DIARY FOR NOVEMBER.

1. SUN..*21st Sunday after Trinity.*
8. SUN..*22nd Sunday after Trinity.*
11. Wed..Last day for service for County Court.
15. SUN..*23rd Sunday after Trinity.*
16. Mon..Michaelmas Term begins.
20. Fri. ..Paper Day, Queen's Bench, New Trial Day, Common Pleas.
21. Sat. ..Paper Day, Common Pleas. New Trial Day, Queen's Bench. Declare for County Court.
22. SUN..*24th Sunday after Trinity.*
23. Mon..Paper Day, Queen's Bench, New Term Day, Common Pleas. Last day to set down for re-hearing.
24. Tues..Paper Day, Common Pleas, New Term Day, Queen's Bench.
25. Wed..Paper Day, Queen's Bench. New Term Day, Common Pleas. Appeal from Chancery Chambers, Last day for notice of re-hearing.
26. Thurs Paper Day, Common Pleas.
27. Fri. ..New Trial Day, Queen's Bench.
29. SUN..*1st Sunday in Advent.*
30. Mon..*St. Andrew.* Paper Day, Queen's Bench. New Trial Day, Common Pleas. Last day for Notice of Trial for County Court.

The Local Courts'

AND

MUNICIPAL GAZETTE.

NOVEMBER, 1868.

TAX SALES.

We continue the synopsis of the case bearing on this subject, which was commenced in our last number.

6.—ADVERTISEMENT.

The omission to advertise the intended sale of lands in the county local paper, the advertisement being regularly published in the official *Gazette*, does not invalidate the sale: it does not on common law principles avoid a sale of lands under execution: *Jarvis* v. *Brooke*, 11 U. C. 299.

The omission to advertise lands in the local paper, for the purpose of giving effect to the sale under the special provisions of 16 Vic ch. 183, secs. 7, 8, which required the advertisements to be in the official *Gazette*, and in a newspaper of the county, was held to avoid the sale.

"The omission of either of these advertisements interposes an insuperable obstacle to the application of the remedial portion of the Act in favour of purchasers at such sales:" *Williams* v. *Taylor*, 13 C. P. 219.

The case of *Hall* v. *Hill*, 22 U. C. 578, is opposed to the decision of that Court in 11 U. C. 299 in this respect; and in *Hall* v. *Hill* the Court said the decision of *Williams* v. *Taylor*, "though under a different Statute, was upon a case very analogous in principle; and if it were necessary for the decision of this case, we should, as at present advised, arrive at the same conclusion."

The publication in the *Canada Gazette* for thirteen weeks, from and including the 1st of August to and including the 24th of October, 1857, though not an advertisement for three months, which would have required the advertisement to be continued till and to include the 31st of October, did not render the sale invalid: the Statute was directory in this respect, and the partial omission was an irregularity.

This was the decision of the Chancellor in *Connor* v. *Douglas*, overruling the opinion of the Referee of titles. The matter is now in appeal from the Chancellor's judgment.

7.—SALE.

The sale of part of a whole lot, which lay in two concessions, for arrears alleged to be due upon one-half, was illegal, because there was no such distinct half to be assessed: the assessment should have been on the whole lot: *Doe d. Upper* v. *Edwards* 5 U. C. 594; *Munro* v. *Grey*, 12 U. C. 647. See also *McDonald* v. *Robillard*, 23 U.C. 105; *Laughtenborough* v. *McLean*, 14 U. C. 175; *Ridout* v. *Ketchum*, 5 C. P. 55; *Black* v. *Harrington*, 12 Grant, 175; *Christie* v. *Johnston*, 12 Grant, 534.

A sale for a total charge of £5 11s. 8d., of which only £1 8s. had been legally imposed, was held to be void *in toto*: *Doe d. McGill* v. *Langton*, 9 U. C. 91; *Irwin* v. *Harrington*, 12 Grant, 179.

The good rates being separable from the bad rates, *held*, not to defeat a distress *in toto*: *Corbett* v. *Johnston*, 11 C. P. 317.

See the observations of Draper, C. J., in *Townsend* v. *Elliott*, 12 C. P. 224, and *Allan* v. *Fisher*, 13 C. P. 72, doubting whether the sale of lands would be wholly defeated, but conceiving he was bound by the decisions he mentioned.

A sale of land described as granted, will prevail against the subsequent patentee: *Charles* v. *Dulmage*, 14 U. C. 585; *Ryckman* v. *Van Voltenburgh*, 6 C. P. 385.

A purchase made in April, 1839, but not carried out by the purchaser, would have

authorized the Sheriff to adjourn the sale: *Todd* v. *Werry*, 15 U. C. 614.

At an adjourned sale the whole lot should not be offered for sale, but only as much of it as is sufficient to cover the taxes: *Ibid.*

The Sheriff must be presumed to know whether a whole lot of land of 200 acres was worth £500 or only £2 12s.: *Henry* v. *Burness*, 8 Grant, 345.

A purchaser procuring the whole lot to be knocked down to him, by requesting the bystanders not to bid against him, as he wanted to confirm his title by purchasing it in, acted improperly, and the sale so conducted was held void: *Todd* v. *Werry*, 15 U. C. 614.

A combination to defeat fair bidding will vacate the sale: *Henry* v. *Burness*, 8 Grant, 345.

The writ to sell was delivered to the Sheriff when in office: he did not sell till he was out of office: the sale was held invalid, as it was not shewn that the Sheriff, while in office, had begun to act on it, and *quære*, if the same rule applied to such writs as to writs of execution: *McMillan* v. *McDonald*, 26 U. C. 454.

Whether land, improperly assessed as non-resident land, when it is in fact occupied land, can be legally sold for arrears. See *Allan* v. *Fisher*, 13 C. P. 63.

Sale by the Sheriff good, though there is a distress on the land: *Ibid; McDonald* v. *McDonald*, 24 U. C. 74.

When taxes are due to an old district, and taxes become due to the new district after separation, the sale for both arrears is to be made by the Sheriff of the new district where the land lies: *Doe d. Mountcashel* v. *Grover*, 4 U. C. 23.

8.—Payments.

A payment of taxes to the Sheriff, while he had the warrant to sell, is good: *Doe d. Sherwood* v. *Matheson*, 9 U. C. 321; *Jarvis* v. *Cayley*, 11 U. C. 282; *Jarvis* v. *Brooke*, 11 U. C. 299.

After the sale of a whole lot for taxes, the Treasurer may receive payment of the taxes in redemption of a part of it, if the lot had been in fact sub-divided, and the Treasurer determined in good faith that such part was a distinct sub-division: *Payne* v. *Goodyear*, 26 U. C. 448; *Brooke* v. *Campbell*, 12 Grant, 526.

If the Treasurer can take notice of land granted, though not returned as such, he must take notice of the particular part of the lot so granted, and he must apply the payments made to him on the part so granted: *Peck* v. *Munro*, 4 C. P. 363.

See also as to payment, *Allan* v. *Hamilton*, 23 U. C. 109.

9.—Description of Lands.

The Sheriff's deed described the land sold as "eighty-nine acres of the south part of twenty five in the second concession of the Township Carlottenburgh:" it was held insufficient, for want of the proper boundaries defining the precise locality: *McDonell* v. *McDonald*, 24 U. C. 74. See also *Cayley* v. *Foster*, 25 U. C. 405; *Knaggs* v. *Ledyard*, 12 Grant, 320; *Fraser* v. *Mattice*, 19 U. C. 150; *Catley* v. *Foster*, 25 U. C. 405.

A description of thirty acres of lot 15, in the seventh concession of Osnabruck, *to be measured according to Statute*, "is sufficient under the 6 Geo. IV. ch. 7, sec. 13, the Sheriff not having exercised the option under 7 Wm. IV. ch. 19, sec. 5, to sell otherwise than according to the first Statute: *Frazer* v. *Mattice*, 19 U. C. 150; *McIntyre* v. *The Great Western Railway Company*, 17 U. C. 118.

10.—The Deed.

Lands were sold under the 6 Geo. IV. ch. 7, but no deed was made of them while the act was in force; it was held a deed could not be made after the repeal of the Act, as no provision was made for such a case; *Bryant* v. *Hill*, 23 U. C. 69.

The like decision was pronounced as to sales made under the 13th & 14th Vic. ch. 67; *McDonald* v. *McDonell*, 24 U. C. 424.

(*To be continued.*)

JUDICIAL CHANGES.

The vacancy caused by the retirement of the President of the Court of Appeal from the position which he had so worthily held as Chief Justice of Upper Canada (of which more hereafter), has been filled by the appointment of the Hon. William Buell Richards, formerly Chief Justice of the Common Pleas. Mr. Justice Adam Wilson goes with him as Junior Puisne, and Mr. Justice Morrison, now becomes the Senior Puisne Judge in the same court, as he is also on the Common Law Bench. Mr. Justice Hagarty is transferred from the Queen's Bench to the Common Pleas, and becomes Chief Justice of the latter Court, while Mr. Justice John Wilson takes the

seat to his right; John W. Gwynne, Esquire, Queen's Counsel, being appointed the new Judge, and sitting as Junior Puisne Judge of that court.

