DIARY FOR FEBRUARY.

1. Wed ... Grammar School Trustees to meet.
2. Thur .. *Purification of B. V. Mary.*
5. SUN ... *5th Sunday after Epiphany.*
6. Mon ... Hilary Term commences.
10. Frid.... Paper Day, Q. B. New Trial Day, C. P.
11. Sat .... Paper Day, C. P. New Trial Day, Q. B.
12. SUN ... *Septuagesima.*
13. Mon ... Paper Day, Q. B. New Trial Day, C. P.
14. Tues ... Paper Day, C. P. New Trial Day, Q. B.
15. Wed ... Paper Day, Q. B. New Trial Day, C. P. Last day
16. Thur ... Paper Day, C. P. [for service for Co. Ct.
17. Frid.... New Trial Day, Q. B.
18. Sat .... Hilary Term ends
19. SUN ... *Sexagesima.*
24. Frid.... *St. Matthias.*
25. Sat .... Declare for County Court.
26. SUN ... *Quinquagesima.*
28. Tues... *Shrove Tuesday.*

NOTICE.

Owing to the delay that has unavoidably taken place in the issue of the January number and of this number of Law Journal *and* Local Courts' Gazette, *the time within which payments must be made to secure the benefits of cash payments is extended to 1st April next.*

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take both publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

The Local Courts'
AND
MUNICIPAL GAZETTE.

FEBRUARY, 1865.

THE RECENT CHANGES.

We have most favorable accounts from all quarters of the reception of the *Law Journal* and the *Local Courts' Gazette*, and have every reason so far to be satisfied with the result of our exertions.

Some few there are amongst the magistracy and municipal bodies that seem to labour under the impression that it is quite out of the power of any mortal to add anything to their stock of knowledge, and so long as they have the "Consolidated Statutes," which they fondly imagine contain *all* the law on every subject, they think they cannot go wrong. The less such people *really* know the more they *think* they know. Fortunately the localities blessed with such luminaries are few, and there appears to be a growing desire on the part of those connected with magisterial and municipal duties to use every means of increasing their stock of information. The first judges in the land find it necessary to keep themselves well posted in the current law; and it is an invariable fact, that those who know most are always the persons most anxious to learn more.

The Council of the County of Simcoe have taken the lead in this respect amongst the municipalities. They have with commendable enlightenment and liberality ordered several copies of both publications for the use of the County Council, and two copies of the *Local Courts' Gazette* for the use of each local municipality in the County. We venture to promise that it will not be money thrown away. Certainly not if we can help it. What will be useful for one county will be of the same advantage to another, and we hope to find this example followed by the majority of the other County councils in Upper Canada.

We have every reason to believe, and are extremely glad to be able to say so, that the changes that have been made have met with such general approbation from persons of influence and intelligence.

MAGISTRATE'S MINUTE BOOK.

Many years ago the writer heard the late Chief Justice of Upper Canada censure a magistrate for not keeping minutes of his official acts and proceedings.

The powers and duties of justices of the peace are most extensive and varied, and it is no less important for themselves than the general public, that some record should be preserved of every application to them, and of every proceeding before them. The magistrate's court should not form the only exception to the rule requiring regular entries to be made of all business coming before courts of justice. This rule is rigidly enforced in the highest as well as in the lowest court of civil judicature in the Province; and magistrates, with their large criminal jurisdiction, ought more especially to observe it. What would be thought of a business man who kept no day-book or journal—an agent who kept no diary of his doings? Why, that he must be an ignorant person, or culpably indifferent and careless. Yet we believe it to be the fact that not one magistrate out of ten keeps any minute of his official doings.

It is not by way of complaint but as a warning that we draw attention to this matter, and urge upon magistrates the necessity of attending to the duty referred to. It is not enough that they have the informations or other

papers before them, by referring to which they may possibly get some clue to what has been done. *Every application made and every act done should be briefly noted.*

Thus: a party prefers a charge for felony, and the magistrate thereupon issues a warrant. Afterwards he issues summonses to witnesses, hears the charge, and commits the alleged offender to a court of Quarter Sessions for trial, and then sends the papers to the County attorney. This would require the following entries to be made, with the proper dates:—(1) Of taking the information on oath, issuing the warrant, and to whom and when delivered. (2) Of issuing the summonses, and to what witnesses. (3) Of the hearing, the sending for trial, the names of parties entering into recognizances to appear and prosecute, and the amount in which they were bound. (4) Of sending the papers to the County attorney. And so with regard to all other matters—the magistrate's note book shewing briefly all his transactions as a magistrate.

In villages the magistrates employ a clerk, and when that is the case, even more care is required in keeping such a book by the clerk; and there need be no hesitation in saying that a clerk who is unable to keep his note book of proceedings properly posted up, is quite incompetent for the more important duties of his office.

The suggestion made will, we trust, commend itself to magistrates. The plan is simple and easily carried out, and the gentleman who feels himself incapable of doing it ought to put this question to himself—If I am not able to keep a simple minute-book of proceedings, can I conscientiously hold an office in the exercise of which I may either, for preliminary enquiry or final adjudication, be required to investigate nearly every crime known to the law, and to conduct such investigation at times and in a manner, squaring not only with the broad principles of justice, but with special enactments laid down for my guidance?

WHAT IS AN ARBITRATOR?

Is an arbitrator the agent and advocate of the person who names him to settle a dispute employed to protect and further the interests of his client, or is he a judge—bound in hon our and conscience to decide impartially and righteously, "without fear, favour or affection," and according to the truth of the case, without reference to its being adverse or favourable to the person appointing him?

Some may smile at the simplicity which asks such a question. All upright and intelligent men will answer that the latter definition alone describes the arbitrator proper, and that the former only suits the ignorant or dishonest man appointed to a duty for which he is wholly unfit.

We believe that by the mass of our people the true position of an arbitrator is utterly misunderstood. The common mode of settling a dispute is "to leave it to two men." Each disputant appoints "his friend," whom he fully expects to look wholly to his interests, to object to everything that bears against him, and to consent to nothing that may prejudice him, and the friend so appointed is generally too ready to do all this most faithfully. His opponent does just the same, and instead of two honest men sitting down to decide uprightly and impartially on the facts, without reference to the parties, we have two advocates each striving with might and main to stand by the man who named him, and with no chance of making an award except by calling in some third person, at increased expense, to turn the scale in favour of one or the other.

Now almost universal as this is in practice, it is, to say the least of it, a monstrous perversion of plain duty. An arbitrator, no matter by whom appointed, is to all intents and purposes a judge, and if he be an honest man and know his duty, he should feel as much shocked at leaning to one side or the other, or favouring one man above the other, as he would be if he saw a judge in court exhibiting favour or partiality. But this, the only true and honest view of an arbitrator's duty, seems to be little understood.

Numerous instances have occurred, and are occurring among us, of the strange misconception that prevails. Arbitrators are heard talking of "their clients," meaning those who named them, just as the lawyer speaks of the person who retained his services. Men in good social position, who would be highly indignant at the imputation of dishonesty or ignorance, so speak, and what is worse, so act on arbitrations, not seeking even to disguise their advocacy of their client's interests; and yet beyond all shadow of doubt such men are either wholly ignorant of their duties or too dishonest to regard their proper performance. Instances are known of such men admitting

that they bargained for a commission or per centage on whatever amount they could get awarded to the "client"! Between such and the judge who takes a bribe to pervert his judgment, there is no moral distinction whatever.

Awards have been made, intelligible on no principle deducible by an impartial mind from the facts in evidence. In the case of contests between individuals and public companies, the results are sometimes ludicrous, were it not for the serious consequences involved. Compensation has been, before now, awarded for a strip of land to an amount exceeding what any man, in his senses, would give as the price of the whole property from which the strip was taken. But these instances are of rare occurrence compared with the numberless cases between individuals occurring daily throughout the country.

Besides, men dead to the plainest dictates of duty, are generally too much alive to their own interests. The one is frequently the effect of the other. Men who scruple not to gain all they can, honestly or dishonestly, for those who employ them, seldom forget themselves. The consequence is, in many cases, not only awards outrageously unjust, but saddled with huge bills of costs in the shape of arbitrators' fees, modestly assessed by the arbitrators themselves.

It is well to call attention to this state of things. We believe there are many really honest and respectable men who misconduct themselves as arbitrators from mere ignorance of duty. The prevailing idea seems to be that an "experienced" arbitrator's duty, as it generally is his practice, is on the one side to get the largest possible sum of his friend, if the friend be seeking compensation, or on the other hand if the friend be resisting payment, to strive hard to reduce the amount to the smallest sum, or to resist it altogether.

