DIARY FOR NOVEMBER.

1. Wed. *All Saints' Day.* Clerks of Local Municipalities to make out rolls of lands of non-residents whose names are not on assessment rolls.
5. SUN. *22nd Sunday after Trinity.*
12. SUN. *23rd Sunday after Trinity.*
16. Thur. Examination of Law Students for call, with Honors. Last day for service for Co. Court.
17. Fri. Examination of Law Students for call to the Bar.
18. Sat. Exam. of Articled Clerks for certificate of fitness.
19. SUN. *24th Sunday after Trinity.*
20. Mon. Mich. Term begins. Articled Clerks and Law Students to file certificates with Secretary of Law Society.
21. Tues. Exam. of Law Students for Scholarships.
23. Thur. Inter-Exam. of Law Students and Artic. 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. *25th Sunday after Trinity.*
27. Mon. Paper Day, Q. B. New Trial Day, C. P. Last day for declaring in County Court.
28. Tues. Paper Day, C. P. New Trial Day, Q. B.
29. Wed. Paper Day, Q. B. New Trial Day, C. P. Last day for setting down and giving notice of rehearing.
30. Thur. *St. Andrew.* Paper Day, C. P. Open Day, Q.B.

The Local Courts' AND MUNICIPAL GAZETTE.

NOVEMBER, 1871.

MEETING OF THE COUNTY JUDGES.

The recent meeting of the County Judges, in Toronto, was, we understand, very numerously attended. It was purely a private one, and properly so, because the subjects discussed did not necessarily require publication in the public press.

The isolated position of County Judges is not without disadvantage to the Local Bench; indeed, one of the greatest advantages in centralization of Courts is the opportunity which the Judges have, as in the case of the Judges of our Superior Courts, of almost daily conference and intercommunication.

The result of the meeting cannot fail to be of profit to all who attended it, for we have been informed that the time was improved in discussing subjects of common interest, for instance, the administration of the Attorney-General's Act for the speedy trial of criminals before the County Judge—the practice in the County Judges' Criminal Courts—the Division Court procedure—Jurisdiction under the Municipal and Assessment Acts—Appeals to the Sessions, &c. The Judges no doubt found interchange of thought in the matters discussed very advantageous and eminently calculated to secure uniformity of procedure and prevent that diversity of practice which to some extent prevails. The concurrent testimony was strongly in favor of the County Judges' Criminal Courts as a most beneficial and economical method of disposing of criminal charges; and it would appear that all over Ontario prisoners have largely availed themselves of the privilege (we think we may so call it) of being promptly tried by a Judge.

There was one point discussed and determined which we have particular pleasure in noticing, though some possibly may not see the importance of it. After being canvassed in the meeting, a very decided majority pronounced in favor of the practice of the Judges wearing the gown in the Division Courts. Those who had not done so hitherto determined to wear the gown hereafter, and very properly so, for there would be little use in taking a collective expression upon such matters, if, after discussion, the views of the majority did not prevail. Besides, the practice is right in itself, and emphatically so since it has been decided by the Queen's Bench in *Re Allen*, that only professional men have the right to be heard as advocates in Division Courts. The readers of the *Law Journal* will remember that from the first, and persistently, we have advocated the practice of wearing the gown; and although the gentlemen who did not do so were evidently not persuaded by our argument, they have had the good taste, and, we will venture to add, the good judgment, to fall in with the resolution of the collective body of their own order.

We understand the Judges are to meet annually for the purpose of mutual conference, assistance and advice, in order to promote uniformity of practice and to increase their public usefulness—the fourth Tuesday in June being the time appointed, the place, Toronto. We are decidedly of opinion that a more praiseworthy step could not have been taken, and hope that all the County Judges in the Province, without exception, will so arrange their appointments as to enable them to attend the annual gathering.

The Chief Justice of the Court of Appeal sits in the Court of Queen's Bench this term, in place of Chief Justice Richards. Whilst regretting that the state of health of the latter is such as to render necessary a cessation from work, all on the other hand were pleased to see the former again "in harness," looking so well and vigorous after his partial rest.

SWEARING.

[COMMUNICATED.]

(Continued from p. 145.)

So much for the mere form, which philosophy and reason concur in asserting to be immaterial to the efficacy of an oath. "Forma jusjurandi," writes Grotius, "verbis differt: re convenit," and on a far greater authority, that of the Saviour: "Who swears by the temple, swears by the God who inhabits it." "All that is necessary to an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth and avenger of falsehood," said Lord Hardwicke, in his famous judgment in *Omichund* v. *Barker*, 1 Atk. 21, 48; Willes, 535, 545, and he goes on to quote Dr. Tillotson; "As for the ceremonies in use among us in the taking of oaths, they are not found in Scripture, for this was always matter of liberty, and several nations have used several rites and ceremonies in their oaths." We commend to all magistrates whose strict Protestantism may possibly obscure their mental vision, these closing words of the great Chancellor: "This course (*i. e.*, administering such oaths as are agreeable to the religious notions of the person taking them) does not in the slightest degree affect the conscience of the persons administering the oath, *and is no adoption by them of the religion conformed to by one of its votaries.*"

In the same way does the learned Puffendorf explain the nature of an oath: "Whatever name you give it, it is quite certain that an oath proceeds from the faith and conviction of the swearer, and it is useless unless one believe that the God whom he invokes is able to punish him for perjury:" 8 Puff. lib. 4, cap. 2, sec. 4; Bynkershoek Obs. Jur. Rom. lib. 6, cap. 2. And finally, the dictum of Heineccius, on the Paudicts, exactly meets the London case: "Since it is a religious asseveration, it is quite clear that the oath should be made conformable to each man's religious belief:" Hein. ad Pand. p. 3, ss. 13, 15.

In England, in earlier times, before she had widely extended her empire and her intercourse with the outer world, few cases would have been likely to arise in which it was necessary to consider the admissibility of the testimony of an alien or an infidel. The Jews were almost the only persons in the kingdom who could neither be commanded nor permitted to take the oath prescribed for Christians. Their case, accordingly, seems always to be had in view by the old jurists who turn their reflections to the matter. Yet we are told that no private cause requiring the evidence of a Jew arose before the Restoration. The Jews were banished from England in the 18th year of Edward I., and they began to return during the protectorate of Cromwell, having, indeed, previously sent over some influential men of their race to discover if Oliver were the Messiah. Hale, observing on the inconvenience that might often be experienced in cases of foreign contracts, most of which were transacted by Jewish brokers, distinctly laid down that the regular oath might be dispensed with in cases of necessity, and that an oath on the books of Moses should be accepted. He further pointed out that the oaths of idolatrous infidels were admitted in many countries, and in Spain particularly, special laws of relief touching them were enacted.

The reported cases, in which Jews, Turks, infidels or heretics were accepted as witnesses, are few: it is impossible to say in how many they were rejected. The probability is, that in those times, when religion was tainted with bigotry, and non-conformity was looked upon as a crime, the opinion of most men was that of Lord Coke, who, narrowly defining an oath (derived from Sax. *Eoth*) to be "an affirmation or denial by any *Christian*," insists that "a new oath cannot be imposed on any subject without authority of Parliament, but the giving of every oath must be warranted by Act of Parliament." And again: "None can examine witnesses in a new manner, or give an oath in a new case, without an Act of Parliament." (Coke, 2nd Inst. 479.) We may draw conclusions not over-flattering to the liberality of our ancestors from the preamble to the statute 7 & 8 Wm. III. cap. 34, for the relief of Quakers and Separatists, which recites that "They (the Quakers, &c.) were frequently imprisoned and their estates sequestered by process of contempt, issuing out of such Courts, to the ruin of themselves and families."

But the unjust and irrational theory, that in courts of justice no man should be thought capable of speaking the truth who did not go through a certain ceremony prescribed by an English statute, was forever cast down by the decision in *Omichund* v. *Barker*. The question there was whether the depositions of two gentlemen, subjects of the Great Mogul, rejoicing in the musical names of Ramkissenseat and Ramchurnecooberage respectively,

could be read in evidence. Their testimony had been taken in India by commission, granted, on application, by the Chancellor, and had been sworn to in the way peculiar to the Gentoo religion. The objection to the evidence was taken on behalf of the defendant, by that very Atkyns who reports the case, and upon whom, as Lord Hardwicke's reporter, is reflected some of the lustre which surrounds the memory of that great Judge. For the plaintiff, and against the objection, were Sir Dudley Ryder, then Attorney-General and afterwards Chief Justice, and Mr. Solicitor-General Murray, better known to posterity by the distinguished name of Lord Mansfield. The arguments of counsel and the decision of the Chancellor and the common-law Judges, whose authority he called to his assistance, are full of learning and wisdom. The opinion of Lord Coke, mentioned above, and chiefly relied upon by the defendant, was overruled, and a doubt discreditable to the law of England was set at rest. The views of Lord Hardwicke have been in part given above. In the case of *Atcheson* v. *Everitt*, Cowp. 389; Lord Mansfield thus alluded to that decision: "It has been truly said that since the case of *Omichund* v. *Barker* (and another case of great authority determined since) the nature of an appeal to heaven, which ought to be viewed as a full sanction to evidence, has been more fully understood. I there argued, and the Judges in delivering their opinions agreed, that upon the principles of the common law there is no particular form essential to an oath to be taken by a witness. But as the purpose of it is to bind his conscience, every man of every religion should be bound by that form which he himself thinks would bind his conscience most." These great opinions were at length adopted by the Legislature, and embodied in Imp. Stat. 1 & 2 Vic. cap. 105, which enacts that an oath, to be binding, must be administered according to the forms and ceremonies which the witness declares obligatory on himself.