It was at one time thought that the Chancellor would have accepted the Chief Justiceship, which was offered to him in contemplation of Mr. Draper's retirement, and it was hoped by many that he would have accepted the office, as it was very generally thought that he was admirably suited for that position, but difficulties that could not easily be surmounted in the choice of some one to succeed him in the Court of Chancery are said to have prevented his making the change.

These appointments will produce a thorough change in the *personel* of the two courts, the majority of the judges formerly in the Court of Common Pleas being transferred to the Queen's Bench, and Mr. Justice John Wilson being the only representative of the Court of Common Pleas as lately constituted. One result of this will be that the cases still standing for judgment are to be re-argued before the present bench.

As to the appointments in themselves, the Chief Justice has already presided as the Chief of a court, and the duties now devolving upon him will not be materially different from those to which he has lately been accustomed, and will, doubtless, be as faithfully performed. Of the learning and ability of the new Chief of the Pleas it is unnecessary to speak, it is admitted on all sides. We congratulate Mr. Gwynne upon his appointment, which is accepted by the profession as likely to give general satisfaction.

But while glancing at these changes we, in common with the profession at large, do so with a sense of sorrow and regret, not unmingled with certain undefined feelings of doubt as to the future, when we think that he who has of late years been the master-mind of our courts is no longer at the helm, though still in a position where he can be of signal service to his country. We trust it may not be presumptuous in us to express a hope that the example of his dignity, patience, courtesy and attentive industry will be followed by those who occupy seats he formerly filled.

The new Chief Justices were sworn in before His Excellency the Governor-General at Quebec, on the 12th inst. It certainly seems rather hard that their newly acquired dignity should subject them to such an arduous undertaking as a hurried journey to the extreme end of the Dominion. It would be bad enough to have to go to the Capital, where one might expect to find His Excellency, instead of travelling day and night by rail, a distance of a thousand miles or so. There being some doubt as to whether the Governor-General or the Lieutenant-Govenor was the proper person to administer the oaths to the Chief Justices, they were also sworn in by the latter functionary on their return from Quebec.

The Chief Justices of the respective courts on the first day of Term, in open court, administered the required oaths to Mr. Adam Wilson and Mr. Gwynne.

After this form had been completed, the Hon. J. H. Cameron, the Treasurer of the Law Society, in the absence of the Attorney-General, first, in the Queen's Bench, and afterwards in the Common Pleas, congratulated the new Chiefs upon their promotion, and Mr. Gwynne upon his appointment.

Both Chiefs when assuming their new positions in answer to the address of the Treasurer of the Law Society, referred to the good feeling, which at present exists between the Bench and the Bar, and promised to do their best to maintain it.

The appeal of the convict Whelan to the Court of Queen's Bench is ripe for argument, and will be disposed of without delay. It is thought that if the decision of that Court is adverse that he has the right to go to the Court of Error and Appeal, and finally, if necessary, to the House of Lords.

SELECTIONS.

THE FALLACY OF LOCAL TRIBUNALS.

If the wisdom of the Social Science Association were to be measured by its discussion on 'the reorganisation of our Courts, superior and local,' the interest in its proceedings would speedily be limited to those who are charmed with the sound of their own voices. To say nothing new, and to say that little badly, is less than could be expected even from the boldest usurpers of the title of *savans*. Yet the only sense on perusing the speeches delivered at Birmingham on the condition of our judicature is one of entire disappointment. To plead as they do in Chancery, to fuse law and equity, and to substitue local for central jurisdiction, are the specifics discovered by the doctrinaires of the Association. The first two propositions are good enough, but they

are not new; the last is neither good nor new. It is, as we believe, an idea thoroughly considered and completely discarded by the Judicature Commission, scarcely at this date to be galvanised into a *post-mortem* activity by the most ardent and juvenile of advocates. Yet, as it has been seriously and elaborately recommended in Section B, and not combated by any subsequent debater at the meetings of the Association, it behoves us to say a few words on this proposition.

It is advanced, first, that the plaintiff should be allowed to begin his action in any local court, whatever may be the nature or amount of his claim. Second, that if the claim be below 500*l*., then the plaintiff should be compelled to begin in some local Court. On the other hand, the defendant may post an affidavit to the registrar of the local Court stating that he has a good defence and a good cause for removal. The plaintiff may reply, opposing the removal, by a counter affidavit. This is certainly a pleasant prospect to start with. A., living in Northumberland, receives a summons from the County Court of Cornwall for a demand amounting to some hundreds of pounds. Being a prudent man, he necessarily would not be content with posting an affidavit to the registrar stating an inclination to have his cause tried in London or at Newcastle, but would be driven to employ an attorney at Bodmin to watch the proceedings. The summons is also to contain in all cases a clear warning that, unless the defendant, within six clear days of the hearing, gives notice to the registrar of his intention to defend, with a statement of the grounds on which he rests his defence, the plaintiff shall be at liberty to have judgment entered up against the defendant. At present a summons must be served ten clear days before the day of hearing. The consequence is that, according to this plan, within the space of four days A. would have to find an attorney—his own resident in London, for example—and, through that attorney, to take counsel's opinion as to the grounds of his defence, to get an affidavit drawn and sworn, and to transmit all these documents in due form to Bodmin, under pain of having judgment entered up against him. The post would take two days, so that this marvellous feat would demand accomplishment in about 48 hours.

Such a scheme is so monstrous, that, if the language was not explicit, it would be only fair to suppose that grave misapprehension existed as to the meaning of the speaker. At present, if the proceedings are in the County Court, the defendant has this advantage, that the plaintiff must come into the defendant's own district; but here the words are: 'The plaintiff should have the option of suing in whatever local Court he thought fit, not being compelled to follow his debtor to any distance;' just as though to 'snap' a judgment was altogether about the most just and delightful thing known to all the legal world. If a man is sued now in the superior Courts, he has eight days to appear; then he has the breathing time afforded before delivery of the declaration; then eight days to plead, with further time as a matter of course. In most cases a defendant gets some three or four weeks in which he may prepare to meet the demand made against him. But that sort of delay is no longer to be allowed, and the defendants are to be tomahawked and scalped within four days from the service of the summons. We can almost discern in the gloom the twinkle of the eye of the tallyman at this charming proposition. But it goes beyond petty debts and the petty oppression of petty creditors, and defendants are to be fixed with judgments and executions, we suppose with proportionate rapidity, for amounts not exceeding 500*l*. Indeed, that seems to be the limit only of compulsory jurisdiction, so that it may be that the judgment may run up to thousands or even millions, unless the local judge of his own mere motion interfere for the purpose of transferring the cause to a superior Court.

We have criticised these items of the general proposition to localise the administration of justice, not so much because they go in any way to the root or principle of the thing, but rather to show how crude, unpractical, and absurd are the views which have been thus put forward. It is impossible for an association to repress persons who insist on reading papers in the several sections, but the mischief is that a fictitious importance is lent to such documents by the prestige of the society. The public, naturally unable to form as sound a judgment on the reform of the adminstration of law as on broad questions of policy, is apt to imagine that there is a virtue in the legal quackery which loudly asserts its own excellence, and that the real authorities, the staff of judges and heads of the profession, are mere adherents of a species of priestcraft. But the principle of localising justice in this country is unsound, the moment that it is carried beyond the speedy means of recovering petty debts, remedying small grievances, and resolving rights of trifling import. In the present day communication with London is a matter of the utmost facility, and procedure by writ or other notification issued out of offices in the metropolis is at once the most inexpensive and most rapid method of getting the litigant parties together. Every day that diminishes the use of writs brings home to the attorneys a stronger sense of the convenience attached to that ancient system of commencing actions. The main point as against the localisation of Courts is that in proportion as you localise the administration of law, you lessen justice. Local law and bad law are convertible terms. Law is a thing not acquired once for all, as if it were an instrument warranted never to get out of order, but it is a science of unceasing developement. Let the most learned and most acute of judges be taken from Westminster Hall and planted in a County Court, and in ten years he will

sink below the least able of the brethren over whom he once towered. The reason why a man elevated to the Bench in Westminster Hall does not decline in knowledge, energy, and power is because the endless attrition of other intellects keeps his mind bright. Take away that instrument, and he rusts. The County Court judge has no chance. He has no Bar before him to keep up his education; he has no means, except through reports which he has little leisure and less inclination to master, of keeping himself *au courant* with the historical changes of the law, which are hourly effected by judicial decisions. It is difficult to measure the extent to which the tendencies of public opinion, the march of scientific, theoretical and moral inquiry, operate on the minds of judges and lawyers, and so by an imperceptible but steady process influence the law. All this is lost upon the local judge. By no human possibility can he get beyond the point of excellence which he had reached at the moment of his appointment. But by the great law of nature, which compels movement in one direction or another, he as surely retrogrades. As a rule, too, unless he is a remarkable man, not only his legal power but his moral nature suffers, as does the nature of all men whom circumstances have placed in isolated superiority to those with whom they have to deal. These are the common causes which go to create the complaints, neither indistinct nor unintelligible, as to the conduct of County Court judges. The system is at fault, not the men, who work well for nine-tenths of the objects for which they were appointed, but fail in the tenth, and so rise against themselves a clamour disproportionate to the real greivance. But now it is demanded that their jurisdiction shall be extended immeasurably, with the certain result that the outcry against them will find substantial justification, and that a formidable reaction will set in, so soon as the wealthier classes begin to feel where the shoe pinches.