The evil is one of a most serious kind, and any person who can succeed in attracting public attention to it will deserve the thanks of all. As a large portion of the evil results from misconception, it is only necessary, so far as honest mind is concerned, to explain the true position of the case. The legislature is constantly providing for the settlement of disputes by arbitration, and it is of the highest importance that men should rightly understand that an arbitrator is not an advocate or a partizan bound to stand by his client, but that he is a judge, bound to decide with rigid impartiality, and that if he favour one side more than another, or needlessly heap expenses on either party to the reference, he does not act the part of an honest man.

POUND-KEEPERS.

Section 359 of the Municipal Institutions Act (Con. Stat. U. C. cap. 54,) gives power to the council of every township, city, town and incorporated village to pass by-laws (not being inconsistent with the act relating to cruelty to animals), for providing sufficient pounds, for restraining the running at large of any animals and impounding them, and for the sale of them if not redeemed within a certain time, or if the damages, fines and expenses are not duly paid; for appraising the damages done by any animals trespassing, and for determining the compensation for services rendered in carrying out the act. As a general rule many of the municipalities in Upper Canada have taken advantage of the powers granted to them in this section. However, where no by-law has been passed under section 359, the regulations contained in section 360 are to be followed.

The act respecting cruelty to animals, which is referred to in section 359 is to be found in the Con. Stat. of Canada, chap. 96. This statute, and any township regulations on the same subject, must therefore be kept in view in drafting a by-law under this section. Section 360, moreover, is binding in all cases not otherwise specially provided for by a by-law, and its provisions may at the same time serve as a valuable formula, so to speak, from which to draft by-laws containing the whole or part of its provisions, and adding thereto such clauses as may be considered necessary or advisable in any particular locality or for any peculiar circumstances that might have arisen or may be likely to arise.

A pound-keeper is a public officer discharging a public duty. As remarked by a learned judge, "The pound is the custody of the law, and the pound-keeper is bound to *take and keep* whatever is brought to him at the peril of the person who brings it. If wrongfully taken *such person* is answerable, not he. It would be a terrible thing if the pound-keeper were liable to an action for refusing to take cattle in, and also liable in another action for not letting them go."

As a public officer discharging a public duty a pound-keeper can claim the privileges and protection accruing to him from such a position, and is therefore entitled to notice of any action which may be brought against him for acts done in the execution of his office; he may give special matter in evidence under the general plea of not guilty, and the plaintiff must aver in his declaration that the alleged grievance was committed maliciously and without reasonable and probable cause, and must give proof accordingly.

But if a pound-keeper goes beyond the line of his duty, or becomes a party to the illegal act of another person, he loses the advantages of his position as a public officer and cannot claim the protection of the statute, and on this subject many of the remarks made in our last number with respect to magistrates apply equally to pound-keepers, as well as to other public officers.

What then are the duties of pound-keepers when animals are impounded? (1) As to the receipt of the animal; (2) As to the claim for damages done to the impounder; and particularly, (3) As to the sale of it, if such be necessary, and the preliminaries antecedent thereto.

(*To be continued.*)

PROVING DISPUTED ACCOUNTS.

Amongst the annoyances connected with a country merchant's business is to be put to proof of a long account, extending over two or three years. He may have changed his clerks several times during the period, or some of them may be dead, or have left the country. Under these circumstances, with an account containing perhaps one hundred or more items, it is very difficult, often impossible, to bring direct proof of all, when the whole account is denied by a defendant.

Our present object is to offer some suggestions as to the mode of proving such an account.

First—The plaintiff should bring all the direct proof he can obtain as to the particular tems in his bill.

Second—He should shew by witnesses that the defendant was in the habit of dealing with him for his family supplies, and if such be the case, with him alone; that he or his family were frequently seen in plaintiff's store, purchasing articles, &c.

Third—The merchant should bring his books, day-book and ledger, into court, and (after giving all the direct and general evidence he can furnish to shew the dealings by facts and circumstances) claim of the judge to be allowed his own oath in supplement of the partial proof given. If the judge be satisfied that some of the objected items have been proved, that there is evidence of the defendant having dealt with the plaintiff for his supplies, and that the plaintiff's books have been properly kept, and that the items of the account are regularly entered therein, the judge will be quite warranted in allowing the plaintiff to be examined to establish the account in detail.

As a general rule, it is not prudent to call the defendant: a man who dishonestly denies a claim will have little scruple in committing a graver offence against morals; and a sound discretion must be exercised in calling a member of the defendant's family.

It is always better, in cases of the kind referred to, that the account in detail should be sued on, rather than trust to being able to prove that a copy was rendered. But, it may be added, that the fact of an account being rendered yearly and not objected to till sued on, is a strong circumstance against the defendant, and one that would, no doubt, weigh with the judge. Therefore, when proof can be obtained that the account was rendered, it should always be supplied.

THE "JUDGMENT SUMMONS" POWERS.

Under the 165th sec. of the Division Court Act, amongst the grounds upon which a judgment debtor brought up for examination may be committed, is the following—"If it appear to the judge, &c., that the debtor incurred the debt or liability by means of fraud, &c." A recent case before the Court of Bankruptcy in Ireland (*Re S. B. Carpenter*, Irish Jurist Rep.) will be an authority in point, being upon an enactment analogous to our statute. A judgment debtor sought to take the benefit of the Insolvent Act. He was an attorney, and had brought a frivolous and unfounded action, by which he put the defendant to considerable cost, although the latter obtained a verdict. The defendant now as creditor opposed the insolvents' discharge,

on the ground that the debt (for costs) was fraudulently contracted by the plaintiff; and so the judge held and remanded the insolvent to gaol for a month. In giving judgment, *Lynch, J.*, remarked that if solvent parties brought unfounded actions and paid the costs there could be no fault found with them. But he thought nothing could be more harassing and annoying than a party bringing a frivolous and unfounded action, and upon the speculation of getting costs, and if he fails coming into court to take the benefit of the Insolvent Act. Carpenter, who was an attorney himself, well knew that his action was unfounded.

SEPARATE SCHOOLS.

The case of *Stewart and the School Trustees of Sandwich* reported in the last volume of Queen's Bench Reports, is of interest with reference to the position of persons for whose benefit a separate school has been established, but which has, for some cause or another, been discontinued.

The facts of the case appeared to be that Stewart, a coloured man, applied to the School Trustees of the section in which he lived for the admission of his daughter to the common school. This application was refused on the ground, as it was afterwards urged, that the coloured people in the neighbourhood had organized a separate school of their own some time previously, and it was asserted by the local Superintendent of Education and others, that the effect of allowing coloured children into the school would be to break it up altogether. Stewart subsequently applied for a mandamus to the trustees to admit his daughter. The affidavits were conflicting, but the Court thought that no separate school had been established within the meaning of the statute, that even if it had, the statute did not apply to the applicant, at all events that this separate school had been discontinued and had remained so for two or three years previous to the application.

It was attempted to be argued that a separate school having once been established, the persons for whose benefit it was so established had no right to claim to benefit of the common school. But the Court considered it impossible to hold such a doctrine as that, when the separate school if it ever existed had been discontinued. Draper, C. J., saying:—"The creation of a separate school suspends but does not annul those privileges (of the Common School act) and when the separate school ceases to exist the rights revive. And therefore the applicant, if his rights as a resident of school Section No. 8 ever were suspended, was reinstated in them." Any other view than this, would practically have deprived the applicant of the benefit of a school so long as he continued in that neighbourhood.

The court further considered that no consideration as to the possible consequences of allowing coloured children to attend the common school could have any weight and that so long as there is no separate school in existence and in operation for the benefit of coloured people, they cannot be deprived of the benefit of the ordinary common schools.

AGENTS APPEARING FOR CORPORATIONS.

There are a vast number of corporations, municipal and private, in Upper Canada, and they are frequently in court for one cause or another.

A case of importance as regards actions in the Division Courts by corporations was recently before the "Sheriff's Court" in England, a court answering to our Division Courts. The rule there laid down may probably be too strict in its application to the inferior courts in a new country like ours, but still the rule is clear in the superior courts, and the principles of practice in these courts may be incorporated with Division Court administation.

The Gas Light and Coke Co. v. *Pratt* (reported in a late number of the *County Court Chronicle*) is the case alluded to. The action was for gas supplied, and an agent appeared for the company. *His Honor* said that a rule of law had been laid down which governed cases of this kind, which was that incorporated companies must appear in proper form before the court.

Agent—I was not aware of it.