Since, then, it was long ago established that our common law, in respect of evidence, is not more barbarous than the laws of antiquity, a magistrate need have no hesitation in accepting a witness not entirely orthodox, whether he calls for the Koran or smashes a saucer. In the case of the priest and the Douay Bible, it is surely not sophistical to say that the form of the oath would not have been violated if he had been permitted to exercise his own discretion. The oath is to be taken "by touching the holy Gospels." Since neither the "authorized version," nor the translation of the Douay College, profess to present the exact originals, the occasional difference of an idiom or a reading will not deprive the one of the sacredness necessary to confirm an oath, which the other possesses. The priest's candour in declaring his scruples is commendable; but the whole circumstance suggests an unpleasant reflection. Amongst the great number of witnesses who kiss the Protestant Bible in our courts, there must be many of the Romish faith. How many, unprincipled or fanatic, untroubled by the scruples which affected the conscience of the London priest, make the supposed necessity of conforming to a ceremony which ignorance and superstition whisper is not binding, a convenient excuse for perjury?

SELECTIONS.

THE ELECTION LAWS.*

The coming year of 1872 will be one of much importance to the Dominion. The first Parliament will have closed its career, and the people will be called upon to choose those to whom they desire the public affairs shall be entrusted. The machinery of government applicable to a large confederation having been devised and set up by the Parliament which shall have passed away, the approval or condemnation of its acts must be submitted to those from whom, under our English constitution, the power emanates. No uniformity in the mode of selecting the representatives to the House of Commons having been agreed upon by Parliament, the selection will be left to each Province, to be made according to its own laws. By an Act passed at the last session of the Dominion Parliament, 34 Vic. c. 20, entituled "The Interim Parliamentary Elections Act, 1871," and to be in force for two years only from the time of its passing, section 2, it is declared: "The laws in force in the several Provinces of Canada, Nova Scotia and New Brunswick, at the time of the Union on the 1st of July, 1867, relative to the following matters, that is to say, the qualifications and disqualifications of persons to be elected or to sit or vote as members of the Legislative Assembly, or House of Assembly, in the said several Provinces respectively; the voters at elections of such members; the oath to be

* We reprint this article, from *La Revue Critique*, as interesting at the present time, and as it gives information as to the law on the subject in the sister Provinces. We have not, however, examined it with the view of seeing how far the writer is correct in his statement of the law in this Province.—EDS. L. C. G.

taken by voters; the powers and duties of Returning Officers; and generally the proceedings at and incident to such elections, shall be provided by the British North America Act, 1867, continue to apply respectively to elections of members to serve in the House of Commons for the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick." There are certain exceptions, as to the polling in Ontario and Quebec lasting only for one day, and that the qualification of voters in Ontario shall be such as was by law in force on the 23rd of January, 1869; and a provision that the revisors in Nova Scotia shall add to the list of voters the names of such Dominion officials and employees as would have been qualified to vote under the laws in force in that Province on the 1st of July, 1867, but who may have been disqualified by act of the Legislature of that Province passed since that day. There are also provisions respecting Quebec, British Columbia and Manitoba, and on some other points, but not of a bearing necessary to be observed upon in this article.

Without commenting upon the propriety or impropriety of having the same House composed of representatives chosen under different laws, with different statutory qualifications, and elected in different ways, it is sufficient to say that Parliament in its wisdom thought proper to prefer such a course, leaving to the House hereafter to be chosen to determine whether the continuance of such a course shall be prudent for the future or not. The important questions of the qualifications of the candidates, of the nature and extent of the franchise, and of the mode of election, whether by ballot and simultaneous polling or not, will no doubt form during the discussions preceding, and the canvas pending the elections, the subject of many and exciting arguments.

Assuming that all are desirous of doing what is best for the country, it may be useful to compare the existing laws, and thus by contrast enable the people of all the Provinces to select from the legislation of each that which may be deemed best, not simply in theory but in practical working. For this purpose, it is proposed briefly to point out the salient features of the Election laws in the three Provinces of Ontario, New Brunswick and Nova Scotia (Quebec is not touched upon), and with reference to both British Columbia and Manitoba, it is manifest, a little time must be allowed to those two Provinces to develope their own systems.

In the three Provinces referred to, the Election laws differ very materially, both as to the qualification of the electors and the candidates, the mode and time of voting, and the restrictions imposed upon the exercise of the franchise.

First, as to the qualification of the voters:

In *Ontario*, every male person 21 years of age, a British subject by birth or naturalization, not coming under any legal disqualification, duly entered on the last revised and certified list of voters, being actually and *bona fide* the owner, tenant or occupant of real property of the value hereinafter mentioned, and being entered in the last revised assessment roll for any city, town or village, as such owner, tenant or occupant of such real property, namely:

In Cities, of the actual value of....		$400
In Towns	" "	300
In Incorporated Villages,	"	200
In Townships	"	200

shall be entitled to vote at elections for members for the Legislative Assembly.

Joint owners or occupiers of real property rated at an amount sufficient, if equally divided between them, to give a qualification to each, shall each be deemed rated within the Act; otherwise, none of them shall be deemed so rated.

"Owner" means in his own right, or in right of his wife, of an estate for life, or any greater estate.

"Occupant," *bona fide* in possession, either in his own right or in right of his wife (otherwise than as owner or tenant), and enjoying revenues and profits therefrom to his own use.

"Tenant" shall include persons who, instead of paying rent in money, pay in kind any portion of the produce of such property.

In *Nova Scotia*, every male subject by birth or naturalization, 21 years of age, not disqualified by law, assessed on the last revised assessment roll, in respect of real estate to the value of $150, or in respect of personal estate, or of real and personal together, of the value of $300, shall be entitled to vote.

Also, when a firm is assessed in respect of property sufficient to give each member a qualification, the names of the several persons comprising such firm shall be inserted in the list, but no member of a corporate body shall be entitled to vote or be entered on the list in respect of corporate property.

Also, when real property has been assessed as the estate of any person deceased, or as the estate of a firm, or as the estate of any person and son or sons, the heirs of the deceased in actual occupation at the time of the assessment, the persons who were partners of the firm at the time of the assessment, and the sons in actual occupation at the time of the assessment, shall be entitled to vote, as if their names had been specifically mentioned in the assessment, on taking an oath, if required, in accordance with the facts coming within the separate classification of the above provisions.

In *New Brunswick*, every male person 21 years of age, a British subject, not under any legal incapacity, assessed for the year for which the Registry is made up—in respect of real estate to $100, or personal property, or personal and real, amounting to $400, or on an annual income of $400—shall be entitled to vote.

Thus, in both Nova Scotia and New Brunswick the franchise is more extended than in Ontario. In Ontario it still savours of the real estate. In New Brunswick and Nova Scotia it is based upon personal estate, *per se*, as well as real estate.

In *Ontario*, certain persons are forbidden to exercise the franchise, whether qualified or not, namely, Judges of the Supreme Courts, of County Courts, Recorders of cities, officers of the Customs of the Dominion, Clerks of the Peace, County Attorneys, Registrars, Sheriffs, Deputy Sheriffs, Deputy Clerks of the Crown, Agents for the sale of Crown lands, Postmasters in cities and towns, and Excise Officers, under a penalty of $2,000, and their votes being declared void.

Again: no Returning Officer, Deputy Returning Officer, Election Clerk or Poll Clerk, *and* no person who at any time, either during the election or before the election, is or has been employed in the said election, or in reference thereto, or for the purpose of forwarding the same, by any candidate, or by any person whomsoever, as counsel, agent, attorney or clerk, at any polling place at any such election, or in any other capacity whatever, and who has received, or expects to receive, either before, during or after the said election, from any candidate, or from any person whomsoever, for acting in any such capacity as aforesaid, any sum of money, fee, office, place or employment, or any promise, pledge or security whatever therefor, shall be entitled to vote at any election.

No woman shall be entitled to vote at any election.

In *New Brunswick* and *Nova Scotia*, there is no restriction as to the exercise of the franchise by persons who are duly qualified. On the contrary, express provisions are made to enable presiding officers, poll clerks, candidates and their agents, when acting in the discharge of their various duties connected with the election, to poll their votes in districts where otherwise, but for such provisions, they would not be entitled to vote.

As to the Qualification of Candidates.

In *Nova Scotia*, the candidate must possess the qualification requisite for an elector, or shall have a legal or an equitable freehold estate in possession, of the clear yearly value of eight dollars.

In *New Brunswick*, the candidate must be a male British subject, 21 years of age, and for six months previous to the teste of the writ of election have been legally seised as of freehold for his own use of land in the Province of the value of £300, over and above all incumbrances charged thereon.