The moment that men of landed estate, of large commercial interests, and of great social standing, experience in their own affairs what it is to have important issues of law and fact decided by the local tribunals, it will go hard with the whole institution. It is precisely because it is desirable to preserve what is of real value in the County Courts that it is a duty to save them from their friends.

These objections, we are glad to perceive, had occurred, though in a very slender degree, to the mind that advanced the great theory of local Courts. Therefore it was proposed that the judicial staff should be increased, and that four times in the year a sort of County Courts Quarter Sessions should be held, at which some three or four judges of the adjoining districts might meet, and hold sittings in banco, and also try issues in fact reserved specially for these meetings. This scheme is fair enough, and might be adopted in some form or other with advantage at the present moment. It is certainly rather vain labour to move a judge to rescind his own ruling on a point of law, and his own finding on an issue of fact, and some plan of making such motions before a Court composed of three or four judges might well be adopted. So also there would be a chance of getting a few counsel to attend on such occasions, to the benefit of the Bench and of the suitors. But it is impossibe to suppose that this balm of Gilead will suffice to heal all the diseases existing or to be engendered in the local tribunals.

Another argument which has found weight in some quarters apparently offers considerable attractions to the gentleman whose views, as expressed at Birmingham, we have endeavoured to explain and to combat. It is said that County Courts and these new quarterly Courts would be a sort of training ground for young advocates. Possibly persons whose breath would be taken away by confrontation with a Middlesex jury and a judge of the Court of Queen's Bench may control their nerves before a County Court judge. But how an arena in which bad law and indifferent manners are not absolutely unknown is to fit an advocate for more exalted struggles it is hard to see. The way to learn law and advocacy is to listen to the ablest counsel, and to note what falls from the ablest judges, and little or nothing is gained by acquiring a confidence which only makes a man rush in where angels fear to tread. There is another point not to be lightly dismissed. It is now pretty well admitted, and was very strongly put amid loud cheering at the meeting of the Bar last spring, that the petty rules and restrictions appertaining to practice on circuit might well be thrown overboard as useless cargo.

How did the ship of the profession ever come to be freighted with the burden? Because each circuit assumed to itself the airs of a petty corporation, in which the members acted on the grand principle of mutual jealousy and suspicion. Just as though all were rogues eager to circumvent their neighbours, and so had to be checked by a code of stringent regulations. So sprang up the notion of protecting one circuit as against another, of protecting elder members as against the juniors, and of protecting all from the contamination of attorneys. All this system is now decaying with such rapidity that it is wholly unnecessary to employ active means for its rapid annihilation. But the notice of local Bars attending local Courts is not only a child of the same family with the aged monster, but is infected by graver vices. What was formerly only felt twice a year and alleviated by the purer air of London practice, is now sought to be made perpetual without the means of finding any alternative. Multiplicity of practice, of traditions, even of law, would be hard to endure, but their mischief would be small in comparison with the gigantic evil of local Bars with a variety of rules of miscalled etiquette, and a host of precedents of conduct of questionable propriety.

There is yet a stand-point for our adversaries They may point to France and to America.

In the United States the Constitution rendered localisation of justice necessary, but not in the sense used in this country. Every State of the Union is sovereign—is, so to speak, for all purposes of internal economy, an Empire, and enjoys its own particular system of jurisprudence. Each State, therefore, must of necessity have its own judges and its own lawyers. The example of France serves the turn no better. Considering the very great ability and eloquence of the French Bar, any man must be struck with its want of power and position in the State. The first Emperor could afford to despise and insult the profession, and the existing Government takes no heed whatever of it in calculating the forces of friends and foes. The French Bar cannot furnish a member to the Bench; it even occupies a position of weak antagonism both to the Bench and the Executive. There may be many reasons for this state of things. But the great reason is that the Bar is not one homogeneous and consolidated body, able to concentrate its power in a given direction, but is split up by a system of local centres of justice into a number of associtions. In England the Bar is an united body, and this fact is the chief element of its great and growing strength.—*Law Journal.*

STATISTICS OF THE DIVORCE COURT.

If the Frenchman who believes that one of the eccentric peculiarities of Englishmen is the sale of their wives at Smithfield Market when they prove intractable were to air his curiosity in the Divorce Court at Westminster, he would probably after a few hours of attentive listening to the proceedings of the Court be satisfied that a much better mode had been discovered of settling matrimonial disputes in England. It might also dawn upon him that English wives are not wholly passive in the transaction, though how far they are active as petitioners to the Court the Blue-book renders no information. Of the whole of the official returns these are the most meagre—indeed they are so defective as to be wholly valueless for the ordinary objects of statistics. The total number of petitions for judicial separation and for dissolution of marriage is given, but whether the petitioners were the husbands or the wives it has not been thought proper to state. However, we must bear these omissions and also many discrepancies philosophically, and accept what we can get. The number of proceedings for 1867 and for the previous year, as well as an average for the seven preceeding years, 1859-65 inclusive, have been given. A certain though slight improvemeut is perceivable in the business of the Court from year to year. In 1867, there were 321 petitions filed against 306 in the previous year, which shows an increase of 6 when compared with the average for the seven years. We will, before going further, proceed to analyse, as far as possible, the total for the former year. It will be needless to refer to the others, as each particular item of one year is merely an echo of the previous year. The petitions for dissolution of marriage in 1867, then, were 224, on which 119 decrees were made; for judicial separation 70, on which 11 decrees were made; and for the restitution of conjugal rights only 15. Entire dissolution of the Gordian knot, as revealed by these figures, is preferable to the mockery of a judicial separation. Innumerable private reasons of course may exist in many instances to urge the latter form of disunion, but it is well known that some of those who pursue the former plan, immediately on being cured thrust their fingers again into the fire, and not unfrequently discover that they have once more been burnt. There were 9 petitions filed for nullity of marriage, 1 for declaratory act, and 2 *in formâ pauperis*, which make up the total of 321. The remainder of the business of the Court shows a proportionate increase; for example, the number of petitions for alimony was in 1867, 95; in the preceeding year 86; and 77 was the average for the seven years. In the former year 466 citations were issued, and 676 summonses. The number of causes actually tried was 159 in 1867, of which number 127 were tried before the Judge-Ordinary on oral evidence, and the remainder before him and juries; 183 in 1867; and 231 is given as the usual average. Judgment was delivered by the Judge-Ordinary in the whole of the 159 cases brought to trial during last year, from which only 4 appeals were made to the full Court, and the absence of any to the House of Lords is remarkable. The revenue of the Court, like its business, experiences a small variation, but there is a decrease in that for 1867 on every year. The statements stand thus:—In 1867 the sum of 2,512*l.* 16*s.* was the amount of fees actually received, against 2,596*l.* 13*s.* in the previous year, and 2,582*l.* is given as the average of the amounts for the seven preceding years.—*Law Journal.*

RIGHTS OF WOMEN UNDER THE REFORM ACT.

The Hon. George Denman, Q. C. has addressed to a lady his views upon this vexed question He says:

I think it a very doubtful point. As the Bill was originally drawn, I have a strong opinion that it would have given the franchise to women (not married). It contained a clause saying that certain classes of "men" should be enfranchised, and in enumerating those classes, enumerated one of them as "every man who (being a male person) shall be," but that clause (the fancy franchise clause) was struck out. The matter now stands as follows: The Act gives the vote to "every man" who, &c., not being under any legal incapacity. The word "man" was not used in the Act of 1832 (2 & 3 Will. 4). but the words "male person." By 13 & 14 Vict. c. 21, s 4, it is provided that "words importing the masculine gender shall be deemed to include females (in all future Acts of Parliament), unless there is

something to the contrary in the Act itself." It is argued, on the one hand, that the words "not being under any legal capacity" are words to the contrary of "man" being held to include "woman;" on the other, that those words merely refer to "minority," "marriage," and such-like incapacities. There is this in favour of your view (and it may have been intended in high quarters), viz., that when I put the question to Mr. Disraeil, whether it was intended, he gave me an evasive answer; and when Mr. Mill proposed the word "person" instead of "man," he (Mr. Disraeil) abstained from voting: but that the House did not mean it is clear, from the faet that we who voted for it were in a considerable minority. With this, however, no judge has any thing to do. It is a pure question of law, and I think, a very arguable one as it stands.—*Exchange.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Mutual Insurance Companies.—A. insured with a mutual insurance company, by a policy expiring on the 26th June, 1863. The 29 Vic. cap. 37, passed on the 18th September, 1865, enacted that no suit should be brought on any policy after one year from the loss, or one year from passing the act, if the loss had happened before, *saving the rights of parties under legal disability.*

To a plea that the loss happened before the act, and that the action was not commenced within one year from its passing, defendant replied that when the act was passed, A. was in prison (not saying for felony), and continued there until his death on the 21st February, 1867, and that the action was commenced within a reasonable time after his death.

Held, that the replication was no answer to the plea.—*Tullman et al., Executors of Tullman,* v. *The Mutual Fire Insurance Company of Clinton,* 27 U. C. Q. B. 100.