His Honor—It is a very proper rule, and I am bound to see it carried out. If, however, the objection is not formally taken, it is no part of my duty to take it.

Mr. George, who appeared for the defendant, said that his client had not been well used by the company, and he felt bound to take every objection, and as there was a very proper rule that an incorporated company can only appear by attorney or under seal, he objected to the agent appearing for the company.

Agent—I have been allowed to appear at other courts, and I have been nine years in the service of the company. I have the collector here, who can prove the case.

His Honor—You are not in a position to call him. It has been held on a former occasion that an incorporated company has no *status* in a court of a law, except when it appears by an attorney. I must hold the objection to be fatal if pressed.

The defendant's attorney persisted in his objection, and asked for costs. The agent pleaded hard that costs should not be allowed, as he did not know that an attorney was necessary. But the judge thought the company must have known it very well, and accordingly nonsuited the plaintiff with costs.

OUR APPEAL.

We are glad to say that the county judges, with one exception, have most kindly responded to our appeal for support.

The exception is that of a judge whose name out of charity we repress, but the only judge in the Province, we venture to say, that could indite such an epistle as the following:

"Judge ——— has the honor to acknowledge the receipt of the letter of the Editors of the *Upper Canada Law Journal* of date of Feb'y 1st instant.

"Judge ——— most respectfully begs to inform the Editors that he does not *understanding* touting for newspapers, and suggests that some better qualified person should be employed.

"———, Feb'y 4, 1865."

The *learned* Judge greatly misunderstands us if he supposes that by sending him the circular we intended him to infer that he understands "touting for newspapers" any better than he understands law or English grammar. We hoped in exchange for the law that he so greatly needs, to receive, at least, the politeness of a gentleman and the support which his position as a Judge is *supposed* to give him. It is quite possible that he has not the influence we naturally imagined he had, and his excuse, under the circumstances, we are willing to accept. We have no doubt that we can easily find a person "better qualified" than himself to explain to others the value of that which he does not appear to understand.

The writer of the note before us professes to have, we are informed, a sovereign contempt for "American jurists," and has no favorable opinion of our own, for he finds that the cases in our Superior Courts "rather embarrass him than otherwise!" He is therefore consistent enough in declining to interest himself for a publication intended to circulate a knowledge of those very decisions.

THE BURLEY CASE.

We give in the *Law Journal* for this month a very full and carefully prepared report of this important case as finally decided in Chambers before the Chief Justice of Upper Canada, assisted by the Chief Justice of the Common Pleas, Mr. Justice Hagarty, and Mr. Justice J. Wilson. It is one of the most important cases ever decided in Canada. We propose in our next issue of the *Law Journal* to make some remarks on this case and the law of Extradition generally.

MUNICIPAL ELECTIONS—DISQUALIFICATION OF CANDIDATE.

Judgment was given on 7th February inst., in Chambers, by Mr. Justice Hagarty, on an epplication to unseat Mr. Beard, who was elected at the last municipal elections as one of the councilmen for the City of Toronto.

It appeared that at the time of the election the firm of which Mr. Beard is a member had an unsettled claim against the city for goods delivered. The learned judge ordered a new election, even though it was shewn that the account had been closed before Mr. Beard took his seat at the council board.

SUGGESTING SUBJECTS OF INTEREST.

We shall at all times be glad to receive suggestions from our readers as to subjects for examination. Those actually engaged in a calling must know best what would be most likely to interest and be of use to persons in their particular office or business; and it is by suggestions from such that we shall be better able to add to the usefulness of the publication.

SELECTIONS.

ENGLISH JUSTICES OF THE PEACE.

An English Justice of the Peace is surely the most amazing person in the world, unless it be that into which he often develops once in his life—namely, an English High Sheriff. It is no wonder that both offices are utterly puzzling even to the most intelligent foreigners, as there is certainly nothing like either of them in any other part of the world. First

of all nearly everything that is to be done in a whole country is entrusted to a single body of men. The only division of labour is that some functions are discharged by the whole body of magistrates acting together, some by committees chosen out of their number, some by one or two magistrates acting singly. Still the administration of all but the highest justice, the care of the local purse, and the management of most of the public local institutions, are all entrusted to the magistrates in some form or other. Even when anything is not in the hands of the magistrates as magistrates, it is often in the hands either of boards of which the magistrates are *ex officio* members, or else of commissions which are chosen largely out of the same class from which the magistrates are chosen. Generally, whatever is done in a county, the justices of the peace are the doers of it. And the tendency of recent legislation has been to increase their powers and duties rather than to diminish them. The English justice, as a justice, is a judge, a financier, an administrator, member of this and that board, member of this and that committee, discharging ten or twenty different functions, which in most countries would be entrusted to distinct officers or bodies of officers. Add to this, what is the great wonder in the eyes of strangers, that he does all this without pay. Add to this again, that though he is in form a Government functionary, appointed by the Crown and liable to be removed by the Crown, he is, in practice, the most independent of men. He has nothing to hope and next to nothing to fear. The Crown appointed him, but the Crown has no attractions to tempt him with, and no penalties to alarm him with. The Crown cannot promote him in his own line, nor can it visit him with any punishment save removal from the commission—a punishment most unlikely to be nowadays resorted to, except in cases of extreme misconduct. His official ambition, if he has any, must be confined to striving after a good reputation in the eyes of his brethren, or, at most, to being placed, by their own votes, at the head of their body. Add again to all this that he enjoys no privilege, no exemption, no means of sheltering himself under the wings of official favour. He must obey the law he administers, and he is responsible for any blunders or any acts of malversation of which he may be guilty in administering it. There is probably no one else in the world who has so many and such varied duties as the English justice, and who does them all without fee or reward, with nothing to hope and nothing to fear from the powers that be. —*Saturday Review.*

VICIOUS ANIMAL.

An action was recently tried at Westminster, England, it was brought against the Islington Hall Company by a person bitten at a London dog show. It was shown that while passing along one of the avenues of the exhibition the plaintiff waved his hand towards a large Russian bloodhound, with the remark that "he looked a ferocious creature;" that the dog seized hold of his hand, and lacerated it frightfully; and that, inasmuch as the dog had bitten other people, the Company who were managers of the show must have known it was not safe to trust him without a muzzle, the jury gave the plaintiff a hundred pounds. and the judge concurred in the verdict.—*English paper.*

REBUKING A JURYMAN.

A curious incident took place recently at the sitting of the Court of Assizes of the Seine. M. Lachaud was speaking in defence of a woman named Puel, accused of having abstracted certain securities belonging to the succession of a person named Paulmier, by whom she was employed as attendant, when one of the jurymen, who had several times shown his feelings by significant gestures, said in a low voice, but distinctly enough to be heard by the learned counsel—"That circumstance is of no consequence." M. Lachaud immediately stopped, put on his cap, and declared that after such an improper manifestation he could not continue the defence. On the President asking M. Lachaud what course he intended to pursue, the latter replied that, considering the words used by one of the jurymen as an expression of feeling hostile to the prisoner, he requested the affair to be put off to another session. That course was accordingly ordered, and the case will come on again towards the end of the month.—*Solicitors Journal.*

THE LAW & PRACTICE OF THE DIVISION COURTS.

(*Continued from page 7.*)

CAP. 6.—OF JURISDICTION.

The word Jurisdiction implies the right, means and power of administering justice. The Division Courts being entirely creatures of the statute law, the nature and extent of their jurisdiction depends upon and must be gathered from the words of the Acts of Parliament concerning them, as interpreted by the Superior Courts.

Looking then to the statutes relating to the Division Courts, their jurisdiction, it will be seen, may be conveniently discussed under the three following heads, viz.: As to *place*—As to *parties*—As to *subject*, or *cause of action.*

1st. As to Place.—As we have seen, every judicial district (composed of a county or union of counties), for which a county judge is appointed, is divided into a convenient number of divisions, and a court established in and

for each. Every court is designated by a number prefixed, and each has its own local limits. The court for each division is a distinct court, forming within itself a territorial division for all judicial purposes authorised by the statute.