In *Ontario*, by the Act of 1869, 33 Vic. c. 4, passed to amend the Act of the previous session, entitled, "An Act respecting Elections of Members of the Legislative Assembly" (the 32 Vic. c. 21), it is enacted, "That from and after the passing of that Act, no qualification in real estate should be required of any candidate for a seat in the Legislative Assembly of Ontario; any statute or law to the contrary notwithstanding, and *every such last mentioned statute and law is hereby repealed.*"

Neither the said 32 Vic. c. 21, nor the preceding Acts of the same session, caps. 3 & 4, defining the privileges, immunities and powers of the Legislative Assembly, and for securing the independence of Parliament, point out what shall be the qualifications of a candidate, and the previous Acts in the Consolidated Statutes on the subject have been repealed.

By the 23rd section of 32 Vic. c. 21, 1868–9. the electors present on nomination day are to name the person or persons whom they wish to choose to represent them in the Legislative Assembly. There is no restriction, as in Nova Scotia, that a candidate must have the qualification of an elector, which, among others, is that he shall be a male subject by birth or naturalization, or, as in New Brunswick, specifically, that be must be a "male British subject."

In the Ontario Act, 32 Vic. cap. 21, sec. 4, it enacts: "No woman shall be entitled to vote," but there is no restriction in the 23rd section as to the sex of the person or persons whom the electors shall choose to represent them in the Legislative Assembly, nor is there any clause in the two Acts, caps. 3 & 4, above referred to, from which any such restriction can be inferred. The 61st section of 32 Vic. cap. 21, declares, "That no candidate shall, with intent to promote *his* election, provide or furnish," &c. But by the General Interpretation Act, passed by the Legislature of Ontario, cap. 1, 31st Vic. (1867–8), sec. 6, clause 8, it is enacted that "words importing the singular number, or the *masculine* gender, shall include more persons, parties or things of the same kind than one, and *females* as well as males, and the converse."

And by the 3rd section of the same Act the interpretation clauses were to apply to all Acts thereafter passed.

Thus it would appear, that if the electors present on nomination day, choose a female as a candidate, and, in case of a poll being demanded, she should be elected, she would be entitled to take her seat as a member in the Legislature of Ontario.

In this respect Ontario differs from the other two Provinces, and may be said to be in advance of both England and the United States on this point.

This difference—assuming that the above construction of the Ontario Act is correct—is one of so much discussion at the present day, that it may not be uninteresting to refer to a very important argument and decision which took place in the Common Pleas in England almost at the time the Act was under consideration in the Ontario Legislature, and which it is presumed must have come under the observation of the very able legal men in that House. The argument was commenced early in November, 1868, and judgment given in January, 1869. The case of *Chorlton*, appt. v., *Lings*, respt., L.T.N.S., 1868-9, 534, L. R. 4 C. P. 374, 5 C.L.J.N.S. 102. The name of Mary Abbott, with a large number of other women, appeared upon the lists of voters for members of Parliament for the Borough of Manchester. Her

name was objected to and struck off by the revising barrister. Her statutory qualification otherwise than as a woman was not disputed. On appeal from the decision of the revising barrister, the case was argued by Coleridge for the appellant, by Mellish for the respondent. The decision which was to govern the other cases as well as her own was that she had not a right to vote. In the course of the argument, some observations were made by the counsel and the judges, which will aid us in the construction to be put upon the Ontario Acts, bearing in mind that the question here is not the right of the woman herself to exercise a right or privilege, but *the right of the electors* not *to be restricted* in *the exercise of their rights—that is the right* of *selection*. And further, whether when in a particular statute, dealing with an entire question, a particular resolution is made with regard to a particular class of persons, it does not negative the application of any other restriction to the same class, than the restriction named, assuming that in other respects the requisitions under the statute are complied with. The Ontario Statute first gives the franchise to every "male person," &c., then as if that was not sufficiently explicit, as if to remove the very doubt which has been raised in England, and to show that the consideration of woman's rights and her position had not been overlooked, it declares "no woman shall be entitled to *vote* at any election." When it comes to the nomination of candidates, it requires the sheriff to call upon the electors present to name the "person" or "persons" whom they desire to choose without any restriction in such selection as in the case of the franchise to the *persons* being male. By a subsequent Act, c. 4, 1869, the legislature abolishes the qualification in real estate, thus removing the inference to be drawn as to night service and the feudal tenure referred to by one of the judges in *Chorlton* v. *Lings*. Then assuming that the selection is of a woman of full age—a feme sole—*compos mentis*—not under any restraint from infancy or marriage or any legal incapacity from crime—does she not come sufficiently under the term "person" to be within the Act. In the case referred to, Mr. Mellish in his very able argument against the construction of the English statute, which Sir John Coleridge was contending for; viz., that woman had the right to vote, because under Lord Romilly's Act, words imputing the masculine gender included the feminine, says; "No one can doubt that in this Act (that is the Representation of the People Act, 1867), the word "man" is used instead of the word "person" for the express purpose of excluding "woman," thereby admitting that if the word "person" had been used (in the absence of anything else in the Act, to control it) woman would have been included." Chief Justice Bovill, in referring to the Reform Act of 1852, and to the Representation of the People Act, 1867, says: "The conclusion at which I have arrived is that the Legislature used "*man*" in the same sense as "*male person*" in the former Act, and this word was intentionally used to designate expressly the male sex, and that it amounted to an express enactment and provision that every man, as distinguished from woman, possessing the qualification, was to have the franchise, and in that view Lord Romilly's Act does not apply to this case, and will not extend the word "man" so as to include "woman." The other judges, Willes, Byles and Keating, fully concurred with the Chief Justice as to the construction to be put upon the statute, saying that the words "man" and "male person," together with the context of the statute throughout, showed conclusively that it was not intended to confer the franchise on women. Judges Willes and Byles went further, expressing their opinion that women were under a "legal incapacity" from either being electors or elected; the latter observing that "women for centuries have always been considered legally incapable of voting for members of parliament, as much so as of being themselves elected to serve as members," and he hoped "that the ghost of a doubt on this question would henceforth be laid forever." Even the casual opinion of such eminent men is entitled to the highest respect, though the point actually under their consideration and decided by them, was the construction of a particular statute as to *the right of a woman to vote*, not as to the right of the electors to choose one as their representative. The language of the statutes before them was different from the language of the Ontario statute. The latter is the one which governs here. It professes to deal with the whole question—being essentially a question—with which the Ontario legislature had the exclusive power to deal. It classifies and deals with the voters and candidates separately and exhaustively, and throughout the whole contest there is nothing inconsistent with such a conclusion.

Ansley (Thomas Chisholm) in his able review of the Representation of the People's Act, 1867, and of the Reform Act of 1832, ably handles the whole subject, and differs entirely from the views laid down by the learned judges on the case referred to—not upon the broad question, but upon the construction of the statute. His work was written in 1867, their decision given in 1869. In the course of his work he gives Mr. Denman, Q. C., as authority for the statement that the word "person" used in an Act of the legislature of one of the colonies of Australia had given the franchise to women.

It is also further to be observed, that in the Imperial Act 33 and 34 Vic. c. 75, entitled "An Act to provide for Public Elementary Education in England and Wales," (passed in 1870, since the decision in *Chorlton* v. *Lings*), which regulates the distribution and management of the parliamentary annual grants, in aid of public education, and provides for such distribution and management by means of a board or school parliament, with great powers, chosen by election by the ratepayers, the word

"person" is used throughout with reference to those chosen to form the board, and under that designation women have been held eligible and taken their seats, notwithstanding that in speaking of such members the word "himself," and other words of the masculine gender only, are used. It would seem, therefore, taking all points into consideration, to require an arbitrary and unusual construction to be put upon such word, to deprive the electors of Ontario of the right of choosing a female representative for their own legislature, if they be so minded.

In all three of the Provinces persons holding offices of profit or emolument under the Crown, excepting members of the executive government, are debarred from holding seats in the Assembly. In all the three Provinces there must be a registration of voters, the foundation in all being the same, namely—the assessment list of the district—the details for the register of voters, simply varying according to the qualifications which give the vote, and which entitles the voter's name to be put upon the list—the exceptional instances in Nova Scotia being when the representatives of a deceased party, or the members of a firm assessed are entitled to vote: and in New Brunswick, when there has been no assessment in the parish for the year for which the list ought to be made up.

In Ontario the voting is *viva voce*.

In New Brunswick and Nova Scotia—by Ballot—introduced in elections in New Brunswick in 1855; in Nova Scotia in 1870.

The mode of conducting the Election.

The mode of conducting the election by ballot is very much the same in Nova Scotia as it is in New Brunswick, the most material distinction between the two being that in the several polling districts in New Brunswick the ballots are openly counted at the close of the poll at each polling place, in the presence of the candidates, or their agents, duly added up openly in the presence of all parties, entered in the poll books or check list, signed by the poll clerk, and countersigned by the candidates or their agents, and the ballots then forthwith destroyed, the countersigned poll book or check list with a written statement of the result of the poll at that district, with the signatures of the candidates or their agents is then forthwith enclosed, sealed up, and publicly delivered to the presiding officer to be transmitted to the sheriff to be opened on declaration day.

Whereas in Nova Scotia the ballot boxes, with the ballots, are sealed up and sent. This mode was in accordance with the law first introducing the ballot in New Brunswick, but, being found liable to abuse, was subsequently amended as above mentioned.

In Nova Scotia, the 17th section of the Act of 1870, introducing the ballot, abolishes the public meeting held by the sheriff on nomination day, but he is to attend at the Court-house or other place prescribed, between 11 a.m. and 2 p.m., for the purpose of receiving the names of the candidates, and he shall exclude all persons not having business in connection with the election.