Dower — Certificate of Examination. — A certificate on a deed executed in 1816, to which the wife of the grantor was not a party, stated that "on the 30th May, 1829, personally came before me, A. F., Judge of the Midland District Court, Mary, wife of the within named Robert McNally," and being examined, &c., consented to be barred of her dower. The grantor was described in the deed as of the town of Kingston, in the county of Frontenac.

It was objected that the wife did not appear to have been resident in the county when the certificate was given; but, *held* otherwise, for the presumption was that she resided with her husband, and that his residence continued the same.

Held, that the 2 Vic. cap. 6, sec. 4, clearly removed any objection, on the ground that she was not a party to the deed.—*McNally* v. *Church* 27 U. C. Q. B. 103.

Tenant—Action of Trespass by.—In action of trespass to land, where the plaintiff is a tenant only, the duration of his term must be shown, the measure of damages being the diminished value of his interest.

The trespass complained of was removing a fence, in May, 1866. The plaintiff's landlady swore that she leased the place to the plaintiff in November, 1865, and added, "Plaintiff was my tenant when the rails were taken away, paying so much a year, taxes and statute labour." There was no further evidence as to the nature of the lease or duration of the term.

Held, that the damages should not as a matter of law, have been nominal only, but estimated on the injury the loss of the fence would cause to the plaintiff during the five or six months for which he then had a right to possession.—*Fisher* v. *Grace*, 27 U. C. Q. B. 158.

Jurors—New Trial.—Conversations had with jurors about the case on trial by the friends of the prevailing party, intended and calculated to influence the verdict, constitute a sufficient cause to warrant the court in granting a new trial, even though not shown to have influenced the verdict in point of fact, and though they were had without the procurement or knowledge of the prevailing party and listened to by the jurors without understanding that they were guilty of misconduct in so doing.

A motion for a new trial, upon the ground of misconduct by jurors during the trial, need not contain an averment that the misconduct was unknown to the moving party before the jury retired. It would seem to be otherwise when the objection to the juror is some matter which existed before the trial commenced, and which might have been a cause for challenge.

The fact that the moving party neglected to inform the court, before the jury retired, of misconduct on the part of jurors during the trial which came to his knowledge, would not, if proved, necessarily, as a matter of law, defeat the motion for a new trial, but would be one circumstance to be considered with others by the court in determining whether, in their discretion, to set aside the verdict.—*McDaniels, Executor, &c.* v. *McDaniels*, Am. Law. Reg. 729.

Judge—Slander.—Plea to a declaration for slander, that the defendant was a county court judge, and the words complained of were spoken by him in his capacity as such judge, while sitting in his court, trying a cause in which the present plaintiff

was defendant. Replication, that the said words were spoken falsely and maliciously, and without any reasonable, probable or justifiable cause, and without any foundation whatever, and not *bona fide* in the discharge of the defendant's duty as judge, and were wholly irrelevant in reference to the matter before him. *Held*, that the action could not be maintained.—*Scott* v. *Stansfield*, Law Rep. 3 Exch. 220.

LIMITATIONS, STATUTE OF.—A cheque is not an advance until it has been paid, and the Statute of Limitations only runs from that time.—*Garden* v. *Bruce*, Law Rep. 3 C. P. 300.

The analogy of the Statute of Limitations cannot be set up by an executor, in answer to a claim founded on a breach of trust by his testator.—*Brittlebank* v. *Goodwin*, Law Rep. 5 Eq. 545.

MASTER AND SERVANT.—W., the defendants' servant, was killed in consequence of the negligent construction of a platform by N., also in their employ. N.'s fitness for his place was not denied. The jury were instructed, that, if the platform was completed before W. was engaged, and if the defendants had delegated to N. their whole power and duty, without control on their part, W. and N. were not fellow-workmen, and the defendants would not be discharged on that ground. *Held*, erroneous. N.'s duty was a continuing one. A master is not made liable to a servant for an injury caused by the negligence of a fellowservant, by the simple fact that the latter is of a higher grade, as a superintendent.—*Wilson* v. *Merry*, Law Rep. 1 H. L. Sc. 326.

RAILWAY.—A train of the defendants, while stationary on their railway, was run into by, and by the fault of, another train. Several companies had running powers over that part of the defendants' line, and no evidence was given whether the moving train belonged to or was under the control of the defendants. *Held*, that *prima facie* defendants were liable.—*Ayles* v. *South-Eastern Railway Co.*, Law Rep. 3 Ex. 146.

A railway carriage on which the plaintiffs (husband and wife) were passengers to R., on reaching R. overshot the platform on account of the length of the train. The passengers were not warned to keep their seats, nor was any offer made to back the train to the platform, nor was it so backed. After several persons had got out of the carriage the husband did so, and the wife then took his hands and jumped from the step, and in so doing strained her knee. There was no request made to the company's servants to back the train, or any communication with them. It was daylight. *Held* (*per* Martin, Bramwell and Pigott, BB.; Kelly, C. B., *dissentiente*), that there was no evidence for the jury of negligence in the defendants.—*Foy* v. *London B. & S. C. R. Co.* (18 C. B. N.S. 225). distinguished.—*Siner* v. *Great Western Railway Co.*, Law Rep. 3 Exch. 150.

UNDUE INFLUENCE.—Persuasion is not unlawful; but pressure, of whatever character, if so exerted as to over power the volition, without convincing the judgment, of a testator, will constitute undue influence, though no force is either used or threatened.—*Hall* v. *Hall*, Law Rep. 1 P & D 481.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

DEBENTURE.—Debentures issued by a company, under a general power of borrowing, in part discharge of existing debts, are valid.—*In re Inns of Court Hotel Co.*, Law Rep. 6 Eq. 82.

The N. I. Co. gave debentures, in which, after reciting a debt due from said company to C., they covenanted to pay to "C., or to his executors, administrators, or transferees, or to the holder for the time being of this debeuture bond," a certain sum; provided, that payment to the holder of the bond should discharge the company from any claim in respect thereof. *Held*, that holders of these bonds could prove in their own names, but (contrary to the decision of the Master of the Rolls) subject to all the equities between the company and C.—*In re Natal Investment Company* (*Claim of the Financial Corporation*), Law Rep. 3 Ch. 355. See *Aberaman Iroworks* v. *Wickens*, Law Rep. 5 Eq. 485, 517.

APPLICATION TO QUASH CONVICTION—ENTITLING RULE NISI—PRACTICE —On application to quash a conviction, so soon as the return to the *certiorari* has been filed the cause is in this court, and the motion paper and rule *nisi* must be entitled in the cause.

Where the rule was not so entitled it was discharged, but, being on a technical objection, without costs; and under the circumstances of the case an amendment was not allowed —*The Queen* v. *Mortson*, Law Rep Q. B 132.

GAMING.—Surrounding the inclosure of the grand stand for the Doncaster races was a strip of land, itself inclosed by a paling. Within this strip were placed temporary wooden structures with desks, at which were clerks. A man outside conducted the business of betting, and the clerks recorded the bets. *Held*, that such a structure was an "office" and a "place," within 16 &

17 Vic. cap. 119, sec. 3, making penal the keeping of such.—*Shaw* v. *Morley*, Law Rep. 3 Exch. 137.

LARCENY.—The prisoner, having paid a florin to the prosecutrix for purchases, asked her afterwards to give him a shilling for change, which he put upon the counter. She put a shilling down, when the prisoner said to her, "You may as well give me the two-shilling piece and take it all." She then put down the florin, and the prisoner took it up. She took up her shilling, and the change for it put down by the prisoner, and was putting them into the drawer, when she saw she had but one shilling of the prisoner's money. But as she was about to speak, the prisoner's confederate drew her attention, and both left the shop. *Held*, that the prisoner was guilty of larceny.—*The Queen* v. *McKale*, Law Rep. 1 C. C. 125.

The prisoner found a sovereign on a highway; believing it to have been accidentally lost, and with a knowledge that he was doing wrong, he at once determined to keep it, notwithstanding the owner should afterwards become known to him, but not expecting that the owner would. *Held*, on the authority of *Reg.* v. *Thurborn* (1 Den. C. C. 387; 18 L. J. M.C. 140), that the prisoner was not guilty of larceny.—*The Queen* v. *Glyde*, Law Rep. 1 C. C. 739.

ONTARIO REPORTS.

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, Esq., J.C. *Reporter to the Court.*)

THE QUEEN V. MURRAY.

Conviction—Appeal to Q. S.—Adjournment—Certiorari—Notice.

Under Con. Stat. U. C. ch. 114, the costs of appeal from a conviction, as well as the appeal itself, must be determined at the Sessions appealed to. There is no power to adjourn the question of costs.

Where the application for a *certiorari* to remove a conviction is made by the prosecutor, no notice to the justices is necessary.

[Q. B., M. T., 31 Vic., 1867.]

Osler, counsel for Leonard, the private prosecutor, obtained a rule calling on the chairman and justices of the peace for the county of Huron to show cause why the order of the Court of General Quarter Sessions made in the matter of the appeal herein, holden in the month of June, 1867, and so much of the order of the said Court made in the same matter at the Sessions holden in the month of March, 1867, as assumes to adjourn the hearing of the said appeal or the question of costs until the said June Sessions, should not be quashed, with costs, on the ground that the said court exceeded its jurisdiction in adjourning the matter of the said appeal from the March Sessions until the June Sessions, and that the court had no jurisdiction to adjourn the hearing of the appeal, and adjudicate therein, and award costs at a subsequent hearing.