The superior courts of Common Law have jurisdiction over the whole of Upper Canada, and over all persons residing therein, but the jurisdiction of the division courts is, as a general rule, restrained to cases where the subject matter of dispute arises within the bounds of the particular division or where the defendant resides or carries on business within the division. A partial jurisdiction is given to the superior courts where defendants reside out of the country. And the division courts possess a somewhat analogous power, under certain circumstances, to deal with cases, although neither has the cause of action arisen, nor does the defendant reside or carry on business in the particular division. The rule, as to inferior courts in general, was, that the defendant must reside, *and* the cause of action arise, within the particular local jurisdiction; And under some of the Court of Request's Acts in England, jurisdiction was made to depend on the residence of both plaintiff and defendant. In tracing the progress of the small debts courts in Upper Canada, it has been shewn, that, in the earlier statutes, jurisdiction was at first limited, as in most of the English Courts of Request; that it was gradually extended, and in 1833 that a defendant, if living within the county (district), might be summoned to the court where the debt was contracted. Now, the division court jurisdiction is not governed by the old rule applicable to inferior courts, or by the rule applicable to the superior courts, but by special statutory provisions regulating their procedure; and the law restricting the jurisdiction of inferior courts does not in general apply to the division courts.*

It is now proposed to notice the various provisions of the law in detail that determine the proper court which must or may be resorted to, as competent to entertain a claim, and issue a summons against a defendant.

The court in which claims may be entered does not always depend upon a definite enactment. Some cases are brought within the local jurisdiction of one or more division courts by force of the several enactments on the subject, others may be so brought under leave from the judge.

The general provision, as to where suits may be entered and tried, is contained in the 71st section of the Act, and is, that any suit cognizable by the courts may be entered and tried,—

A. In the court holden for the division within which the cause of action arose.

B. In the court holden for the division, (1) in which the defendant, or any one of the defendants, resides, or (2) carries on business at the time the action is brought; *notwithstanding* the defendant or defendants may at such time reside in a county or division (or counties or divisions), different from the one in which the cause of action arose.

* What is said in the text relates to transitory actions alone: for, where the venue is local, the action must be brought in the proper county, or in the prescribed division.

MAGISTRATES, MUNICIPAL & COMMON SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

[Under this head will be placed notes giving in substance new decisions relating to the law as it affects Justices of the Peace, Coroners, County, Town and Township Municipalities, School Trustees, Municipal Officers and Constables, with occasional reference to established cases of general importance, and which may be called leading cases on the branch of the law to which they refer.]

MUNICIPAL ELECTIONS—QUO WARRANTO.—The court refused to disturb a person in the exercise of an office to which he was elected for one year without opposition, the person applying on that behalf having been present at such election and not then objecting to the election of the person now complained against: (*In re Kelly* v. *Macarow*, 14 U. C. C. P. 313.)

QUASHING BY-LAWS NOT ILLEGAL ON THEIR FACE.—Unless a by-law is illegal on the face of it it is discretionary with the court to say whether, upon extraneous matter, there is such a manifest illegality that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained. And therefore when errors in computation only are shewn in it, even though extensive, the courts will lean strongly to support it, especially when it has been acted on: (*Secord and the Corporation of the County of Lincoln*, 24 U. C. Q. B. 142.)

QUASHING BY-LAWS — REVISED ASSESSMENT ROLL.—On an application to quash a by-law it appeared that (owing to an improper mode of revising the assessments) the amount of ratable property in towns and villages was much greater than it should have been, and so (in effect) that the amount shewn by the last revised assessment rolls, followed in the by-law, was wrong, but the court held that on an application of this kind they could not go behind the rolls: (*Ib.*)

CORONERS—ADJOURNMENT OF COURT.—A Coroner holding an inquisition adjourned the court to a certain day, but the court was not held on that day. *Held*, that the proceedings could not be resumed, and the inquisition must be signed by the coroner and jury at a court which is properly constituted: (*Reg.* v. *Coroner of Dover*, 11 L. T. Rep. N. S. 488; 13 W. R. 383.)

KEEPING A DISORDERLY HOUSE—CONVICTION—AFFIDAVITS AS TO CONDUCT OF MAGISTRATE.—The prisoner was convicted of keeping a common disorderly bawdy house. It was objected, on an application for her discharge, that no notice had been put up as required by sec. 25 of C. S. C., chap. 105, to shew that the court was that of the Police Magistrate not of an ordinary J. P. The objection was overruled—for the jurisdiction in the absence of express enactment could not be made to depend upon the omission of the clerk to put up such notice.

On an application like this affidavits cannot be received to sustain objections to the conduct of a magistrate in dealing with the case before him; but such conduct may furnish ground for a criminal information: (*Reg.* v. *Munro*, 24 U. C. Q. B. 45.)

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

[The notes of cases under this division will relate chiefly to mercantile law, contracts of the ordinary kind in the general business of the country, and to questions of a general character (whether arising upon a contract, or upon a wrong committed), which are constantly presenting themselves in the contact of every day life. This head will be found interesting and valuable to all, but especially to business men.]

ATTESTATION OF WILLS.—A will subscribed by *two* witnesses in presence of the *testator*, though not by the witnesses in presence of *each other*, is sufficiently executed: (*Crawford* v. *Curragh et al.*, 1 C. P. N. S. 55).

LETTER THREATENING A SUITOR—CONTEMPT OF COURT.—An attempt by a third person to prevent a suitor from laying his case before the court, by threats of bringing him into disgrace and disrepute, is a contempt of court, and subjects the offender to a heavy fine: (*Re Mulock*, 13 W. R. 278).

RAILWAY — NEGLIGENCE.—When a train, in which A. was a passenger stopped outside a station, at a place where there was no platform, A. was told by one of the railway porters to get out as soon as she could; and instead of stepping on the two steps of the carriage in succession, and from the lower one to the ground, she took a gentleman's hand, and jumped from the top one and was injured, it was held by the court that there was evidence of negligence to go to the jury; and the jury having given a verdict for the plaintiff, the court refused to interfere: (*Foy et ux.* v. *London, &c., R. W. Co.*, 13 W. R. 293).

PLEA OF INFANCY BY AN UNDERGRADUATE.—An action was brought in a county court against a student at a University by a hair-dresser for the sum of £3 17s. The plea of infancy was set up, and the question arose as to how far the different items were "necessaries." One of the articles claimed for was an "adjuster," which turned out to be a stiff cosmetic, used when the hair is inclined to "stick up." As regards the shampooing, the plaintiff contended that it was very necessary for gentlemen, after studying and reading, and recommended the judge to witness the operation. The defendant admitted the correctness of the charges, but thought that as the bill was sent into his father, he was not liable—a remark which elicited decided laughter and derision from those present in court. The father of the defendant said he defended the action "on principle." His Honour gave judgment for the plaintiff for £3 4s. 6d., disallowing the "adjuster" and the shampooing: (*Alderton* v. *Wilder*, 9 S. J. 228.)

LIABILITY FOR ACTS OF AGENTS—INSURANCE COMPANY.—When directors of a company hold out to the world a certain person as their agent for a particular purpose, and he enters into a written contract on their behalf, and they ratify his conduct as their agent, they cannot afterwards dispute the contract so made, if it is within the scope of the agency they have recognised: (*Wilson* v. *West Hartlepool R. W. Co.*, 11 L. T. R. N. S. 827).

But a person employed as the agent of an insurance company is not entitled, without special authority from the board, to undertake that a policy shall be granted. His duty is to obtain proposals, and granting policies is not within the scope of his authority: (*Linford* v. *Provincial Home Insurance Co.*, 11 L. T. R. N. S. 330).

UPPER CANADA REPORTS.

COMMON PLEAS.

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

PEARSON v. RUTTAN ET AL.

Action against Division Court bailiff and sureties—Non-avoidance of statutory covenant—Conditions precedent to bringing of action—Pleading—Nonsuit—Con. Stat. U. C. ch. 19.

Sec. 25 of ch. 19, Con. Stat. U.C., is directory, not mandatory. *Held*, therefore, in this case, which was an action against a bailiff and his sureties for an excessive seizure by the former, and a sacrifice of plaintiff's goods, that the fact of the sureties of a division court bailiff being non-residents of the county in which the bailiff's duties lay, did not avoid the covenant into which they had entered on his behalf, the provisions of the section in question being merely intended for the guidance of the judge as to the class and character of sureties to be required and approved of by him.

Held, also, that in an action against a bailiff of a division court for his own torts, the demand of perusal and of copy of warrant, under sec. 195 of ch. 19 Con. Stats. U.C., is not requisite, the same being only necessary in cases of "defect of jurisdiction or other irregularity in or appearing by the warrant," in order that the clerk and not the bailiff may be made liable.

Held, also, that in such an action as the present a bailiff is entitled to notice before suit brought, even though the proposed suit be upon the statutory covenant; that such action must be brought within six months; and that this defence may be raised under a plea of the general issue by statute.

Quære,—1st, Are the sureties of a division court bailiff, in a joint action against principal and sureties, entitled, even under a special plea, to raise the defence of want of notice of action to themselves? 2nd, Can they in such an action plead the want of notice to the bailiff in their own protection? 3rd, Can they, in an action against *themselves*, take advantage of the want of notice to the *bailiff*, or of any other defence that would have been open to the latter?