In Ontario and Nova Scotia, in case of a general election, the polling must be simultaneous throughout the whole Province.

In New Brunswick it is not so; the sheriff or the presiding officer for the county or city selects such time within the writ as he deems most suitable for the convenience of the electors within his county.

As under the Dominion Act, with the exceptions pointed out, the elections are to be held under the laws which were in force on the 1st of July, 1867. The reforms introduced into Nova Scotia by the Act of 1870, of the ballot and the abolition of the hustings on nomination day, will not be applicable.—*La Revue Critique.*

APPOINTMENTS UNDER TREATY OF WASHINGTON.

Our readers will remember that the Treaty of Washington provides for a reference of the Alabama to a tribunal of five arbitrators, to be appointed by the United States, England, Italy, Switzerland and Brazil. In the case of refusal or omission to appoint an arbitrator, on the part of either the last three governments, Sweden and Norway are to be requested to fill the vacancies (Art. 1). These arbitrators are to meet at Geneva, "at the earliest day convenient after they shall have been named." All questions are to be decided by a majority of the arbitrators; and England and the United States are each to name "one person to attend the tribunal as its agent, to represent it generally in all matters connected with the arbitration" (Art. 2). Other articles provide for making up the written or printed case of each of the two parties, and for the preparation of an argument by the agents of the respective governments; and the arbitrators may, if they please, hear further argument from counsel. Under these provisions of the treaty, the United States has appointed Charles Francis Adams, of Massachusetts, and England, the Right Hon. Sir Alexander James Edmund Cockburn, Chief Justice of the Queen's Bench, as arbitrators. The Italian and Swiss appointments are still matter of rumor, and Brazil has not been heard from. Lord Tenterden and Mr. Montague Bernard (members of the Joint High Commission) are both likely, it is said, to receive appointments as "agents" on the part of Great Britain; while on the part of the United States the story is that J. C. B. Davis, Assistant Secretary of State, will act, with the assistance of C. C. Breman, a member of the New York bar, and author of a recent treatise on the Alabama claims. Sir Roundell Palmer is said to be retained as counsel by the English government; and according to the report current as we go to press, the United States is to

have as counsel Caleb Cushing, of Massachusetts, and Wm. M. Meredith, of Pennsylvania.

By Art. 12 of the treaty, the high contracting parties agree that all private American claims against England, and private English claims against America (other than those popularly known as the Alabama claims), arising out of acts committed during the period between April 13th, 1861, and April 9th, 1865, inclusive, shall be referred to three commissioners, to be appointed, one by the United States, another by Great Britain, the third by the two governments jointly; and in case the third is not so appointed within three months from the date of the exchange of the ratification of the treaty, then he is to be named by the representative at Washington of the King of Spain. These commissioners are to meet at Washington "at the earliest convenient period after they have been respectively named." Under this article it is announced that the Right Hon. Russell Gurney, Recorder of London, has been appointed by the English government. In our next issue we shall endeavour to give an accnrate list of all the appointments. The appoietments are all good, and redound greatly to the credit of both governments.—*American Law Review.*

MAGISTRATES, MUNICIPAL, INSOLVENCY & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

CRIMINAL LAW.—The defendant killed a number of rabbits, left them in bags in a ditch in the grounds where killed, as a place of deposit, and subsequently returned and took them away. *Held*, that the killing and taking away were one continuous act, and the defendant was not guilty of larceny, but felony.—*Reg.* v. *Townley*, L. R. 1 C. C. 315. *See* C.L.J. N.S. 294.

INSOLVENCY—SEPARATE ASSIGNMENTS BY PARTNERS.—E., living at Brantford, and James and John G., living in Dundas, carried on businees at Brantford under the name of E. & Co.; and James and John G. had also a separate business at Dundas, in which E. had no interest. On the 14th December, 1869, James and John G., as individuals, and as partners in the firm of James and John G., and as individual members of the firm of E. & Co., executed an assignment under the Insolvent Act of 1869, in Wentworth, of their and each of their estates to one F., an official assignee in that county. On the following day E. made an assignment of his estate, under the Act, to an interim assignee in the county of Brant, and F. was afterwards appointed assignee by the creditors. K. & Co., creditors of E. & Co., filed a claim in Brant under E.'s assignment, which other creditors objected to, and the assignee, having heard the parties, made his award. *Held*, that the County Judge of Brant had jurisdiction to hear an appeal against such award, although James and John G., the co-partners of E., had not joined in his assignment; and a mandamus was ordered directing him to hear and determine such appeal.—*In re McKenzie and the Judge of the County of Brant*, 31 U.C.Q.B. 1.

INSOLVENCY ACT — RETROSPECTIVE LEGISLATION.—The Insolvency Amendment Act of 1871 (34 Vic. cap. 25), is retrospective in its operation, and applies in a case where proceedings commenced under the Insolvent Act of 1869 were still pending at the time the later Act was passed.

Therefore, where insolvents who had ceased to be traders before the 1st Sept., 1869, applied for and obtained an order of discharge under sec. 106 of the Act of that year, the discharge was confirmed on appeal to the Supreme Court, the operation of the original statute having in the meantime been so extended by the amending enactment as to bring the case within its scope. —*In re Archibald et al, Insolvents*, 7 C.L.J. N.S. 300.

INSOLVENCY—COMPULSORY LIQUIDATION—OFFICIAL ASSIGNEE.—*Held:* 1. That an insolvent under the Act has no legal interest to plead an assignment made by him under the Act, in bar of proceedings on compulsory liquidation.

2. That in case of an assignment so made to an official assignee, non-resident in the county or place where the insolvent has his domicile, evidence must be adduced by the party pleading such assignment, that there is no official assignee resident in such county, and this notwithstanding that the sheriff, in his return to the writ of attachment, certifies that there is not an official assignee so resident, and that, in consequence thereof, he has appointed a special guardian.

3. That a petition to stay proceedings, filed by an insolvent after the expiration of five days from the demand of an assignment, on the ground that he has assigned to an official assignee, is too late. —*Martin* v. *Thomas*, 7 C.L.J. N.S. 302.

INSOLVENCY.—1. Under the English Bankruptcy Act it was *held* that a judgment creditor who seized goods under execution, but had not actually sold, before adjudication of bankruptcy, was entitled to sell the goods and retain their proceeds.—*Slater* v. *Pinder*, L. R. 6 Ex. 228.

2. A., owing a banking firm a certain sum, became bankrupt. A.'s trustee paid into the banking firm, £665 in trust for the creditors. The

said firm became bankrupt, and subsequently A.'s bankruptcy was annulled. *Held*, that the property in the £665 reverted to A., as if it had never passed from him, and that he could set off that sum against the amount he owed the banking firm.—*Bailey* v. *Johnson*, L. R. 6 Ex. 279.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

SALE OF GOODS—LETTERS AND TELEGRAMS.—The plaintiff, on the 14th June, by telegraph asked the defendants their prices for high-wines and whiskey. On the 16th defendants wrote, specifying the prices for quantities not less than a car-load, and requesting an order, which they said should receive prompt attention. On the 17th, the plaintiff telegraphed, "Send three carloads high-wines." Defendants answered, that the price had advanced, and refused to deliver at the price first named. It was admitted that the order was reasonable in point of quantity, and that defendants had the goods on hand, *Held*, that there was a complete contract, and that defendants were liable for not delivering.—*Harty* v. *Gooderham et al*, 31 U. C. Q. B. 18.

DOMICILE. — A British subject domiciled in France, had two illegitimate children by a Frenchwoman, whom he afterwards married, when the children were legitimated according to the law of France. *Held*, that the status of the children in England was to be determined by the law of France.—*Skottowe* v. *Young*, L. R. 11 Eq 474.

BILL OF EXCHANGE—BANKERS.—A bill of exchange payable at L.'s bank at N. was presented by the agent of the branch bank of E. at the former bank for payment, the latter bank having discounted the same for P. The bill was presented for payment in the morning; and instead of cash being given for the same, it was marked with the initials of L.'s bank, signifying, according to the usual custom of bankers, that the same would be honoured, and a "credit note" was given to the branch bank of E. for the same, to be honoured in exchange after the termination of business at four o'clock on the same day, and at the usual daily settlement among the bankers at N. Before four o'clock, however, L.'s bank discovered that the acceptor had stopped payment, and thereupon immediately applied to the agent of the bank of E. to cancel the credit note given by L.'s bank in the morning. This, however, was refused; but the bank of E. debited their customer P. with the amount of the bill as unpaid; and, in an action against them by P. for the amount, they (the bank of E.) being indemnified by L.'s bank,

Held, that on the presentation of the bill for payment, the initialling the same and giving a credit note, amounted to more than a mere provisional arrangement made for convenience sake between the bankers, and subject to a subsequent revocation by the parties; that such a recognition of the bill of exchange was in the nature of payment; and that, therefore, the bank of E. having received payment of the bill, were not entitled to debit the amount thereof against their customer; and that P., therefore, was entitled to recover. — *Pollard* v. *Bank of England*, 19 W. R. 1168; 7 C.L.J. N.S. 310.