The rule was drawn up on reading the writ of *certiorari* and return thereto signed by the chairman of the Quarter Sessions and the Clerk of the Peace, and the two orders of the Sessions and other papers returned therewith made in the matter of the appeal

McMichael showed cause, and objected that it did not appear that notice of the application for the *certiorari* had been served on the justices, citing *Regina* v. *Peterman*, 23 U. C. R. 516; *Regina* v. *Ellis*, 25 U. C. R. 324; and he contended that the Sessions had determined the appeal at the March Sessions, the question of costs being a matter which the court might consider at the following sessions.

Osler supported his rule, submitting that notice to the justices was not necessary in the case of the prosecutor applying for a *certiorari*.—Paley on Convictions, 357, 358, 365. 368; *Rex* v. *Farewell*, 1 East. 305; *Rex* v. *Inhabitants of Bodenham*, Cowp. 78; *Rex* v. *Berkeley*. 1 Ken. 80; *Rex* v. *Boultbee*, 4 A. & E. 498; *Regina* v. *Spencer*, 9 A. & E. 485; and as to the illegality of the rules, he relied on *In re McCumber and Doyle*, 26 U. C. R. 516.

MORRISON, J.—In this case it appeared that Murray was convicted, on the 22nd February, 1867, before a justice of the peace, upon the information of Leonard, the applicant, of committing "a spoil by taking away a chisel from Leonard, and refusing to return it when asked therefor," and fined 25c. and $3 75c. costs: that he appealed from the conviction to the (next) March Sessions: that at such Sessions the appeal was heard, and it was ordered by the court, "that the conviction be quashed, and the question of costs shall remain over until next Sessions, with liberty to file affidavits to prove what occurred before the magistrates as touching the question of costs:" that at the following June Sessions the appeal was again heard, and this order made, "that the appeal be allowed, and the conviction of the appellant by Christopher Crabb, Esq., be quashed, with $25 costs, to be paid by the respondent to the Clerk of the Peace, &c., within thirty days from the date hereof, to be by him paid over to the appellant, he being the party entitled to the same. Dated 15th June, 1867, and made in open court:" that on the 16th July last, Leonard, the private prosecutor, made application and obtained the *certiorari* removing all the proceedings into this court.

As to the objection of want of notice to the justice of the application for the *certiorari*, it is laid down in Pailey on Convictions. and clear upon authority, that where the application for the writ is made by the private prosecutor, it issues of course, and without assigning any grounds, nor is any notice, &c., necessary.—*Rex* v. *Battams*, 1 East. 298, 303. The case of *Reg.* v. *Peterman*, referred to, was that of a defendant obtaining a *certorari* with a view of quashing a conviction.

Then as to the merits, this case must be governed by the decision in *McCumber and Doyle* (26 U. C. R. 516).

The words of sec. 1, cap. 114, Con. Stat. U.C., by authority of which the appeal was heard, are, "and such court shall at such Sessions hear and determine the matter of such appeal, and make such order therein, *with or without costs* to either party, as to the court seems meet."

We have already decided that the Legislature intended that the appeal should be disposed of at such Sessions, and we think it is quite clear from the language of the section that the matter of costs should be determined at the same time. Various reasons might be suggested why it should be so, if the language itself was not clear. The justices who preside at Quarter Sessions, with the exception of the chairman, are seldom the same. In the present case no one of the four who were present at the March Sessions, and heard the appeal, were present at the June Sessions, when the costs were disposed of.

No doubt the Sessions has a general power to adjourn; but, as said by Cockburn, C. J., in *Bowman* v. *Blyth*, in the Exchequer Chamber, on appeal (7 E. & B. 47), "we are unanimous in thinking that the decision of the Court of Queen's Bench in this case ought to be affirmed. Their judgment proceeds on the ground that, though the Court of Quarter Sessions have in general power of adjournment, yet, when an act giving any particular jurisdiction plainly intimates an intention that such particular jurisdiction is to be exercised by one particular Sessions, that Sessions cannot adjourn it to another." And Martin, B., in the same case, says, "I will only add that, though I do not question that, in construing acts, language seemingly positive may sometimes be read as directory, yet such a construction is not to be lightly adopted; and never when, as in this case, it would really be to make a new law, instead of that made by the Legislature."

We are therefore of opinion that this rule should be made absolute; but as, as in the case of *McCumber and Doyle*, no objection appears to have been made when the adjournment of the appeal was ordered, there will be no costs.

Rule absolute.

Campbell v. The Corporation of York & Peel.

York and Peel—Services of Registrar of Peel under 29 Vic. cap. 24, secs. 26, 33—Joint liability of Counties after separation—Pleading—Evidence.

Held, as decided upon demurrer to the declaration, 26 U.C. R. 635, that the Corporations of York and Peel were jointly liable to the plaintiff, as Registrar of Peel, for services rendered by him under secs. 26 and 33 of the Registry Act, before the separation of the counties.

Held also, that a demand of payment on the Treasurer of the Counties, and refusal by him, was sufficiently shown by the evidence set out below; and that the Inspector's certificate under sec. 70, though given after the separation, was sufficient, it not being a condition precedent to the right of action on such refusal.

Held also, no objection that the memorials copied by the plaintiff had been received by his predecessor, not by himself.

[Q. B., M. T., 31 Vic., 1867.]

Declaration, that the plaintiff, before and since the 29 Vic. cap. 24, was and is Registrar of the County of Peel, and before its separation from York a separate registry office was before and after the act established in Peel, and the plaintiff after the act, and before the separation, performed certain duties under sections 26 and 33 of said Act, the fees for which duties, according to said act, amounted, under sec. 26, to $963 61, and under section 33 to $2,000, which fees were duly certified by the Inspector of Registry Offices: that such duties were required by the act, and were to be performed by the plaintiff as Registrar under these sections; and after he had performed the duties, the plaintiff did, before action, request the proper treasurer to pay, &c., but he refused: that Peel was afterwards, and before this action, separated; whereby an action hath accrued against the defendants.

Plea, by the defendants separately, never indebted.

The case was tried at Brampton, before Adam Wilson, J.

A certificate by the Inspector of Registry Offices for services under sec. 33, was put in for $2,000, and another, under sec. 26, for $963 61.

Several letters were put in evidence, passing between the plaintiff and the Treasurer of York and Peel.

A witness proved that he went with an order from the plaintiff for the two sums to the office of the Treasurer of York and Peel, and spoke to a person he supposed was the Treasurer, who referred him to the Warden, who referred him to their legal advisers, by one of whom he was told that the County of York did not intend to pay the account at all. This was in February, 1867. The Treasurer said he thought that Peel should pay.

For the defence, *M. C. Cameron*, Q. C., for the County of York, moved for a nonsuit, on the ground that there was no sufficient proof of the account, or of the time the services were rendered: that the certificate does not refer to York more than to Peel, and does not refer to particular services rendered: that there was no sufficient request, under the statute, to pay: that this is a joint action, and no demand is shown on the Treasurer of Peel: that the County of York was not liable: that sections 68 and 70 of the Registry Act, 29 Vic. cap. 24, show that Peel is the County liable: that the fees are to be recovered from the County in which the separate Registry Office is: that Peel had been set off when the demand was made: that the lands lie there, and it had a separate Treasurer: that the plaintiff had not shown that he received any memorials from any other County, of which he was to make copies, and till then he had no duty to perform.

The plaintiff was then called as a witness. He said he had been Registrar over three years: that the memorials he copied were not received by him, but by his predecessor: that he had received about £560 from the Treasurer of the United Counties for services under sec. 26: that he began copying in November, 1865: that he had been paid all his accounts rendered of that class except $963; he had got nothing on account of the abstract indices, there was no other formal request to pay than appeared by the letters and accounts put in; and nothing received on the two accounts sued. In August, 1866, he rendered the account to the Treasurer for $963 61. In December he rendered the account for $2,000. The person he saw in the Treasurer's office said he had no authority to pay it. No demand was made on Peel since the separation excepting the letter (which letter was not among the exhibits).

The defendants, the County of York, then objected that as the plaintiff had not received the memorials, he was not an officer to do the work, &c.

It was agreed that a verdict should be taken for the plaintiff, with leave to the defendants to move to enter it for them, or for a nonsuit.

M. C. Cameron, Q. C., obtained a rule on the leave reserved, to which *James Paterson* showed cause.

HAGARTY, J.—The Inspector's certificates of the due performance of the work bear date 16th January, 1867. The accounts had been previously rendered to the Treasurer of York and Peel before the 1st January, when the final separation took place. There is, we think, sufficient evidence of a demand on the York Treasurer, and of a refusal by him. All the work was done before the final separation, and the plaintiff had been for some time applying to the Treasurer of the United Counties for payment.

The objections urged at the trial came, as we understand, from the counsel for the County of York. The County of Peel pleaded never indebted separately, and do not appear to join in the line of defence taken by York. The attorney on record for Peel was examined by the plaintiff as his witness, to prove a demand on the York Treasurer.