But *held*, in this case, that as the principal and sureties had been joined in one action, and the recovery must, therefore, be against all or none, the discharge of the principal involved that of the sureties.

[C. P. M. T., 1864.]

The declaration was upon the covenant made by Charles S. Ruttan, one of the defendants, as bailiff of the 6th Division Court of the United Counties of Peterborough and Victoria, and by the other two defendants as his sureties for the due performance of the duties of his office, according to the statutes.

The plaintiff alleged that Charles S. Ruttan, as such bailiff, had certain writs of execution against the goods and chattels of the now plaintiff, issued out of the said division court, delivered to him to be executed, to the amount of £25, and no more, for debt, costs, fees and charges; that he seized goods of much more value than £25, and sold of the goods much more than was sufficient to pay the amount he was required to make, to wit, the whole of the goods which he had seized, and levied thereout a much greater sum than the said amount, to wit, to the amount of £150; and also then sold the said goods for a much less sum than the same were reasonably worth, and for which he could and might have sold the same, and converted the monies arising from the sale to his own use; whereby the plaintiff, being a party to a legal proceeding in the division court, has been damnified. A further breach was also stated: for that the said Charles S. Ruttan illegally and oppressively exacted from the now plaintiff, under certain executions which he had as bailiff against the goods of the now plaintiff, more and other fees than there was and is by law provided and limited in that behalf; that is to say, divers large sums of money, amounting to £50 more than over and above the legal and reasonable fees and expenses demandable by the statute for executing the said writs, and over and above the amounts thereby directed to be levied, contrary to the form of the statute in that behalf; whereby, &c.

Henry Ruttan, one of the defendants, pleaded: 1st, That the deed was not his deed. 2nd (to the first and second counts), That Charles S. Ruttan did not misconduct himself as such bailiff, to the damage of the plaintiff, being a party to a legal proceeding in the said division court. 3rd (to the first breach in the first count), That after the seizure of the goods by Charles S. Ruttan, under the executions, one Thomas Pearson, then being the landlord of the plaintiff of and for the premises on which the goods were at the time of the seizure, gave notice that $270 were due to him at the time of the seizure, for rent accruing due in one year, and required Charles S. Ruttan to distrain for the same, who distrained according, and who also levied for the amount of the said executions; and also for and upon another execution, at the suit of one Wood, issued from the said division court against the goods of the now plaintiff, and one Menthorn as defendant; and Charles S. Ruttan did not sell and dispose of more of the goods of the plaintiff than were sufficient and necessary to satisfy the said executions and rent, and the fees thereon. 4th (to the second breach in the first count), That Charles S. Ruttan did not sell the said goods for a much less sum than they were reasonably worth, and for which he could and might have reasonably sold the same. 5th (to the third breach in the first count), That Charles S. Ruttan did not convert and dispose of the moneys arising from the sale to his own use. 6th (to the second count), That Charles S. Ruttan did not exact, receive and take from the plaintiff, for executing the executions, more and other fees than were and are by law provided and limited in that behalf.

John W. Thompson, one of the other defendants, pleaded the same pleas as his co-defendant Henry Ruttan.

Charles S. Ruttan pleaded not guilty by statute.

The plaintiff took issue upon all of these pleas.

The cause was tried before the Chief Justice of this court, at the last spring assizes, held at Lindsay, and a verdict was rendered for the plaintiff, and $300 damages.

The evidence was as follows:

A certified copy of the warrant was put in.

Elijah Lake said: "I was at the sale of plaintiff's goods. Plaintiff forbade the sale at the time. There was something said about rent; that there was no rent and the bailiff was not to

sell for that. I understood the bailiff sold for rent. Some few days after the sale, he told me he had understood there was no rent. I said to bailiff he had been pretty hard on the plaintiff. The bailiff said he was bound to sell him out any way. There was property sold to pay a great deal more than $100. Plaintiff was sold out completely. Bailiff said he had received notice of rent, but since that he heard there was no rent. The sale was conducted in the usual way."

W. H. McLaughlan proved a valuation of the property sold by the bailiff, amounting to $598 50c.

The amount of the different division court executions, including fees, was $169 98c.

The amount of the county court execution of Hatton's was $184 82c.

This payment was held not to be admissible in evidence. The notice of rent was dated 2nd January, 1862, and was delivered by the plaintiff to the bailiff. It was signed by Thomas Pearson, and stated that $275 were due by plaintiff to Thomas Pearson, for one year's rent of premises.

A notice of action to the bailiff was put in, signed by plaintiff.

It was proved that the co-defendants of the bailiff, who are his sureties, did not, at the time of entering into the covenant, nor since, reside in the county of Victoria.

It was contended for the sureties at the trial, that they were not liable, because of their not being residents of the county, according to the statute (Con. Stats. U. C. ch. 19, sec. 35); and that they were entitled to notice of action under sec. 183.

The same objections were taken for the bailiff.

The Chief Justice overruled the objection as to the residence, holding the statute to be directory, not mandatory: and as to the notice of action, he overruled the objection on the part of the sureties, and pointed out that the want of notice had not been raised by plea.

It was also further objected for the bailiff, that the notice served on him was insufficient, and it was so held; and that there was no demand of the perusal and a copy of the warrant under sec. 195; and that the action had not been brought within six months under sec. 193.

It was answered for the plaintiff, that no notice of action was necessary, as the suit was for the bailiff *not* doing his duty, and not for anything he *had* done.

Leave was reserved to the bailiff to move to enter a nonsuit on the two points, of want of notice, and of the action not having been brought within six months.

For the defendants the following evidence was given:

John Dillman stated: "The plaintiff said, on the day fixed for the sale, that Pearson had a landlord's warrant, and the plaintiff wished the witness to buy the things in, to the amount of the rent: it was to an amount over $200.

John R. Little stated: "I undersood the plaintiff had delivered the notice from Thomas Pearson, claiming rent, to the bailiff. The bailiff said, without he got a writing to be relieved from the rent, he would go on and sell for it. Plaintiff said there was no rent due, and that Pearson did not claim any rent."

The section of the act relating to the bailiff's duty when a claim to rent is made, is sec. 177.

The Chief Justice asked the jury to say, whether they were satisfied that the bailiff did actually receive a notice of claim for rent from Thomas Pearson; and if so, was such notice given with the knowledge and concurrence of the plaintiff, and did the bailiff receive it, the bailiff representing it as a *bonâ fide* claim; and whether they believed the bailiff was acting in good faith in relation to this claim, and sold for it after the plaintiff had notified him that there was no rent due, and before the sale. If he did act in good faith in making the levy and selling, the defendants were not liable.

The last part of the charge was objected to by the plaintiff's counsel.

The jury found for the plaintiff, as before mentioned.

In Easter term last, *H. Cameron*, on behalf of the defendants, obtained a rule *nisi*, calling on the plaintiff to show cause why the verdict should not be set aside and a nonsuit entered as to defendant Charles S. Ruttan, pursuant to leave reserved, on the grounds, that no sufficient notice of action was given; that there was no demand made of a copy and perusal of the warrant acted on; that the declaration varied from and was more extensive than the notice of action; and that the action was not commenced within six months from the seizure, or from the first sale. The rule was also to set aside the verdict against the other defendants, and for a new trial, for misdirection of the learned judge in ruling that the said defendants were liable on the bond, although they were not nor are residents of the county, and that they were not entitled to notice of action; and that the action was brought in sufficient time; and for a new trial as to all the defendants, on the ground that the verdict was perverse and against the evidence, and the weight of evidence, which showed clearly that the plaintiff had put forward the claim for rent referred to in the pleadings and evidence, and that the defendant Charles S. Ruttan had acted upon it *bonâ fide*, and was justified in so doing; and that the plaintiff was not entitled to recover against the defendants.

During Trinity term last, *M. C. Cameron*, Q. C., and *Robert A. Harrison*, shewed cause.—No notice of action was necessary (*Dale* v. *Cool*, 6 U. C. C. P. 544); nor was there any plea raising it, even if it should have been given; nor was any demand of perusal or copy of warrant required; for the misconduct of the defendant was what was complained of, and not anything illegal on the writs, or in the act of granting them: *Sayers* v. *Findlay*, 12 U. C. Q. B. 155. This was an act of omission of the bailiff, and not anything done to bring him within section 193 of the statute. It was no defence for the sureties that they were not residents of the county, for the statute is not mandatory: *The Corporation of the Township of Whitby* v. *Harrison*, 18 U. C. Q. B. 603; *The Municipality of Whitby* v. *Flint*, 9 U. C. C. P. 449; *Couse* v. *Hannan*, 14 U. C. C. P. 26. The verdict cannot be said to be perverse, unless it is against law, which cannot be said here: *Brown* v. *Malpus*, 7 U. C. C. P. 189.