ALIENAGE — OATH OF ALLEGIANCE — PETITION TO EXECUTIVE COUNCIL IN 1797.—In ejectment both parties claimed through one James Smith. The defendants claimed under Jonathan, his elder brother; the plaintiffs claimed through John, his younger brother, contending that Jonathan, being an alien, could not inherit. James, Jonathan and John, were all born in the Province of New York, before the Treaty of Independence in 1783, James about 1770, and Jonathan two years after, their father being a British subject. James and Jonathan came to Canada in 1792, and John in 1794. A copy of a petition to the Administrator of the Government of Upper Canada was produced, certified by the Clerk of the Executive Council, purporting to be signed by the three, one being a marksman, stating that they had come into the Province about four years before, and "had taken the usual oaths prescribed," and praying for a location of 200 acres each. The endorsements shewed that it was received on the 15th May, 1797, and a grant recommended on the following day.

James Smith remained in the Province until his death, in 1843, having lived on the land in question since 1804. Jonathan, in 1801, received a grant of land in this Province, which, among other things, provided that any one coming into possession of the land should within twelve months take the oath of allegiance; but in 1804 he went to live in the State of New York, where he continued till his death, in 1846. John remained in the Province, and died here in 1842.

Held, 1. That the petition was admissible as evidence, without any proof of the signatures.

2. The Court being empowered to draw inferences as a jury,—that it might properly be inferred that the three brothers had taken the oath of allegiance before some one properly authorized

3. That as to James, his remaining in the United States so long after 1782 would shew his determination to become an American citizen, in which case, without reference to our statutes, he, as an alien, could not transmit the estate either to John, through whom the plaintiffs claimed, or to Jonathan; but that under 9 Geo. IV. ch. 21, having taken the oath of allegiance, his disability was removed.

4. That as to Jonathan, in the absence of any thing shewing a previous intention to become an American citizen, his coming to this country, taking up land, and taking this oath, shewed a clear election on his part to become a British subject, and his return to the United States could not make him the less one.

It was *held*, therefore, that the plaintiffs' case failed, Jonathan being entitled to inherit.—*Montgomery* v. *Graham*, 31 U. C. R. 57.

Bills and Notes.—1. A company had power to issue "bonds, obligations, or mortgage debentures," to be sealed and registered; also, "to make, draw, accept, or endorse any promissory note, bill of exchange, or other negotiable instrument." The company issued instruments headed "£20. Debenture Bond," promising "to pay to the bearer" the principal, with interest, and sealed with the seal of the company. Interest coupons were attached, headed, "Debenture Bond, No. —, for £20. Interest Coupon, No. —." *Held*, that the instruments were promissory notes.—*Ex parte Colborne and Strawbridge*, L. R. 11 Eq. 478.

1. A. sent B., his agent, a bill to be presented for acceptance. B. presented the bill on Friday at two o'clock, and called on Saturday at half-past eleven, business hours closing at twelve, for the accepted bill. The bill, which had been accepted without B.'s knowledge, was mislaid, and B. departed without it. On Monday the acceptance was cancelled. *Held*, that it being the custom of merchants to leave a bill twenty-four hours for acceptance, and such period running beyond business hours on Saturday, B. was not guilty of negligence in waiting until Monday for an answer from the drawee.—*Bank of Van Diemen's Land* v. *Bank of Victoria*, L. R. 3 P. C. 526.

3. Promissory note as follows: "We, the directors of," &c., "do promise to pay," &c., with the company's seal affixed. *Held*, that the directors were personally liable.—*Dutton* v. *Marsh*, L. R. 6 Q. B. 361.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

In the matter of Sophia Louisa Leigh *

Custody of children—Con. Stat. U. C. cap. 74, sec. 8.

Upon an application by the mother, under Con. Stat. U C. cap. 74, sec. 8, for the custody of her infant daughter, four years of age, the husband and wife having separated:

Held, (after reviewing the cases decided under the corresponding English Act,) that the statute in question does not take away the common law right of a father to the custody of his child, but only makes the recognition of this paternal right conditional upon the performance of the marital duty, and subjects it, in some degree also, to the interest of the child.

If, therefore, upon an application of this kind, it appears that the husband and wife are living apart, the court will inquire into the cause of their separation, in order to ascertain

(1) Whether the husband has forfeited, by breach of his marital duties, this *primâ facie* right to the possession of his children. (2) And whether the wife, by deserting the husband without reasonable excuse, has relinquished her claim to the benefit and protection of the statute, which was intended "to protect wives from the tyranny of their husbands, who ill-used them."

[Chambers, May 17, 1871.—*Gwynne, J.*]

This was a petition, under Con. Stat. U. C. cap. 74, sec. 8, by Mrs. Henry Leigh, praying that her infant daughter, Sophia Louisa Leigh, aged four years, might be taken from the custody of its father and delivered to her.

It appeared, from the affidavits filed on the application, that the husband and wife had been living apart since April, 1870; the cause of separation alleged by the petitioner being her husband's ill-treatment of and cruelty towards her for eight years previous to that time. The husband, in reply, filed the affidavits and certificates of a large number of his neighbours, all of whom testified in the strongest terms to the high character which he had always borne in his social and domestic relations. He also fully met and disproved the allegation of the petitioner that on account of hereditary insanity in his family, it would be unsafe to entrust him with the custody of the child.

The material portions of the evidence, and the cases cited upon the argument, fully appear in the judgment.

Dalton McCarthy appeared for the petitioner.

William Boys for the respondent, Henry Leigh.

Gwynne, J.—In *Re Taylor*, 11 Sim. 178, which was one of the first cases that arose under the English Act, 2 & 3 Vic. cap. 54, it appeared that on the 20th October, 1837, Mrs. Taylor left her husband's house, alleging, in justification of that step, a charge of adultery, which she then preferred against him, upon grounds of which she afterwards admitted the entire insufficiency, and which were, in fact, wholly without foundation. Overtures for a reconciliation were immediately made by Mr. Taylor, and various negotiations followed; but Mrs. Taylor, by the advice of her friends, refused to return home. Circumstances occurred which convinced Mr. Taylor that his wife's affections were alienated, and that no *bonâ fide* reconciliation could be

* See *In re Kinne*, 6 C. L. J. N. S. 96, and the judgment of Adam Wilson, J., in *Re Allen*, Q. B. H. T., 1871 (not yet reported).—Eds. L. O. G.

expected; and he went to reside in France. Afterwards, in July 1838, Mrs. Taylor instituted a suit in the Consistory Court of London for restitution of conjugal rights. To this suit Mr. Taylor put in an allegation in bar, stating the circumstances under which his wife had left his house, and the charge she had made against him; and adding, that although she well knew the charge to be entirely devoid of foundation, she persisted in refusing to retract it. On the 5th February, 1839, the allegation was rejected by the court. Mr. Taylor appealed to the Arches Court, where the judgment of the Consistory Court was affirmed on the 20th June, 1839. He then appealed to the Judicial Committee of the Privy Council, pending which appeal the petition came on to be heard. At the time of the presentation of the petition, there were living five children of the marriage, two of whom were more than seven years old, but the other three were under that age, the youngest having been born on the 23rd May, 1837. The prayer of the petition appears to have been, that Mrs. Taylor might have access to her children.

For the petitioner, Mrs. Taylor, it was contended that the intention of the Act was to create a right in the mother to which the court should give effect in all cases of separation between husband and wife where the wife had not been guilty of criminal conduct: that the clause in the Act pointing out the criminality of the mother as the only cause which should exclude her from the benefit of the Act, distinctly recognised her general right in cases where no criminality could be imputed: that the Act created a positive right of access in the mother, which the court could not deprive her of: that the court was merely the instrument appointed by the legislature to put her in possession of her right: that it was the right of every innocent mother living in a state of separation from her husband; and that the discretion of the court was to determine the *manner* only in which the right was to be enjoyed, not to take it away: that the interest of the children was the only consideration which could be allowed to interfere with the mother's right.

The Vice-Chancellor of England, however, was in that case of opinion that the jurisdiction given by the Act was to be exercised solely in the discretion of the court; and that, pending the question in the Ecclesiastical Court, it would not be right for the court to say that Mrs. Taylor was entitled to have access to her children. Moreover, he was of opinion that the fact of her having, without cause, removed herself from her husband, was a sufficient reason why the court should not exercise the jurisdiction of ordering any access. Accordingly, no order was made on the petition.

In re Bartlett, 2 Col. 661, was an application under the Act, praying the delivery to the mother of two of her children, a boy and a girl under seven years of age, the girl being only two years of age; and that she might have access to her other children, four in number. It appeared that the wife's family had brought about an unhappy state of existence between the husband and wife; that on one occasion he had separated himself from her, and on returning to his house struck her; that he had been bound over to keep the peace towards her; and that he had, both in words and in writing, expressed himself towards her in a very violent and offensive manner. In giving judgment, the Vice-Chancellor held that the statute did not, as a condition of the interference of the court, require that the wife should have obtained or should be entitled to obtain a divorce *a mensâ et thoro*. "This," he said, "is a case in which the husband and wife are living apart from each other" (her brothers having removed her from his house), "her husband appearing to wish, and the wife objecting to, a reunion." He says also, "That she is clearly legally justified in living apart from him, it would be imprudent for me, upon the evidence before me at present, to say; but if she is not so, that she is not without excuse, not without apology, may, I think, be safely stated." He accordingly made an order for the delivery to the mother of her youngest child (two years of age), Mrs. Bartlett's two brothers undertaking for the proper care, maintenance and education of the child while in her custody. The order also made provision for her having access to the other children, and for access for the father to the youngest child so removed into the custody of the mother; and it was ordered that this child should not be removed from the house of Mrs. Bartlett's brothers without the leave of the court.