There was a demand of payment and refusal, or what would be legally equivalent to a refusal on the part of the Treasurer of the United Counties prior to a final separation. It is quite true that the Inspector's certificates were not given or furnished till after the 1st January, but we do not read section 70 as making the certificates a condition precedent to the right of action on demand and refusal to pay. The act, after giving the right of action, then declares that "the Inspector's certificate of the amount and of the services rendered shall be *primâ facie* evidence of the right to recover.

We consider that under the statute the accounts were sufficiently proved, and we do not agree to the objection that the present Registrar was not entitled to do or be paid for the work, as he had not received the memorials.

It was the officer as Registrar receiving memorials, and not any particular individual in his personal capacity, that we think the statute points to and on whom it casts the duty.

Our judgment on the demurrer to the declaration (26 U. C R. 635) covers many of the objections. We said there, "At the moment of dissolution it is a debt due by all the United Counties." So we hold here, that at the moment of dissolution, on the 1st January, 1867, the action had fully accrued to the plaintiff; and, in the further words of the judgment, "it continues a debt against all, as if, after each had commenced its independent corporate existence, it had been again contracted by them jointly with the other."

This view renders it useless to discuss the necessity of a separate demand on the Peel treasurer.

The result at which we have arrived may produce an effect not probably contemplated on the separation of these Counties, and bearing with apparent hardship on the County of York. We see however no other solution of the legal difficulty.

Rule discharged *

GIBB AND THE CORPORATION OF THE TOWNSHIP OF MOORE.

Town hall—By-law to erect—Provision for payment.

A By-law for the construction of a new town hall in a Township, passed 22nd May, 1867, was moved against, on the ground that it authorized expenditure for a purpose not under the head of ordinary expenditure, without having money in hand or making the necessary provision by rate or otherwise to meet the demand. It appeared, however, that the sum required was included in the annual by-law for the year, passed on the 19th August, 1867, upon an estimate previously made, also including it, which the applicant had voted to adopt; that the town hall had been completed, accepted and paid for, and the land on which it stood conveyed to the corporation.

Under these circumstances the rule to quash the by-law was discharged with costs.

[Q. B., M. T., 31 Vic., 1867.]

Harrison, Q C., obtained a rule on the corporation of the Township of Moore to shew cause why their by-law passed on the 22nd May, 1867, entitled a "By-law for the construction of a new town hall in the village of Mooretown, and providing for the expenses thereof," should not be in whole or in part thereof quashed, with costs, because the said by-law authorizes the expenditure of money for a purpose not falling under the head of ordinary expenditure, without having money in hand to meet the demand, without making any provision by rate or otherwise to raise the necessary amount to meet the demand, and without containing the recitals necessary to the validity of a by-law passed to raise money on the credit of the corporation; and on grounds disclosed in affidavits and papers filed.

The application was founded upon the affidavit of the Reeve of the Township, who swore that the funds for building the town hall mentioned in the by-law were taken from the money in the treasury of the township intended for and appropriated to the ordinary expenditure of the township: that no special rate was made to replace the funds so taken, other than a rate of 1¼ cents on the dollar to meet the ordinary expenditure for the present year; and that all the funds in the treasury at the time of passing the by-law were appropriated to the repairing of roads and ditches, &c., and no portion of the same were intended to be applied to the building of the new town hall, or any other or different purpose from those mentioned. He also stated that serious inconvenience and loss was occasioned to parties to whom the corporation was indebted for work and labour, by reason of the funds being applied to the building of the town hall.

In answer to the applicant's affidavit, the corporation filed affidavits of the Deputy Reeve, two other Councillors, the Treasurer, and the Clerk of the Corporation, which affidavits all went to shew that, deducting the appropriations made by the corporation during the year 1867, down to the date of the by-law (22nd May) out of the funds in hand at that time, there was in the treasury nearly $1,200, besides $858 27 in the County Treasurer's hands belonging to the corporation, ready to be paid on demand, making together over $2,000, and which sums might be lawfully applied to meet the expenditure on the new town hall. And attached to the affidavits of the Deputy Reeve and Clerk were certified copies of a general estimate of, and shewing in detail, the ordinary expenditure and liabilities of the corporation for the year 1867, made on the 28th June, 1867, and the ways and means to meet the same, the whole expenditure and liabilities amounting to $8,635, including the $1,500 for the town hall; the ways and means being $4,619, composed of $1,438 in cash on hand and money to be received, and the rate of 1¼ cents referred to in the applicant's

* Leave to appeal was granted.

affidavit estimated to raise $5,771, making in all $10,390, leaving, after deducting expenditure and providing for liabilities for the year, a balance of $1,755 for future appropriations.

It also appeared by the affidavits of the Deputy Reeve and the Clerk, that when the rate of 1¼ cents was struck the applicant knew that in the estimate of expenditure was included the $1,500 for the town hall: that he himself drew the resolution to levy the rate of 1¼ cents with that knowledge, and voted for the same, and that in accordance with that resolution a by-law was passed on the 19th August, 1867.

It also appeared that the fee of the land on which the hall was built was vested in the corporation, and that the town hall had been fully completed and accepted, and had been occupied and used for some time: that it had also been paid for, except as to $200 unpaid, the amount being in silver in the Treasurer's hands, and the person holding the order for it preferring to wait until bank notes came into the Treasurer's hands, and the $200 only remained unpaid for that reason.

It was also denied that any inconvenience or loss had been occasioned to any one, as stated in the applicant's affidavit.

C. Robinson, Q C., shewed cause, citing *Michie and The Corporation of Toronto*, 11 C. P. 386; *Clapp and The Corporation of Thurlow*, 10 C. P. 533; *Gibson and the Corporation of Huron and Bruce*, 20 U. C. R. 111; *Hawke and the Municipality of Wellesley*, 13 U. C. R. 636.

John Paterson supported the rule, and cited *McMaster and The Corporation of Newmarket*, 11 C. P. 402.

MORRISON, J.—Upon a perusal of the affidavits and papers filed on both sides, we are of opinion that this rule should be discharged.

On the whole, the affidavits filed on the part of the corporation fully meet and displace the case made by the applicant.

Then with respect to the by-law itself, for all that appears on its face there was money on hand to meet the demand; and as to the last objection, that it does not contain the necessary recitals, assuming for argument that it is a by-law requiring recitals, as said by Sir John Robinson in giving judgment in *Gibson and The Corporation of Huron and Bruce* (20 U.C.R. 121), "From the absence of any such recitals and provisions we are not at liberty to infer anything against the validity of the by-law, unless we can see clearly on the face of the by-law, or have otherwise shewn to us, that the by-law was passed for a purpose which required them to be inserted If for all that appears the by-law may be legal, we are not to conjecture the existence of facts that would render it illegal * * It is difficult to foresee how much public inconvenience may be sometimes occasioned by quashing by-laws after they have been acted upon, and though this can never be admitted as a reason for sustaining what has been clearly shewn to be illegal, it is a strong reason for declining to quash a by-law except on some clear grounds."

Rule discharged, with costs.

COMMON PLEAS.

(Reported by S. J. VANKOUGHNET, Esq., *Reporter to the Court.)*

IN RE MOORE V. LUCE.

Insolvency—Debt not matured—Right of creditor to commence proceedings.

Under the Insolvent Acts of this Province a creditor, whose debt is immatured, may commence proceedings against his debtor, who is insolvent, in like manner as he might have done, if his debt had been overdue at the time. But, in this case, it appearing that the debtor did not owe more than $100 beyond the creditor's debt, none of which was at the time due, and a portion not payable for several years to come, the Court directed that he should be allowed further time to shew, if he could, that he was not, in fact, insolvent, and so not liable to have his estate placed in compulsory liquidation.

[C. P., E. T., 31 Vic., 1868.]

A writ of attachment in insolvency was issued on the 25th of March, 1868, on the usual affidavits. The principal affidavit was made by R. P. Luce, the agent of the creditor, who stated, among other facts, that John R. Moore "is indebted to the plaintiff in the sum of eight hundred and sixty-six dollars and sixty-five cents, currency, for principal money accruing due upon eight promissory notes, hereunto annexed, made by said defendant: to the best of my belief and knowledge, the defendant is insolvent."

This affidavit was made on the 9th of March, 1868.

The first note was as follows:

"$100.—Two years after date, for value received, I promise to pay to Luce Brothers, or bearer, one hundred dollars, with interest at the rate of eight per cent per annum until paid.

"JOHN R MOORE."

The first note and the seventh were payable to Luce Brothers, or bearer, and both were stated to have been endorsed to T. J. Luce

The first six notes were dated the 14th of Nov, 1866. The seventh and eighth notes were dated the 19th of November, 1866.

The first six notes were for $100 each.

The seventh note was for $128

The eighth note was for $138 65.

The first note was at eight per cent. generally. The remaining seven notes were at eight per cent. payable annually.

The first note was payable at two years, and each of the other notes was payable respectively, at three, four, five, six, seven, eight and nine years.

The debtor petitioned the Judge on the 28th of March, 1865, to set aside the attachment, because his estate had not become subject to compulsory liquidation, as he was quite solvent, and the notes mentioned were not due.