H. Cameron, contra.—The action, although formally on the statutory covenant, is in reality for a tort; and if it is held that it is not necessary, when a tort is so prosecuted under the

covenant, that there should be a notice of action, it will be equivalent to a repeal of the statute passed for the protection of persons acting under it. The same observation applies to the demand of perusal and copy of the warrant. The sureties also were entitled to notice. He cited *Moran* v. *Palmer*, 13 U. C. C. P. 528.

A. WILSON, J., delivered the judgment of the court.

The real complaint against the bailiff is, that he sold the plaintiff's goods to enforce payment of $275 rent, when, as the plaintiff says, that rent was not due. The valuation of the goods sold was, as the witness states, $598 50c. The division court executions amounted to $169 98c., and the rent in question to $275, making together $444 98c., and leaving a difference between this last sum and the valuation of $153 52c., which can hardly be called an excessive seizure, to meet the exigencies of a bailiff's sale, if the rent were rightly levied for.

The learned Chief Justice left every question relating to the claim for rent fully to the jury; and although we may think the verdict might more properly have been the other way on this part of the case, we cannot say that the jury have so wilfully gone wrong in their conclusions that we can properly interfere.

It was the plaintiff who gave the bailiff the claim for rent against himself; and if the jury had found for the defendants, we should have been disposed to think that the debtor, having put forward this fraudulent claim against himself to defeat the executions, could not call upon the bailiff afterwards to disregard the claim upon his mere word and request, against his acknowledged landlord's written declaration that the rent was in fact due; and more particularly when the bailiff, to reach the executions, must first of all cover the rent by the sale which he had to make.

But, on the other hand, the jury may have believed that the bailiff knew, when he got the pretended landlord's notice, that it was in fact the debtor who was putting it forward for his own purposes, and that no such rent was due at all; and that, as it was under the debtor's control altogether, he should have obeyed the debtor's direction, when he gave it, not to enforce it, because it was not due. The plaintiff has been the author of his own injury, and does not deserve much consideration; but all this was before the jury, and it was for them to decide upon it.

No authority was cited in the argument showing the covenant to be void, because the sureties were not residents of the county in which C. S. Ruttan was acting as bailiff; and we see nothing which makes it obligatory to observe this provision, and which must necessarily avoid the covenant if it be not observed. The words, "being freeholders and residents within the county," were intended as a guide to the judge as to the class and nature of the sureties which he ought to require and which he should approve of; but it never could have been contemplated that the public should lose the benefit of the security which was given, if it afterwards turned out that the sureties were not freeholders, or being freeholders, were not residents within the county; and we think if there could have been authority for such an objection being available, it would not have been wanting. Many instances are given in *Morgan* v. *Perry*, 17 C. B. 843, of what are directory and what are imperative statutes, which shew that the 25th section of this act is of the former character, and that a strict non-compliance with it will not avoid the security professedly given under it. The case then is reduced to the consideration of whether a notice of action was required to be given to the bailiff or to the other defendants as a condition precedent to bring the action, and if so, whether it was necessary to plead the want of it; and whether the action should have been brought within six months, and if so, whether this objection can be taken without a plea to that effect; and, lastly, whether the action will lie without a demand of the perusal and copy of the warrant. All three objections arise under secs. 93, 94 and 95 of the statute.

We think sections 196 and 197 shew that the demand for perusal and a copy of the warrant is only required in cases where a "defect of jurisdiction or other irregularity exists in or appears by the warrant," so that the clerk who issued the warrant, and not the bailiff, may be made responsible, and not to cases where the jurisdiction and validity of the warrant are not questioned and the bailiff is proceeded against for his own individual act and misconduct, and the clerk could not in any way be made responsible for it.

Sayers v. *Findlay*, cited in the argument, is a decision upon this very point and principle; and it was long ago held, under the provision of the 24 Geo. II. ch. 44, from which the above sections 196 and 197, and all similar enactments, are copied, that "where the justice cannot be liable, the officer is not within the protection of the act:" *Money* v. *Leach*, 3 Bur. 1768.

As to the notice of action, the plaintiff contends that the action is not brought for an act done, that it is, in fact, for not paying over the excess of the money the bailiff levied; and *Dale* v. *Cool*, 6 U. C. C. P. 544, is relied upon for this purpose. In that case the action was for money had and received by the bailiff, and it was brought against the bailiff alone to recover the excess of moneys remaining in his hands after the payment of certain executions.

The declaration in this case complains that the bailiff "seized goods of much more value than were sufficient to pay the amounts he was required to make, and levied thereout a much greater sum than the said amounts;" that he "sold the goods for a much less sum than they were reasonably worth, and for which he could and might have sold them," and that he "oppressively exacted, under colour of certain executions, more and other fees than are limited in that behalf." All of these are very plainly *acts done*, and not *omissions*, as the *not paying over* surplus monies was held to be in *Dale* v. *Cool*.

Something was said that as the action was on *the covenant*, and not an action for tort, no notice was required; but we cannot fail to see that while it is in form an action of covenant, brought upon the statutory security, it is to recover damages for the acts and misconduct, specifically complained of as torts in the declaration, and as constituting a breach of the bailiff's covenant. The case of *Charrington* v. *Johnson*, 13 M. & W. 856, shews this. If it were otherwise, we should be depriving those persons who are entitled to the protection of the statute, of that

very protection which the statute expressly granted to them.

We think then these were *acts done* by the bailiff, and that the remedy adopted being by the election of the party upon the covenant, the same rule must be applied in such a case as to notice of action and otherwise, as if the claim had been made by the ordinary and appropriate form of action at the common law. It was not questioned at the trial that these acts were not done *in pursuance of the act*, and probably it could not have been done so successfully; we must, therefore, assume that they were so done. Unquestionably they were done by the bailiff "in his office of bailiff," otherwise the plaintiff can have no remedy on the covenant. Should this defence, then, of want of notice, have been specially pleaded by the bailiff?

The 194th section enacts, that "if tender of sufficient amends be made * * the plaintiff shall not recover; and in any such action the defendant may plead the general issue, and give any special matter in evidence under that plea." And it concludes thus, "And see the act to protect justices of the peace and other officers from vexatious actions." This section, and the 193rd section, which begins, "any action or prosecution against any person for anything done in pursuance of the act," &c., and which provides for the notice of action being given, were both contained in the one section (sec. 107) of the 13 & 14 Vic. ch. 53. In this previous act the words at the end of that section, "and it shall be lawful in any such action for the defendant to plead the general issue," &c., the word "such" clearly applied to the whole of the section, and had not reference to "all actions and prosecutions" mentioned at the beginning of that section, and were not confined to those actions only in which tender of amends had been made or money paid into court.

If sections 193 and 194 can be construed as section 107 in the act of 1850, then these defendants, or the bailiff at any rate, were not required to plead the want of notice. There are three sections, the 192, 193 and 194, contained under the one heading of the consolidated act, which reads "Limitations and Notices of Actions for things done under this Act." If the words "in any *such* action" in the 149th section apply to the actions under the heading above mentioned, and which are more expressly mentioned in section 193 as "any action or prosecution," then it was not necessary to plead specially. No doubt this was the construction of the act of 1850, and it appears to have been the like intention of the legislature in the present consolidation; but the question is, whether we can judicially declare it to have been so enacted. If the restricted meaning be applied to this section, then the defendant is permitted, where he has made a tender or paid money into court, to plead the general issue and to give any special matter in evidence under it, and not merely the fact of such tender or payment into court. But why, because he has tendered amends, should he be allowed to give *any* special matter in evidence, accord and satisfaction, for instance, or leave and license, arbitrament and award, or release, or any other special defence, having no necessary connection with or relation to such tender, but all of them, in fact, inconsistent with and repugnant to it?

The reference also to the "Vexatious Actions" Act in this section is very important, which extends to "any officer or person fulfilling any public duty, for any thing done by him in the performance of such public duty," and would include this bailiff; and in which act the defendant is authorised to plead the general issue, and to give the special matter of defence, excuse or justification in evidence under it.

We think that the words "and in any *such* action" means *any* action, and not only an action in which a tender or payment into court has been made, and are to be read as a separate member of the section. By this construction the original intention of the act is preserved, and it is made reconcileable, also, with the "Vexatious Actions" Act, and with itself. We refer to the observations of Lord Chelmsford on the word "*such*" in the case of *The Eastern Counties Railway* v. *Marriage*, 6 H. & N. 941.

