared, go beyond the law."

Here are clearly and forcibly shewn, in a few words, some of the results of what is now pretty freely admitted to be a defect in our Division Court system, viz., inadequate remuneration to the officers of these courts.

When the tariff of fees was passed, and for some years afterwards, the business of these courts was such as to afford a living, more or less comfortable, to many of these officers, notwithstanding the insufficiency of the tariff. Indeed, if report is to be credited, some of them had, from this source, incomes scarcely inferior to those of the Superior Court Judges. This is now entirely changed. The business has decreased by degrees until it is now only a very small proportion of what

it has been. In some courts, within my own knowledge, there is scarcely one-eighth of the business now done that there once was. A clerk, grown grey in the service, well fitted in all respects for his office, and who has had nearly a thousand suits in a year, returns $56 as his last half-year's income. Another, who has had four hundred suits in a single court, returns a little over $100. These may be exceptional cases; but I think it is within the mark to assume that, throughout the Western section of the Province, the business of these courts has been at least four times as great as at present.

It is not necessary to discuss the reason for this change. We must accept it as we find it; and with it the stubborn and important fact, that the tariff of fees, which once gave some. thing like a reasonable allowance to clerks and bailiffs, does so no longer. The paragraph quoted shows some of the results. Many of these officers have no other means of subsistence. To eke out a living for themselves and their familiss, they are obliged to "exert every possible ingenuity to charge what they legally can;" and from this it is only one step, under the strong temptation, to "go beyond the law."

Another serious result is the difficulty, when vacancies occur, in getting suitable persons to accept, *and attend to*, these offices. Except in cities and large towns, scarcely any person will now take either of the offices, and attend to that alone, or give it his undivided or even his best attention. Nearly every applicant has already some business or occupation taking up a good part of his time, and wishes the office merely to fill up spare time, or thinks that the fees would be an acceptable addition to his income, and that these duties would not interfere much, if at all, with his other affairs. In such cases, the proper performance of these duties is too apt to be considered a mere secondary matter—the business of the courts carelessly attended to or neglected, the interests of suitors prejudiced, and the courts themselves brought into disrepute.

We have, then, the tendency on the one hand towards an undue forcing of the business, soliciting of suits, multiplying proceedings unnecessarily, and stretching the tariff to or beyond its utmost limits, by those who *must* make a living out of the office; and on the other hand, an indifferent attention to, or utter neglect of, the duties of the office, by those who take it merely as a make-weight to their ordinary business.

I do not wish to be understood as making a charge of extortion or neglect against these officers as a body, or any of them individually,—I only wish to point out the ineveitable tendencies of the present position of affairs with the view of calling public attention to the necessity for a remedy.

What this remedy should be, is the question suggested by the article referred to. The reply, in general terms, would be to pay these officers better; but a difficulty arises in shewing how this is to be done. In my opinion, given very diffidently however, the most feasible method would be to remodel the tariff, by giving higher fees on several items, and, more especially, allowing fees for many services which clerks and bailiffs have now to perform for nothing, and which they may justly feel to be a hardship. Other methods have been suggested, such as paying these officers by salary, funding the fees, and making up the deficiency from Municipal or Provincial sources, or increasing the emoluments by diminishing the number of the courts.

I shall at present offer no argument for or against any particular course, in the hope that you, or some of your correspondents of greater ability and experience than myself, may discuss the question thoroughly and practically, with a view to bring about a remedy by legislative interference.

NOVICE.

APPOINTMENTS TO OFFICE.

CLERK OF THE CROWN IN CHANCERY.

EDWARD JOSEPH LANGEVIN, Esquire, to be Clerk of the Crown in Chancery, in and for the Dominion of Canada. (Gazetted July 13, 1867.)

CORONERS.

JOHN DAVENPORT ANDREWS, of Little Briton, Esquire, M.D., to be an Associate Coronor for the County of Victoria, in the Provrnce of Ontario. (Gazetted July 13, 1867.)

TO CORRESPONDENTS.

"AN OLD SUBSCRIBER."—We cannot undertake to answer your question in the present position of the case, even if we should otherwise be inclined to do so. We have no doubt the learned judge of the County Court will give due attention to the matter.

"TOWN CLERK," "NOVICE," under Correspondence. "A JUTICE OF THE PEACE:" "T. A. AGAR;" "C. D.," crowded out—will appear next month.