The petition was argued before the learned Judge in the Court below, and he decided that by the Act of 1864, sec. 12, sub sec. 5, the plaintiff was a *creditor*, and, being a creditor, he could establish his claim under sec 3, sub-sec 7; that he was not required to shew his debt was overdue, or that he had an existing cause of action at law; that *Phillips* v. *Poland* L. R 1 C. P. 206, placed a construction on the term *creditor* as applicable to the English Bankruptcy Act of 1849, sec. 112, which shewed that it meant, as to that Act, a person would come in under the Act and have the benefit of it; that *Wood* v. *DeMattos*, L. R. 1 Exch. 91, decided the same

as to the term creditor under the 24 & 25 Vic. ch. 134; and that the plaintiff could certainly prove his claim under the statute, on proceedings taken by another creditor.

The petition was thereupon dismissed with costs, as well on the law as on the merits.

The defendant appealed to this Court to revise and reverse the decision of the judge, and that it might be declared his estate was not, under the circumstances set forth in the affidavits on which the attachment was granted, subject to compulsory liquidation; and that all proceedings therein might be set aside, with costs to be paid by the plaintiff, and that all the defendant's property and rights might be re-invested in him, in the same manner as if the attachment had not been issued.

In Easter Term last, *Street* appeared for the appellant:

The main question was, whether proceedings under the Insolvency law could be taken by a person who had a claim against another before the claim was due; whether such person was a *creditor* under the statute, and the claim he had was a *debt*.

The English Act, 7 George. I. ch. 31, sec. 8, enabled creditors, whose debts were not due, to rank as creditors, but it prohibited them from being petitioning creditors: *Ex parte James*, 1 P. Wms. 610.

The Judge in the Court below relied on sec. 12, sub-sec. 5, and sec. 3 sub-sec. 7, and two late English decisions giving a meaning to the word *creditor*, in coming to the conclusion which he did.

Harrison, Q. C., contra:—

The fact that the section of 7 Geo. I. ch. 31, prohibited creditors, whose debts were not due, from becoming petitioning creditors, shows that but for the enactment they could have been such petitioners

This section, too, was also expressly repealed by the 5 Geo. II ch. 30, and therefore a creditor, whose debt was not due, could after that be a petitioning creditor, as was held in *Ex parte Douthat*, 4 B. & Al. 67.

The word *creditor*, under the Bankruptcy Acts, means a person having a claim, who can prove for it and claim the benefit of the Act: the cases referred to in the Court below shew this; L. R. 1 C. P. 204: L R 1 Exch. 91.

In addition to the section of the Act of 1864, referred to in the Court below, sec. 5, sub-sec. 2, expressly names "debts due, but not then actually payable."

A claim not due may be a debt, and though not due may be attached under the garnishment enactments: *Jones* v. *Thompson*, E. B. & E. 63.

By the English Bankruptcy Act of 1849, sec. 91, a creditor whose debt is not due may take initiatory proceedings: the same construction should be placed on our Acts. It was not an unreasonable proceeding, for a debtor should not be allowed to waste his estate to defraud his creditors, merely because the day of payment had not arrived.

Street in reply:—

Creditor is used in the statute to describe one who can prove a debt, in distinction to one whose claim is not an absolute one, but contingent only.

A. Wilson, J.—The question is one of novelty with us, and it is of great consequence it should be settled, both as respects debtors and creditors.

If our Insolvent Act is expressed, and is to be construed in the same way as the English Bankruptcy Acts, the policy of both being alike, the decision appealed from must stand.

Before the passing of the English Statute 7 Geo. I ch. 31, none but creditors whose debts were due at the time of the act of bankruptcy committed were entitled to prove for their debts, or to be petitioning creditors for the Commission: *Tully* v. *Sparkes* (2 Ld. Ray. 1549).

The 7 Geo. I ch. 31, enabled creditors who had security in writing, to prove for their debts, though not due when the Bankruptcy was committed, but it precluded such creditors from being petitioning creditors.

By the 5 Geo. II. ch. 30, sec. 22, this disability was removed, and under it the case of *Ex parte Douthat* (4 B. & A. 67) was decided.

The Statute of Geo. II. was confined to creditors who had security in writing for their debts. If the creditor, therefore, had a debt for goods sold and delivered, which was not due, but no agreement or note in writing for the amount payable at a certain time, he could not prove in respect of such debt: *Hoskins* v. *Duperoy*, (9 East. 498); *Price* v. *Nixon* (5 Taunt. 338).

The 6 Geo. IV. ch. 16, sec. 15, enabled every creditor, whose debt was not due at the time of the bankruptcy committed, to prove his debt or petition for a commission, whether he had a security in writing or not for his debt, and the 12 & 13 Vic. ch. 106, sec. 91, is to the same effect.

The question then, is, does our Insolvency Act permit a person, whose debt is not yet due, to make his debtor an insolvent in respect of that debt?

This power can only be exercised, if expressly or by plain implication it has been conferred on the creditor, for without it he can have no such power.

It is quite clear that debts not due may be proved against the estate by the direct language of the statute, and this goes far to establish the right to commence proceedings for them; for, as said by Abbott, C. J., in 4 B. & C. 71, in relation to the 7 Geo. I. ch. 31, and the 5 Geo. II. ch. 30, and some years before the 6 Geo. IV. was passed, "No distinction can now be taken between a proveable debt and that of the petitioning creditor."

The different parts of the Act of 1864, which apply to the question, are the following: Sec. 2, requires the person making a voluntary assignment to exhibit a statement to the creditors shewing, among other things, the amount due to each, "distinguishing between those amounts which are actually overdue and those which have not become due at the date of such meeting."

The form B in the schedule shews the distinction made, not as to direct liabilities, which is strange, but as to *indirect* liabilities, maturing *before* and *after* the day fixed for the first meeting of creditors.

The form of oath of the insolvent immediately following this schedule states, "That all the above-mentioned liabilities are honestly *due* by me, and that none of them were created or have been increased with the intention of giving to the creditor thereof any advantage *either in voting at meetings of creditors or in ranking on my estate.*"

Sec. 2, sub-sec. 3, also refers to direct liabilities *then actually overdue:* on such latter securities the creditor may vote, but not on indirect liabilities which are not due.

By sec. 3, sub-secs. *b, c, i*, a creditor, whose debt is not due, may be injured, and under them he may state, in respect of his immatured debt, a cause of insolvency which affects him equally with a creditor having a claim which is past due.

The affidavit the creditor has to make, by the form given under sub-sec. 7, when he applies for a warrant against his debtor, is that "the defendant is indebted to the plaintiff" in a particular sum, stating the value of the debt, and, to the best of the creditor's belief, that the defendant is insolvent within the meaning of the Act, and has rendered himself liable to have his estate placed in compulsory liquidation. The 7th sub-sec. does not use the phraseology that the defendant *is indebted* to the plaintiff, which the form does, but that the plaintiff *is a creditor* of the insolvent; no doubt very different language; but the statement that the insolvent *is indebted* may be read by the light of the statute, which in effect makes an undue debt to be due, and so the party *indebted* for the purposes of the Act.

By sec. 5, sub-sec. 2, "all debts *due and payable* by the insolvent at the time of the execution of a deed of assignment, or at the time of the issue of a writ of attachment under this act, and all debts, *due, but not then actually payable*, subject to such rebate of interest as may be reasonable, shall have the right to rank upon the estate of the insolvent."

By sec. 9, sub-sec. 3, the consent in writing of the proportion of creditors specified to the discharge of a debtor "absolutely frees and discharges him from all liabilities whatsoever [except those hereinafter excepted] *existing against him and proveable against his estate, whether such debts be exigible or not* at the time of his insolvency, and whether direct or indirect;" and, lastly, the word *creditor* by sec. 12, sub-sec. 5, shall be held to mean "every person to whom the insolvent is liable," whether primarily or secondarily, and whether as principal or surety.

The respondent was certainly a *creditor* of the appellant at the time when these proceedings were taken: he had a direct and primary liability against him: his claim was *due* under sec. 2 and the oath to Form B, and under sec. 5, sub-sec. 2; although, according to sec. 2, *not actually overdue*, or according to sec. 5, sub-sec. 2, *not then actually payable*, or according to sec. 9, sub-sec. 8, *whether exigible or not;* and such a debt he would be barred by the discharge under the last mentioned section from ever enforcing against the appellant, because by that section, and also by sec 5, sub-sec. 2, it was proveable against and entitled to rank upon the estate of the insolvent.

The consideration of these enactments of the statute leads us to the conclusion that our Insolvent Act must in this respect be construed as the Bankrupt Acts are in England, and that a creditor having an immatured debt may commence proceedings against his debtor, who is insolvent, in like manner as he might have done if his debt had been overdue at the time, although there is no direct enabling clause to this effect in the statute, as there is in the English Acts.

The right exists, by virtue of his position as a creditor, and to prevent the exercise of this right would require a disqualifying clause such as was originally contained in the Act of 7 Geo. I. ch. 31

The averment in the affidavit of the creditor before alluded to, that the insolvent *is indebted* to him, must be construed according to the general tenor, effect and purpose of the Statute; and by the Act the insolvent *is* indebted to him. The expression cannot, then, be said to be inconsistent with the purview and intent of the Act.

Under the words "all debts owing or accruing," that which is *debitum in presenti*, though *solvendum in futuro*, is attachable: *Jones* v. *Thompson* (E. B & E. 63); *Dresser* v. *Johns* (6 C. B. N. S. 429).