We, therefore, think that the bailiff was entitled to a notice of action before the action was brought against him, and that he is entitled to the benefit of this objection, which was covered by the plea of the general issue by statute, and which was taken at the trial, and renewed by him in the present rule.

We are not satisfied the sureties are entitled to raise this objection for themselves, even if they had pleaded a plea which would have raised the question, although they may, perhaps, be entitled to set up as a defence to any proceedings taken against themselves, any matter of defence which could have been available to their principal, if he had himself been sued. If, therefore, they are not entitled to be notified before they are sued, it may be they can plead the want of notice to the bailiff in their own protection. If this be not so, it would, in effect, be making the bailiff liable in every case, without a notice, because his sureties must be entitled to be indemnified for all recoveries had against them as his sureties. But it is not necessary to decide this, for they have pleaded no plea of this kind, although the case was argued for them as if they had the right to the benefit of this objection. The result, however, of the decision in favor of the bailiff, is to acquit the sureties also, for the recovery must be against all the defendants or against none of them. It is, therefore, not necessary to notice any of the other objections.

The rule, therefore, will be absolute to enter a nonsuit.

Rule absolute accordingly (*a*).

INSOLVENCY CASES.

(In the Insolvent Court for the County of Wentworth.)

Re Stevenson, an Insolvent.

A creditor, although not named in the schedule annexed to the deed of assignment or composition made by the insolvent, may oppose the confirmation of his discharge.

The insolvent should be present when application is made for the confirmation of his discharge. Debts must be proved before the assignee, and not before the judge.

The insolvent applied for a confirmation of the discharge executed by a majority in number of

(*a*) In this case leave has been obtained to appeal.

his creditors for sums of $100 and upwards, and representing three-fourths in value of the liabilities mentioned in the statement annexed to the deed of composition executed by him and filed in court.

One James Watson appeared claiming to be a creditor, and to have a right to object to the confirmation of the discharge; his name did not appear in the statement of liabilities prepared by the insolvent, and annexed to the deed of composition. He also contended that the insolvent should be present in order that he might be examined pursuant to sub-sec. 3 of sec. 10.

Sadleir, for the insolvent, stated that he disputed the claim of Mr. Watson, and argued that Watson had no right to be heard in opposition to the application: that his claim, if he has one, would not be barred, as sub-sec. 3 of sec. 9 only discharges the insolvent from the liabilities which are mentioned and set forth in the statement annexed to the deed of assignment, or in any supplementary list of creditors, and as his rights are not affected in any way by the discharge, he has no right to be heard in opposition to the application.

LOGIE, Co. J.—I think the only question is, whether or not Mr. Watson is a creditor; if he is, he has a right to appear and be heard in opposition to this application, although not named in the statement of liabilities annexed to the deed of composition. By sub-sec. 6 of sec. 9 it is provided that "upon such application *any* creditor may appear and oppose the confirmation of the discharge," The right to appear is not limited to the creditors named in the schedule. It *may* perhaps be the case that the insolvent is only discharged from those debts named in the statement annexed to the deed of assignment or composition, but that is not enough; every creditor has an interest in the estate of the insolvent, and a right to participate in any dividends that may be declared, and for that purpose is entitled to prove his account and rank upon the estate, and also to oppose the insolvent's discharge. The only method of proving debts given by the Insolvent Act is before the assignee, under sub-sec. 13 of sec. 5; the judge has apparently only an appellate jurisdiction in respect of the proving of debts.

In this case, on being satisfied by affidavit that a bona fide claim to rank as a creditor is made by Mr. Watson, I shall adjourn this meeting, in order to enable him to prove his debt before the assignee. I think, too, that the insolvent should be present when application is made for the confirmation of his discharge, in order that he may be examined, if any creditor desires to do so.

IN THE MATTER OF HAMILTON AND DAVIS INSOLVENTS.

A person summoned as a witness cannot refuse to give evidence respecting his own dealings with the insolvents by alleging that he is a creditor.

T. C. M., a confidential clerk, and manager of the business of the insolvents, was summoned as a witness at the instance of the assignee, by a judge's order granted under the authority of sub-sec. 4 of sec. 10 of the Insolvency Act.

In the books of the estate he appeared as a debtor to a considerable amount, but claimed to be a creditor, alleging that he had a set off exceeding in amount his indebtedness to the estate.

After being examined generally touching the estate of the insolvents, he was asked about his own account, when he objected to produce it, or give evidence respecting his own dealings with the insolvents.

Sadleir, for the witness, contended that a creditor has no right to examine another creditor about his claim against the estate until he seeks to prove his account, and to rank upon the estate: that it would be unjust to compel the witness to give such evidence, as his statement might be used against him, while he could not use them in his own favour.

LOGIE, Co. J.—Under sub-sec. 4 of sec. 10, *any* person may be examined as to the estate or effects of the insolvents, but only on a judge's order granted upon petition; no judge acting in insolvency would allow a witness who claimed to be a creditor to be examined at this stage of the proceedings touching his own account, unless it appeared to him necessary in the interest of the creditors that he should be so examined. In this case the witness was manager of the business of the insolvents; in the books kept chiefly by himself he appears to be largely indebted to the estate, and his claim, which is in the nature of a set off, arises out of his transactions with the insolvents; and I think it is necessary, in order to ascertain whether the debt apparently due by the witness is an asset or not, that he should answer the question put to him respecting his own account.

The witness then produced his account, and an adjournment was asked for and granted. At the next meeting, before resuming the examination,

LOGIE, Co. J., said—At the time of granting the adjournment, I was asked to look into the point raised by Mr. Sadleir; I have done so, and I am of opinion that my decision was correct. The cases of *Ex parte Gopldie*, 2 Rose, 330, cited in Deacon & DeGex Bankruptcy Law, 165, and *Ex parte Chamberlain*, 19 Ves. Jr. 481, are in point. In the last case, the Lord Chancellor (Eldon) said, "The Commissioners must proceed with the examination, as, although the witness thinks himself a creditor, he may not be so." And again, "The question whether the testimony will be useful or useless is very different from that of the right to examine; what may be the effect is for the commissioners to decide, *but the witness cannot set up the objection.*

ENGLISH REPORTS.

REGINA V. ROBINSON AND ANOTHER.

On an indictment for feloniously receiving goods, knowing them to have been stolen, it is unsafe to convict a party as receiver on the evidence of the thief, unless it is confirmed.

On an indictment for stealing and receiving a mixture, it appeared that the thief had stolen two sorts of grain, and then mixed them and sold them to the prisoner:—*Held*, that the latter could not be convicted on such an indictment; and there being no evidence but that of the thief, the Judge would not amend.

[Hertford Crown Court—Spring Assizes, 1864.]

Indictment against one Saunders for stealing, and against Robinson for feloniously receiving. The indictment alleged that Saunders, "one

bushel of a certain mixture consisting of oats and peas, the goods of his employer, feloniously did steal, take and carry away;" and that Robinson, "the goods aforesaid, so as aforesaid feloniously stolen, feloniously did receive, he then well knowing the said goods to have been stolen."

Second count, that Robinson feloniously did receive one bushel of a certain mixture consisting of oats and peas, of the goods, &c., which said goods had been stolen, he then well knowing them to have been stolen.

Saunders, the thief, pleaded guilty.

Robinson, the receiver, pleaded not guilty.

Abel, for the prosecution.

Codd, for the defence.

The prosecutor had known the prisoner Robinson for years and had recently sold him various sorts of corn. Before the theft the prosecutor had missed oats and peas. and his oats were peculiar. On the prisoner's premises, after the other prisoner had been arrested, were found a quantity of mixed oats and peas, and the prosecutor believed the oats were his, but could not positively identify them, mixed as they were. The only other evidence was that of Saunders the thief, who swore that the prisoner asked him to "get" him some corn, and afterwards bought it of him and gave him a shilling for it, and told him to "say nothing about it."

Pollock, C. B., advised the jury to acquit the prisoner; it being perilous, he said, to convict a person as receiver on the sole evidence of the thief. This would put it in the power of a thief from malice or revenge to lay a crime on any one against whom he had a grudge. And here there was no adequate confirmation of the thief's evidence.

The jury, however, after consideration desired to return a verdict of guilty.