In re Fynn, 2 DeG. & Sm. 457 (A.D. 1848), was not a petition under the Act, and no order was made upon the petition for the want of a sufficient provision being made for the care, maintenance and education of the child, if the father should be deprived of his common-law right of possession and control of his children. In that case, however, the facts were such as seemed to justify the wife in living apart from her husband, for Knight Bruce, V. C., says, "I am not persuaded, however, that she has not a good defence to the pending suit, if there is one pending, or to any suit against her for restitution of conjugal rights."

In *Re Tomlinson*, 3 DeG. & Sm. 871, no order was made, for a reconciliation took place while the petition stood over to enable the wife (the petitioner) to answer the affidavit filed by the husband. Knight Bruce, V. C., in this case also seemed to regard the mother's right as dependent upon her being justified in living apart from her husband; for he says there, "I should have thought it right now to make an order relating to the custody of the infant, without directing the petition again to stand over, had there appeared to me to be a probability of the mother's success in the ecclesiastical suit, that is to say, in establishing that she is justified in living apart from her husband." The husband had instituted a suit for the restitution of conjugal rights, and the case had stood over for the purpose of enabling counsel from the Ecclesiastical Court to argue the case upon the validity of the mother's defence to that suit; at the close of which argument the learned Vice-Chancellor made the observations above quoted.

In *Warde* v. *Warde*, 2 Phill. 786 (A.D. 1849), the wife obtained a decree *a mensâ et thoro*, and the order was made on her petition. Lord Cottenham has there ennunciated his opinion of the object of the Act. He says: "I must say something with regard to the position of the children under the late Act of Parliament, as to the construction of which, and the object with which it was introduced, some very erroneous

notions appear to exist. The object of the Act, and of the promoters of it, and that which I think appears upon the face of the Act itself, was to protect mothers from the tyranny of those husbands who ill-used them. Unfortunately, as the law stood before, however much a woman might have been injured, she was precluded from seeking justice from her husband, by the terror of that power which the law gave to him, of taking her children from her. That was felt to be so great a hardship and injustice, that Parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife without the risk of any injury being done to her feelings as a mother. That was the object with which the Act was introduced, and that is the construction to be put upon it. It gives the court the power of interfering; and when the court sees that the maternal feelings are tortured for the purpose of obtaining anything like an unjust advantage over the mother, that is precisely the case in which it would be called upon and ought to interfere."

In re Halliday, Ex parte Woodward, 17 Jur. 56, came before Turner, V. C., in 1852. That was the case of a petition under the Act, presented by the mother, praying for the custody of her infant child, four years of age. It appeared that the husband and wife had lived happily enough together until about a year previously, when a legacy of £540 had been left to the wife, which, it was alleged, the husband had since squandered in dissipation. The money being all gone, and his wife becoming chargeable to the parish, he was taken up for deserting his wife, convicted, and sentenced to six months' imprisonment. Shortly after coming out of prison, he made his way, in the absence of his wife, to the lodgings where she was living and maintaining herself by going out as a laundress, and took away their child. He refused to state what had become of it, except that it was at board in Essex. By the affidavits filed in the matter, each accused the other of habitual drunkenness, and in addition the wife accused the husband of adultery.

In relation to the Act and its object, the Vice-Chancellor says: "It will necessarily be important, in the first place, to look at the principles upon which the Act proceeds. When this Act came into operation, it was the undoubted law of the country that the father is entitled to the sole custody of his infant children, controllable only by this court (the Court of Chancery) in cases of gross misconduct. With this right the Act does not, as I understand it, interfere so far as to have destroyed the right; but it introduces new elements and considerations under which that right is to be exercised. The Act proceeds upon three grounds: first, it assumes and proceeds upon the existence of the paternal right; secondly, it connects the paternal right with the marital duty, and imposes the marital duty as the condition of recognizing the paternal right; thirdly, the act regards the interest of the child. These three grounds, then—the paternal right, the marital duty, and the interest of the child—are to be kept in mind in deciding any case under this statute." He then cites *Warde* v. *Warde*, in confirmation of his view, and says, "I think there is a very great difficulty in calling on the court to restrain a man in the exercise of his legal right. * * * There are, however, two grounds on which the court has jurisdiction under the Act, viz, breach of marital duty, and the interest of the child. That the husband did desert his wife previously to May, 1851, he does not deny; but he justifies the desertion as necessary. It is, therefore, incumbent upon me to look into the conduct of the wife. The charge against her is that of habitual drunkenness." The Vice-Chancellor, upon the evidence, came to the conclusion that this charge was not proved; and, referring to the conduct of her husband taking away her child from his wife's lodgings, and to the fact that he did not even inform the court where the child was, except that it was at board in Essex, he proceeds: "Is it, or is it not, in contravention of the marital duty, which the Act has placed in competition with the paternal right, that the husband should thus take away his children and keep them, without any communication with the mother as to the mode, or place, or circumstances of their maintenance? The natural right must be held to have been modified by the Act, and the same opportunities must now be given to the mother as to the father, of communicating with the offspring. Then there is to be considered the question of access only, or of custody of the child; and that depends upon what is most for the interest of the child in the position of the parties." And finally, he says: "But I shall decide, if possible, rather in favour of the paternal right than against it; and I therefore give now an option to the father to place his child to be taken care of where the mother can have access to it, and see that it is properly attended to, so that she may have the benefit intended by the Act. Unless it be shown by affidavit on the next seal day that this has been done, I shall direct the child to be delivered over to the mother."

In *Shillito* v. *Collett*, 8 W. R. 683 (A.D. 1860), the application was by the mother against the testamentary guardians of the children, appointed by her husband's will, for the custody of three children, all under seven years of age. The observations of Kindersley, V. C., in that case, are to be taken as applying to the particular circumstances of that case, which from its nature raised no question arising out of the fact of a husband and wife living apart. The stress which he lays upon the interest of the children being the point to decide the case, must be limited to the case before him. This sufficiently appears to be the intent of the learned Vice-Chancellor, from the context of his judgment; and it is therefore by no means an authority for the position, that in the case of separation between husband and wife, the cause of separation is to be overlooked, and that the sole point for consideration is the benefit of the children. He says, there, "Beyond all doubt, if it had not been for Mr. Justice Talfourd's Act, the guardians could have assumed the conduct themselves of the education and maintenance of the children; but under the statute, the court has the discretion, either against the father or the testamentary guardians, as in this case, where any of the children are under seven years of age, if it sees fit, to decide that the custody shall be given to the mother, although she was not appointed guardian. With respect to the age of the children, the Legislature considered that as between the guardian and the mother, the very young children required a mother's nurture; and, notwith-

standing the legal rights of a father, they should be entrusted to her. But it still enabled the court to do that which it thought best for the interest of the children. It did not consider that, as between the father and mother, the father had an equal interest with her, but that in the majority of cases the custody should be given to the mother; but, under ordinary circumstances, it was most desirable that it should be entirely discretionary in the court." In the exercise of that discretion, the Vice-Chancellor was of opinion that he "must look at the interest of the children, which might be just as well preserved by giving the custody either to the father or the mother, the tendency being to lean towards the mother when the children were of very tender age; but still the material question was, what was for the children's benefit?" He then proceeds to show why, in that case, he thought the discretion of the court would be best exercised by leaving the children in the custody of the testamentary guardians. There is nothing in this case which countenances the idea that the learned Vice-Chancellor intended to cast any doubt on the propriety of the observations of Lord Cottenham in *Warde* v. *Warde;* of Turner, V. C., in *Re Halliday;* or of the Vice-Chancellor of England in *Re Taylor*, in a case where husband and wife were living apart.

In *Re Winscom*, 11 Jur. N. S. 297 (A.D. 1865), the application was by the mother for access to her female child eight and a half years old; but the principle upon which the right of access and custody depends is the same. In that case the husband had petitioned the Divorce Court for a divorce upon two allegations of adultery, one of which was condoned and the second not established, and so the petition for divorce was dismissed, but the husband and wife lived apart. Wood, V. C., in that case, rests upon Lord Cottenham's decision in *Warde* v. *Warde*, as establishing the intention of the Act, and the course of the court in relation to it; and applying these observations to the case before him, after stating the circumstances under which the husband and wife were living separate, he says, p. 299: "The consequence is, that they are not separated from the matrimonial tie; but it could not, as I apprehend, be with any great hope of success suggested, that the lady is in a position to institute any suit for restitution of conjugal rights. Nothing of the kind is suggested, and they must for the present remain apart." And again: "But further, I have had to consider most seriously how far it would help her for me to interfere at all with the father's directions in a case circumstanced like the present. In the first place, it is not clearly a case in which, according to Lord Cottenham's view, the court is called upon for any interference whatever. It is not a case in which, to use Lord Cottenham's expression, the mother requires protection from the tyranny of her husband."