The cases referred to by the learned judge in the court below, of L R 1 C P. 204, and L R. 1 Exch. 200, show that the word *creditor* as used in the Bankrupt Acts is not applied to all persons who are creditors; that it does not apply to a person who recovered judgment for a debt contracted after the debtor became a bankrupt, but to a creditor "who can come in under the bankruptcy and have the benefit of it, whether his claim be strictly a debt or not."

The judgment of the learned Judge of the County Court has been very carefully prepared, and is fully and satisfactorily sustained by his reasoning.

As to the merits,—the application to have the proceedings set aside, because the respondent was not in fact insolvent, or amenable to the Act; we think that evidence of the facts contained in the petition might have been and may still be admitted; and no doubt, where the effect of such proceedings is to accelerate the payment of a debt but lately contracted, by several years, they should be looked upon with that natural degree of suspicion which so great an advantage to the creditor unavoidably creates. We are of opinion the appeal must be disallowed, excepting that the debtor should be allowed a further time to sustain the allegations of his petition, if he can; upon which the learned Judge, after hearing the testimony on both sides, legally advanced and admissable, will of course pronounce his own opinion. We should not probably require this to be done in an ordinary case; but in so unusual and peculiar a one as this is, and the debtor not owing more than about $100 beyond this creditor's debt, and having apparently quite a large property in possession, the very fullest opportunity should be offered to the debtor to scrutinize the proceedings of a creditor, whose interest is so obviously opposed to the delay of waiting for his debt until it is due, and is so plainly benefited by anticipating, if he can, the long day of payment he agreed to give,

Rule disallowing the appeal, excepting that the debtor be allowed a further day, to be named by the Judge of the County Court, to support his petition by evidence, if he can, and that the parties be then reheard therein on the merits; and on the whole, without costs, if the residuary proceedings be finally set aside by the learned Judge below; but if they are directed to stand on such rehearing, the whole costs should be costs against the estate.

Rule accordingly.

CORRESPONDENCE.

Statute of Limitations saved by Division Court process—Continuances in Courts not of Record.

To the Editors of the Local Courts' Gazette.

Sirs,—I read in your September number an enquiry on this subject from a Toronto correspondent; and as I have had occasion to examine into the same questions in my own practice, I copy what I believe to be good law, from Moseley on Inferior Courts, p. 190:

"The action must be commenced within the six years from the day of the accruing of the plaintiff's rights to sue. And the mode of issuing and continuing a writ in the Superior Courts, in order to save the Statute of Limitations, is not probably applicable to Inferior Courts; for it was given by the Uniformity Process Act, which is only applicable to the Superior Courts, as appears from its commencement; and the regulations in this respect have reference only to writs issued by the authority of that Act."

I think it out of the question for any one to insist that "continuances" should be entered, to save the Statute of Limitations, in Courts not of Record, like the Division Courts.

Under the old practice of the King's Bench in England (I quote from Tidd's Practice, 8th ed.), "Where a writ is sued out to avoid the Statute of Limitations, it should regularly be *entered* on a roll and docketed, with the sheriff's return thereto, and continuances to the time of declaring," &c. Now, substituting the word "bailiff" for "sheriff" here, how, I would ask, would it be possible to enter a continuance in a court wherein there is no docket, and the proceedings are not enrolled?

Again, looking at the practice in this respect in the County Courts in England, which *are* Courts of Record (see 9 & 10 Vic. cap. 95, sec. 3, Imp. Stat.), I find, under rule 12, the practice to be, "Where the summons has not been served, the judge may, in his discretion, in order to save the Statute of Limitations, direct another summons or succession of summonses to be issued, bearing the same date and number as the first summons."

The Division Courts' Act makes no reference to this subject, but gave certain judges the power to make rules, and declared certain rules to be in force. The only rule which they did make affecting this question was the 18th, (still in force); it reads thus: "The ordinary summons on demand, &c., shall be issued according to the form to these rules appended, &c., *and the issuing thereof shall be the commencement of the suit;* and every summons shall be numbered to correspond with the demand or claim on which it issues, and dated as of the day on which the same was entered for suit, except in the case of alias or pluries summons, which shall be dated on the day on which it actually issues." On referring to the form (No. 6), it will be found there is no direction given as to when or how often "alias or pluries summonses" are necessarily to issue; so that it may be inferred in all reason, in the absence of a direct rule, such as I have shown exists in the County Courts in England, the action is commenced when the *first* summons issues; all subsequent process is intended to give the defendant notice of it, and nothing more is necessary; and so soon as an opportunity occurs for effecting a service (no matter, I think, at what space of time afterwards) the plaintiff should sue out an alias; and not effecting a service of *that*, then a *pluries* summons, &c., until service of process is completed.

To suppose or insist upon any other system than this, would, to my mind, be oppressive to the plaintiff, and no manner of good to the defendant, but the reverse; for it would make a jurisdiction, intended to be as inexpensive as possible, in a case like that mentioned by your correspondent, very cumbersome and costly, without serving any purpose whatever.

If it were intended to be otherwise than I suggest, surely the learned judges who framed our Division Court Rules, and the Superior Court judges, who approved of them, would, with the English Rules before their eyes, have followed them in this respect.

I have the honor to be, Gentlemen,
Respectfully,

Union, Nov. 10. Union.

Municipal Law.

Preston, Nov. 17, 1868.

To the Editors of the Local Courts' Gazette.

Gentlemen,—Will you kindly inform me whether section 259 and sub-section 23 of section 355 of the Municipal Act (29 & 30 Vic. cap. 51), are applicable to *all* informations, complaints or prosecutions that may be brought under the Municipal Act, or whether

section 259 only has reference to the two next preceding sections (257 and 258) and the other only to pounds and pound-keepers.

By comparing section 259 with section 256 of the old Municipal Act (22 Vic. cap. 54), it appears that the former is almost a transcript of the latter, with this material difference, that in the latter the words "the two last preceding sections" are left out.

And by comparing sections 256, 259 and 355 (23) of the present Act, I find what to my judgment as a layman appears an anomaly.

Sec. 256.—All prosecutions for penalties incurred by persons vending liquors without license, shall be recoverable with costs before *any two* or more justices of the peace having jurisdiction in the *municipality* in which the offence is committed.

Sec. 259.—All informations, complaints or other necessary proceedings may be brought and heard before *any one* or more justices of the peace of the *county* where the offence or offences were committed or done.

Sec. 355 (23).—Every fine and penalty imposed by *this Act* may be recovered and enforced, with costs, by summary conviction, under the Summary Conviction Act, before *any* justice of the peace for the *county or of the municipality* in which the offence was committed.

Thus, while by section 256 at least *two* justices of the peace are required to convict a person for selling liquor without license, sections 259 and 355 (23) appear to give authority to a *single* justice of the peace to convict *any* offender against *any* of the provisions of the Municipal Act, hence including the offence of selling liquor without license.

There also appears a difference in the kind or sort of justices of the peace, that are permitted to convict under that Act.

Sec. 256 authorizes justices of the peace having jurisdiction in the municipality where the offence was committed.

Sec. 259.—Justices of the peace of the county where the offence was committed, and

Sec. 355 (23) Justices of the peace for the county or of the municipality in which the offence was committed.

Should your information be, that section 259 does not affect section 256, then I should wish to know the *time* within which proceedings must be begun from the date of the offence, in prosecuting an offender for selling liquors without license.

I remain, Gentlemen, respectfully yours,

Otto Klotz.

REVIEWS.

Georgia Reports, vol. 35. December Term, 1866; and a Table of Cases, reported in the first 31 volumes of the Georgia Reports: By L. E. Bleckley, Esq., late Reporter of the Supreme Court of Georgia. Atlantic ,Ga., 1868.

We have to acknowledge the above through the courtesy of Mr. Bleckley.

The cases seem to be carefully reported, and many of them decide points of interest, more especially to the American people—such, for example, as the case of *Clarke* v. *The State of Georgia*, which is an authority, founded on an act of the Legislature, that persons of color are competent witnesses in all cases, just as white persons are; a proposition which to us seems sufficiently reasonable, and beyond discussion, though the lesson has been a difficult and a bitter one for Southerners to learn.

The reporter gives, in an appendix, some decisions of Judge Erskine, of the same State. The first of these must have been felt as a relief to the exasperated feelings of honorable men in the South, whatever the ultimate result of it may have been. In *Ex parte William Law*, he held that an attorney or counsellor, duly admitted to practice in a court of the United States, and practising there prior to the late civil war, and who has received and accepted a full pardon from the President, &c., may resume his practice in the said court, without taking the oath prescribed by the act of Congress, which act required an oath, in certain cases, that the person had not borne arms against the United States, or submitted to the authority of the Confederate Government, &c.; such act being, in its application to such person, in the opinion of the judge, unconstitutional and void.

To constitute the crime of bigamy, there must be a valid marriage subsisting at the time of the second marriage. A marriage between slaves was, in legal contemplation, absolutely void; but if the parties, after their manumission, continued to cohabit together as husband and wife, it was a legal assent and ratification of the marriage; and if, while such marriage exists, one of the parties marries another, it is bigamy.