Pollock, C. B., however, declined to receive it or allow it to be recorded, and directed them to find the prisoner not guilty, as the evidence failed in point of law. The indictment charged a receiving of a mixture which had been stolen, knowing it, *i.e.* the mixture, to have been stolen; but the evidence of the thief, if believed at all, was that he stole pure oats and pure peas, and then mixed them and afterwards sold them to the prisoner, so that the one prisoner did not steal a mixture, and the other did not receive, as the indictment alleged, a "mixture" which had been stolen, for the mixture had not been stolen.

The jury, however, still declined to return a verdict of not guilty, declaring that they deemed that when the thief mixed the oats and peas it became a "mixture."

Pollock, C. B., with some firmness, told the jury that they were bound, on his direction in point of law, to return the verdict he directed. He explained that the facts only were within their province, the law was in his; and although he did not infringe on their province, he could not permit them to invade his. He peremptorily directed them, therefore, to return a verdict of not guilty.

The jury, after some hesitation and with great reluctance, at length, accordingly, returned a verdict of not guilty.

SPRING CIRCUITS, 1865.

The Hon. Mr. Justice Morrison.

Kingston	Tuesday	21st March.
Brockville	Tuesday	4th April.
Perth	Monday	10th "
Cornwall	Monday	17th "
Ottawa	Tuesday	2nd May.
L'Orignal	Tuesday	9th "

The Hon. Mr. Justice Wilson.

Napanee	Monday	20th March.
Picton	Wednesday	22nd "
Belleville	Monday	27th "
Whitby	Tuesday	11th April.
Cobourg	Monday	17th "
Peterborough	Monday	1st May.
Lindsay	Thursday	4th "

The Hon. Chief Justice of Upper Canada.

Milton	Monday	13th March.
Hamilton	Monday	20th "
Barrie	Monday	3rd April.
Niagara	Tuesday	25th "
Welland	Tuesday	2nd May.
Owen Sound	Tuesday	9th "

The Hon. Mr. Justice Hagarty.

Guelph	Monday	29th March.
Brantford	Monday	27th "
Berlin	Monday	3rd April.
Stratford	Monday	10th "
Woodstock	Monday	17th "
Cayuga	Tuesday	25th "
Simcoe	Tuesday	2nd May.

The Hon. Mr. Justice John Wilson.

Goderich	Tuesday	21st March.
Sarnia	Monday	27th "
St. Thomas	Thursday	30th "
London	Monday	3rd April.
Chatham	Wednesday	12th "
Sandwich	Monday	17th "

The Hon. Chief Justice Richards.

Toronto City	Monday	20th March.
York and Peel	Monday	10th April.

INSOLVENTS.

P. S. Stevenson	Toronto.
Charles J. Houghton	Montreal.
Charles Larocque	Plantagenet.
A. Bunnell	Brantford.
Pierre Elzear Pothier	Three Rivers.
Peter Aylsworth	Demorestville.
Thomas Redner	Tp. Hillier.
David Caldwell	Galt.
Thos. Mahoney	Peterboro'.
John Young	Montreal.
W. Muirhead	Hamilton.
John W. H. Schneider	Welland.
Wollaston F. Pym	Cobourg.
James M. Swetman	Huntingdon.

John C. Taylor	Belleville.
John Taylor	Co. Wentworth.
William Douglas & Co.	Montreal.
Arthur Macbean	Cobourg.
William Rice	Perth.
Charles Latour	London.
Holmes & Davidson	Point Levi.
J. Craig	Brantford.
Henry Nicoll	St. Thomas.
Cornelius Mitchell	St Thomas.
David P. Beattie	Montreal.
Alexander F. Beattie	Strathroy.
Godard & Co.	Grafton.
William Coyne	St. Thomas.
Clark Gordon	Sherbrooke.
J. Livingston	Montreal.
Archd. McNeil	Centreville.
Hubert Gravel, sen.	Montreal.
B. Sinotte	Montreal.
John Ashton	St. Hyacinthe.
Samuel Ashton	Darlington.
James McGuire	Cartwright.
Robert Evans	Kingston.
John Orr	Hamilton.
Gurd & Tarlton	Cainsville
T. & D. Brown	Montreal.
Turnbull Brodie & Co.	Montreal.
Paul T. Ware	Montreal.
Owen Murphy	Toronto.
Marois & Son	Quebec.
Wm. B. Whittier	Quebec.
Henry Snider	Picton.
John Tees	Picton.
D. A. P. Watt	Montreal.
Noble C. Smith	Newtonville.
James Creed	Tp. Barton.
John Yuill	Tp. McNab.
H. C. Forsyth	Burford.
Christopher W. Richardson	Co. Wentworth.
Thomas Graham	Co. Wentworth.
Daniel L. Healy	Tp. Smith.
Lochman A. Cremmer	Waterdown.
John Thomson	Peterboro'.
Wm. Thomas Kiely	London.
Robert G. Pole	Hamilton.
Richard Murphy	Toronto.
John Murphy	Toronto.
John Breene	Mariposa.
Joseph Breene	Mariposa.
Daniel Haggart	Peterboro'.
Willet Ferris	Pittsburgh.
John McKay, sen	Kingston.
Wm. Bennett	Port Hope.
John R. Babcock	Rednersville.
Henry Labelle	Vankleek Hill.
Job C. Thompson & Co	Montreal.
W. T. Ecclestone	Hamilton.
George Robertson	Oil Springs.
George S. Wilkes	Brantford.
Levi Beemer	Toronto.
Lewis Smith	Tp. Barton.
Wm. Wood	Sophiasburgh.
Nicholas Greely	Sophiasburgh.
Edwin Roblin	Picton.
Patrick Ryan	Montreal.
Jacob Casselman	Newcastle.
George W. Boggs	St. Thomas.
Henry T. McKichan	Hamilton.
Wm. Briscoe	Toronto.
Lawrence Lawrason	London.
John Swartz	Waterloo.
George Douglass Griffin	Hamilton.
Fisher Munro	Port Colborne.
James McMonies, jun.	Co. Wentworth.
Ebenezer Johnston	Tp. Ernestown.
Thomas J. Owens	Drayton.
Peter McCann	London.
Martin Hauck	Co. Waterloo.
J. C. Booth	Chambly.
Allan McQuarrie	Eldon.
J. J. Marshall	Mount Forest.
Angus McSween	St. Thomas.
McClellan & Co.	Montreal.
Rhinard Maybee	Manilla.
Nelson Storm	Kingston.
Samuel Lake	Newburgh.
James C. Macklin	Hamilton.
George H. Comer	Tp. Richmond.

APPOINTMENTS TO OFFICE.

SPECIAL COMMISSIONER.

FREDERICK WM. TORRANCE, of Montreal, Esquire, Advocate, to be a Commissioner under Chapter 13 of the Consolidated Statutes of Canada, to inquire into the proceedings connected with the St. Alban's offenders. (Gazetted January 28, 1865.)

NOTARIES PUBLIC.

WILLIAM U. BARRETT, of Port Hope, Esquire, Attorney-at-Law, to be a Public Notary in Upper Canada. (Gazetted January 2I, 1865.)

CORONERS.

JOHN GEORGE McLEAN, Esq , M.D., Associate Coroner, County of Lincoln. (Gazetted January 21, 1865.)

JOHN H. ELLIOTT, Esquire, M.D., Associate Coroner, County of Welland. (Gazetted January 21, 1865.)

ISSUERS OF PASSPORTS.

A. J. PETERSON, of Berlin, THOMAS WILLS, of Belleville, THOMAS SPARROW, of Galt, SAML S. SMADES, of Port Colborne, and THOMAS BURGAR, of Welland, Esqrs. (Gazetted January 7, 1865.)

MOSES SPRINGER, of Waterloo, THOMAS GORDON, of Owen Sound, JAMES McGIBBON, of Lindsay, and JAMES HOLDEN, of Prince Albert, Esquires. (Gazetted January 21, 1865.)

ANDREW DONNELLY, of Richmond, WILLIAM B. HAMILTON, of Collingwood, CHARLES ELLIOT, of Cobourg, WILLIAM WALLACE, of Simcoe, WILLIAM M. KING, of Oakville, LEWIS W. ORD, of Seaforth, JAMES THOMSON, of Goderich, and JAMES RIDDELL, of Port Dover, Esquires. (Gazetted January 28, 1865.)

TO CORRESPONDENTS.

"Lex"—In our next.

"A. A. B."—Many thanks for your communication and accompanying statement. The subject will be referred to in our next.

"S. P."—You are perfectly correct as to the fact of the repeal of the section referred to; but it was immaterial as far as the article was concerned. We may have occasion hereafter to refer to the late act.

"F. E. M."—Is reminded of the invariable rule that the names of Correspondents must be sent with their communications, not necessarily for publication, but as a guarantee of good faith.