Our Act, Con. Stat. U. C. cap. 74, sec. 8, is identical with the Imperial statute 2 & 3 Vic. cap. 54, with the exception that in our Act the age of twelve years is substituted for seven years, and that the jurisdiction which the English Act confers on the Lord Chancellor and Master of the Rolls is by our Act conferred upon the Superior Courts of Law and Equity, or any judge of any of such courts.

From all of the above cases, the true principle to be collected, I think, is, that the court or a judge, in the exercise of the discretion conferred by the Act, is bound to recognise the common law right of the father, and should not assume to impair or interfere with that right, so long as the father fails not in the due discharge of his marital duties. In order to induce the court to interfere on behalf of the wife, she should satisfy the court that the separation, if the act of the husband, is in disregard of his marital duties, that is, without sufficient cause given by the wife; or, if the act of the wife, that, although she may not have cause sufficient to entitle her to a decree for judicial separation, she has reasonable excuse for leaving her husband and living apart from him: and further, that it should not appear that it is not the interest of the children that she should have access to them, or the custody of those under the age mentioned in the Act in that behalf The object of the Act being to protect wives "against the tyranny of husbands who ill-use them," a wife can have no right under the Act, who should capriciously or without some reasonable excuse, desert her husband, absent herself from his home, and abandon her duties as a wife and mother. In view of these principles, it will now be necessary to enquire whether the petitioner in this case brings herself within them, so as to entitle her to the interposition of the jurisdiction conferred by the Act.

It is difficult to conceive anything more contradictory than the statements contained in the affidavits of the wife, her mother, and of Margaret McKay, on the one side, and in the affidavits of the husband and others, filed upon his part, in the material points. By the affidavit of Mrs. Leigh it appears that she and Mr. Leigh have been married for ten years; and she alleges that for the last eight years her husband has been in the habit of abusing, insulting, and maltreating her in the most shameful manner, not only in vituperative language, but also by inflicting upon her grievous bodily injury; and she says that to such an extent has he carried his cruelty towards her, that frequently, through the effect of his brutal treatment of her, she has been so ill that her life has been despaired of; and that whilst so ill, her husband manifested such perfect indifference as to her condition, and so neglected her, that she had to apply to her mother for her care and protection, and even for the common necessaries of life; and that finally, from the continued and constant ill-treatment she received from her husband, and being pregnant of her youngest child, and being apprehensive of danger to its life and to her own, she, in pursuance of the advice of her physician, left her husband's house in April, 1870, taking with her her three children, now aged nine, eight and four years respectively, and has since continued to reside with her mother. The affidavit then alleges that the father, on the 5th April, 1871, succeeded in getting possession of her child of four years of age, and in taking it away; and avers that since it was so taken away, the mother has never seen the child, nor does she know of its whereabouts. The affidavit then proceeds to allege that two of the husband's brothers have for a long time been subject to fits of insanity, and that the wife, from her husband's treatment of her, and his general demeanor, has no hesitation in saying that he is, and for some time has been, subject to fits of

insanity; and that she has no doubt he was under the influence of one of such fits when he took away his child, on the 5th April last: and it alleges that the mother is well able to supply all the wants of the children.

Now, the first observation which strikes one upon the perusal of this affidavit is, that it is strange that no single particular instance is given of the ill-treatment, which it is said has continued for a period of eight years, during which the life of the wife, in consequence of such ill-treatment, was frequently despaired of. If the husband is one of a family long afflicted with fits of insanity, and if he himself, as is alleged, has been subject to such fits, and under the influence of them has, for a period of eight years, in the midst of a civilized community, treated his wife, in the language of her mother, "more like a brute than a natural creature;" and if, in consequence of such treatment, the wife, acting upon the advice of her physician, found it necessary to leave her husband's house, and fly with her children for protection to her mother, surely abundant and indisputable evidence could be adduced of the truth of the charges. The only evidence, however, which has been offered, is that contained in the affidavits of the wife, her mother, and the hired servant now living with them, and who, it appears, did at one time live with Mr. and Mrs. Leigh for about four months, in the year 1868.

The husband, in his affidavit, contradicts, in as express terms as is possible, the general charges made against him; and he states matters which are wholly uncontradicted, and which, being uncontradicted, I should be obliged, even though not confirmed, to treat as true upon this application, but they are confirmed in most important particulars by the affidavits of other persons. These affidavits appear to establish that reliance cannot be placed on the affidavits filed by the petitioner, upon the essential points offered to evoke the jurisdiction conferred upon me by the statute.

Leigh, in his affidavit, after extracting the material allegations from the affidavit of his wife, says that there is not a word of truth in any of such statements: that he has never in any way abused or ill-treated his said wife or any of his children, and that she left him entirely without cause: that he and his wife lived always on good terms up to the time she left him, and that when she did leave him it was without any previous misunderstanding whatever: that she had asked him to drive her and the little girl (the custody of whom is now in question) out to her mother's, and to let her stay two or three days, and that he did so; and that on leaving her at her mother's, it was arranged between him and his wife that he should take them back home on the following Sunday: that accordingly he went for them on the Sunday, but that his wife's mother said they had better not return that day, it was so very cold: that he then returned without them, and without any suspicion whatever that his wife did not intend to return to him, he having parted with her then on the best terms: that previous to his leaving on that occasion, it was arranged that Mrs. Bull (his wife's mother) should drive his wife and child home: that having waited for a week without their returning, he went over to Mrs. Bull's again, and then asked his wife if she was going to forget him altogether, to which she made no answer; and that then, for the first time, he saw that there was something wrong; and that he had again to leave the mother's house and return home without discovering what was the matter, or what his wife intended to do: that on the next day he again went to see his wife, and found her at Mr. Steele's house; that she at first hid from him, but that on his asking for her, she came out and shook hands with him; but on talking to her there, she at last told him she did not intend returning to her home: that he returned home alone, and that shortly afterwards Mrs Leigh got possession of the other two children by taking them on their way home from school. He then proceeds to contradict the several other charges made against him; and after retorting charges against her in relation to her temper and ill-treatment of her children (which is much to be regretted, as this case cannot be made to depend upon the relative suitability of either to have sole charge of the children), he concludes by saying that he is still and always has been willing and anxious that his wife should return and resume her proper place in the management of his household, and that she keeps away from her home entirely against his will.

This affidavit is accompanied with certificates, signed by about twenty of his neighbours, who have known him for periods varying from ten to forty years, describing him to be a sensible, upright, honest, trustworthy, respectable man, of sound judgment, a good and obliging neighbour, to whose disparagement nothing is known; that he bears the best of characters; and one describes him to be noted as a good husband and kind father—a man of good sense, steady habits, and amiable disposition, and esteemed so by all his neighbours. Mr. John Steele, who has been for thirteen years reeve of the township in which Leigh lives, states on affidavit that he has known Leigh for eighteen years; that during all that time he has always found him to be a temperate, well-conducted man; that he has known the brothers of Leigh also for eighteen years, and that he has never heard of any of them being insane, or subject to fits of insanity; that his brother Leonard, upon the occasion of his wife's death, was much overcome with grief for about a month; and this, as well from Mr. Steele's affidavit as from that of Mr. Simpson, who was Leonard Leigh's father-in-law, seems to be the only foundation for the charge of insanity. Mr. Steele also states that about three years ago Mrs. Leigh was very ill, and was expected to die; and that as she owned some separate property, Mr. Steele was sent for to draw her will; and he says that then she spoke highly of her husband, and of his kindness to her—that he had been a good husband and father. He also states that until Mrs. Leigh left her husband, her mother, Mrs. Bull, always spoke highly of Leigh, and considered him an excellent man. Mr. Steele also says that he was present at Mrs. Bull's on the day that Leigh's wife remained there on account of the coldness of the weather; and that from the manner of Mr. and Mrs. Leigh to each other, he (Mr. Steele) had no idea she was going to leave her husband, and that he was quite surprised when a short time afterwards he heard that she would not return to him.

A Mr. Lawrence, a medical man, states that he attended Mrs Leigh and the family during

the years 1867-8-9: that during those years she was twice dangerously ill—once from inflammation of the lungs, and the other time from pleurisy: that during those periods, her husband manifested the greatest concern for her, and paid her the greatest attention, and procured for her everything she required. He adds that he has had many opportunities of judging, and that he has never seen any trace of mental disease in Leigh; that he does not believe there is any; that he is, in fact, a quiet man, and by no means excitable or violent in any way. Then there is the affidavit of a Mrs. Charlotte McCalman, who lived in Leigh's family for upwards of six months in 1868, and during the period that Margaret McKay was there. She describes the conduct of Leigh towards his wife, and also towards his children, as most kind and affectionate; she describes him as a kind husband and father; that he never ill-treated his wife, but was always kind and attentive to her; that he was fond of his children, and they of him. Andrew Home and Charles Morgan describe Leigh as a quiet, sober, industrious man, who holds a very respectable position as a farmer in the township; and say that they have never known or heard of his being insane, or in any way violent or peculiar in temper. Then there is the affidavit of Mr. Simpson, who has known Leigh's family for forty years, and is the father-in-law of his brother Leonard. He says that Henry Leigh, the petitioner's husband, is a kind-hearted man; that he has always been sober and well conducted, and that he does not believe any of the statements to the contrary made by his wife in her affidavit filed in this matter; that in his belief, the wife has no just cause whatever for leaving her husband, and that he believes the trouble between them to be of her own making, under the instigation of her mother; and as to the imputation of insanity in the family and in Henry Leigh, he says he has never known or heard of anything of the kind, and in effect he says the only foundation for the charge is that Leonard Leigh was out of his mind with grief for the loss of his wife for one or two months after her death, but that he got over it, and has ever since been perfectly sane.

Upon the whole, the only conclusion at which I can arrive upon this evidence is, that the petitioner has failed in satisfying my mind that she has had any excuse for leaving her husband's home and deserting her duties as a wife in the manner she appears to have done. Her allegations, and those of her mother, and of Margaret McKay, are contradicted by Leigh himself, as plainly as they can be, having regard to the generality of the charges; and the uncontradicted account which Leigh has given of the manner in which his wife left him and got possession of all his children, so diametrically opposed to the account of the same transaction given by the wife, coupled with the confirmation which I think Leigh receives from the affidavits of the other persons filed by him, forces upon me the conviction that reliance cannot be placed on the statements contained in the petition filed; and that I cannot do otherwise than discharge the application, without incurring the danger of giving rise to a belief in ignorant minds that the duties of the married state are less obligatory upon the wife than upon the husband.

I have not thought it necessary to refer to the mutual charges of unfitness of either alone to have charge of the children, because of the opinion which I have formed that the petitioner has not established such a case as in my judgment warrants my interfering with the paternal right. But in view of the character for sound judgment and amiability of disposition given by his neighbours to Mr. Leigh, and to the character of Christian meekness and gentleness given to Mrs. Leigh by the Rev. Mr. Ferguson and others, I venture to express the hope that both husband and wife will yield to their better feelings, and agree to forget their differences, from whatever cause they may arise, and live together in love and affection; and that Mrs. Leigh will not permit any one to lead her away from the discharge of the duties imposed upon her by her marriage contract; and that she will resume, as desired by her husband, her proper place at the head of his household. If, unfortunately, different counsels should prevail, and if the wife should at any future time be advised to renew this application, I should certainly, if the application should be made to me, require the parties and witnesses to be examined *vivâ voce* before me, for the purpose of arriving, if possible, at the truth as to the grounds of an alienation which, upon the material at present before me, I am obliged to say appears to me to be causeless.

In the hope of avoiding adding bitterness to the feelings of either of the parties, and of aiding in the promotion of a good understanding between them, I shall discharge the present summons without costs.

Summons discharged.

NOVA SCOTIA.

IN THE SUPREME COURT.

In re E. D. Tucker, an Insolvent.

Insolvency Act of 1869, ss. 86, 55, 83, 97 & 101—Discharge—Confirmation—Dividends.

It is optional with an insolvent whether he will proceed under sec. 97, or under sec. 101 of the Act of 1869; and when there is reason to anticipate that the discharge will be opposed, the latter course is more expeditious.

Where a deed of composition and discharge has been duly executed and filed with the assignee, *ii semmotice* of the filing and of the insolvent's intention to apply for a confirmation of his discharge may be given at once under sec. 101, although the month allowed by sec. 36 (Form I.) for creditors to file their claims has not expired.

The assignee may declare a dividend at any time within one month after his appointment, and thereafter at intervals of not more than three months.

(Sup. Ct. N.S.—June 2, 1871.—*Sir W. Young, C. J.*)

Sir William Young, C. J., now (June 2, 1871,) delivered judgment as follows:

This is an appeal to me under the Dominion Insolvent Act of 1869, section 83, from an order of the Judge of Probate and Insolvency at Halifax, made on the 18th March last. It was a final order or judgment refusing a discharge to the insolvent under a deed of composition, on preliminary or technical objections arising out of the Act, and without any examination of the insolvent or enquiry into the validity of the deed. I had supposed when I granted a rule *nisi* on the appeal, that these were the only objections, but it appeared on the hearing before me on the 28th ultimo. that other objections alleged to be of a more serious kind were be-

hind, with which at present I have nothing to do. An objection also was taken to the regularity of the appeal under section 84, which I think is untenable.

The insolvent made a voluntary assignment, dated the 28th February, 1869, and delivered 1st March to the interim assignee, who forthwith called a meeting of the creditors, under sec. 2, for the 15th. The creditors who had proved their claims under sectian 122, thereupon appointed the interim assignee to be the assignee of the estate. On the 24th March a deed of composition and discharge was prepared by the insolvent, which was filed with the assignee on the 29th, and the insolvent thereupon published an advertisement of that day, and continued it for one month, that on the 1st of May he would apply to the Insolvency Court for a confirmation of his discharge. The order of the 18th May—the subject of this appeal—was the result of that application.

The first objection was, that the insolvent had not deposited the deed with the assignee for the purposes contemplated, nor had the assignee pursued the course prescribed by section 97. This section is analogous to the 2nd sub-section of section 9 of the parent Act of 1864, and the question is whether it is imperative or optional. If acted on, and no opposition to the composition and discharge is made by a creditor, it saves time and is a great advantage to the insolvent. But where he has reason to apprehend (as was the case here) that opposition would be made, there was neither saving of time nor advantage to either party, and upon the best consideration I can give to this clause, I am of opinion that the insolvent may waive it in all cases if he thinks fit, and proceed under section 101.

The second objection was that one month's notice had not expired from the first meeting of creditors of the insolvent before the deed of composition and discharge had been filed in court, and acted upon as required by section 36 of said Act. By section 36 the assignee, immediately upon his appointment, shall give notice thereof by advertisement in form I, which requires creditors to file their claims before the assignee within one month—that is, in this case, by the 15th or 16th of April. Creditors having by the statute this time to come in, was it legal to file a deed of composition and discharge and publish an advertisement on it (which is the action referred to in the objection) on the 27th March? There is more in this objection than in the former, and yet, if the deed in point of fact when filed has been executed by a majority of the creditors under section 94 (which is the main inquiry), there is no reason for the delay, as the confirmation itself cannot take place before the month has expired. There seems to have been no decision on this point in Canada, and the commentators there differ upon it, as will be seen upon reference to Mr. Abbott's edition of the Act of 1864, folio 67, and the doubt in Mr. Popham's edition of the Act of 1869, folio 124. The hearing before the judge in this case, was on the 18th May, more than two months after the advertisement to the creditors, when the objection in point of time was reduced to a mere technicality, which, as I think, ought not to prevail.

The third objection proceeded, as I conceive, on a misapprehension of the Act. It was assumed that no dividend could have bean declared on the 1st of May, nor until three months had expired after notice of the appointment of an assignee. That is not the meaning of section 55. The assignee may declare a dividend if he have funds at the end of one month, or as soon as may be after the expiration of such period, and thereafter at intervals of not more than three months. I overrule, therefore, this objection, and regret that the hearing below was confined to these niceties of construction, in place of the main issues. The counsel for the insolvent insisted that these were now excluded, and the opposing creditors having failed on these preliminary points, that the insolvent was entitled to a discharge without further enquiry. But I cannot assent to this view, which would be against the analogy and the practice of all courts, and I content myself with disposing of the points before me, and setting aside the judgment of 18th May, and the order of 22nd May thereon, with costs.

APPOINTMENTS TO OFFICE.

JUDGE OF THE SUPERIOR COURT—QUEBEC.

THE HON. CHRISTOPHER DUNKIN, of Knowlton, in the Province of Quebec, a Member of the Queen's Privy Council for Canada, and one of H. M. Counsel learned in the Law, to be a Puisné Judge of the Superior Court of Lower Canada, now Quebec, *vice* the Hon. Edward Short, deceased. (Gazetted Oct. 28th, 1871.)

MINISTER OF AGRICULTURE.

JOHN HENRY POPE, of Cookshire, in the Electoral District of Compton, in the Province of Quebec, Esquire, to be a Member of the Queen's Privy Council for Canada, and Minister of Agriculture, *vice* the Hon. Christopher Dunkin.

NOTARIES PUBLIC.

JOHN DONALD McDONALD, of the village of Renfrew, Esquire, Barrister-at-Law. (Gazetted Oct. 28th, 1871.)

JAMES CLELAND HAMILTON, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted Nov. 11th, 1871.)

CHARLES E. PEGLEY, of the Town of Chatham, Esquire, Barrister-at-Law. (Gazetted Nov. 11th, 1871).

JOHN TAYLOR, of the City of London, Esquire, Barrister-at-Law. (Gazetted Nov. 11th, 1871.)

HAMNETT PINHEY HILL, of the City of Ottawa, Gentleman, Attorney-at-Law. (Gazetted Nov. 11th, 1871.)

RICHARD THOMAS WALKEM, of the City of Kingston, Esquire, Barrister-at-Law. (Gazetted Nov. 18th, 1871.)

FREDERICK FENTON, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted Nov. 18th, 1871.)

ASSOCIATE CORONERS.

MYERS DAVIDSON, of the Village of Florence, and ANSON S. FRASER, of the Village of Sombra, Esquire, M.D., within and for the County of Lambton. (Gazetted Oct. 28th, 1871.)

THOMAS WHITE, junior of the City of Hamilton, Esquire, M.D., within and for the County of Wentworth. (Gazetted Nov. 18th, 1871.)

It has been held in England, in *Lee* v. *The Lancashire and Yorkshire Railway Company*, that the legal and equitable rights of a passenger injured by a railway accident are exactly the same as those of a passenger injured by any other common carrier, and the same considerations and rules apply in both cases.