DIARY FOR JUNE.

4. SUN ... *Whit Sunday.*
5. Mon ... Recorder's Court sits. Last day for notice of trial [for Co. Ct.
11. SUN ... *Trinity Sunday. St. Barnabas.*
13. Tues... Quar. Sess. and Co. Ct. sitt. in each Co.
18. SUN ... *1st Sunday after Trinity.*
20. Tues... Accession Queen Victoria, 1837.
21. Wed ... Longest Day.
23. Thurs.. Sittings Court of Error and Appeal.
24. Sat .... *St. John Baptist* Midsummer Day.
25. SUN ... *2nd Sunday after Trinity.*
29. Thurs.. *St. Peter.*
30. Frid.... Last day for County Council finally to revise Assessment Roll.

NOTICE.

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.

JUNE, 1865.

THE TEMPERANCE ACT OF 1864.

Our attention has been directed to one of the clauses of this Act. A correspondent asks whether a wife having a cause of action under the 42nd section, can maintain the same in a Division Court. The words of the section on this point are in substance as follows:—The person giving the notice may, in an action as for a personal wrong, recover of the person notified such sum not less than twenty nor more five hundred dollars, as may be assessed by the court or jury as damages.

It is not easy to determine from the language used, whether the Division Courts can entertain such a case. Our impression is, that they can, at least if no more than forty dollars are claimed in the particulars, and we have arrived at this conclusion for the following reasons: If the mention of the larger amount in the clause excludes the jurisdiction of the Division Courts, it would also exclude that of the County Courts which never could have been intended by the Legislature. There are many cases where there would in effect be a denial of the remedy if the wife or relative of a person who is in the habit of drinking were compelled to resort to the superior courts. The expense, if nothing else, would be a bar to the remedy, for the wife of a drunkard has seldom a dollar at command. She might be able to make up the small fees necessary to enter a suit in the Division Court, though not at all likely to have sufficient means to bring an action in the Court of Queen's Bench or Common Pleas, not to speak of the loss of time and necessity for travelling a considerable distance from home. These considerations we admit, will not determine the question of jurisdiction, but one cannot lose sight of them in considering the point.

Under the 55th section of the Division Court Act, these courts can entertain actions for "personal wrongs;" they come within the general term "personal actions." But do the words "such sum not less than twenty nor more than five hundred dollars," make it necessary to claim the larger amount in all cases? The action is not given as for a debt, or to recover a debt, but for a "personal wrong," and evidence of damage should be given. And therefore we think if a party has not sustained damages beyond forty dollars, he or she may limit the claim to that sum and so enable Division Courts to deal with the case.

Such sum "as may be *assessed* by the court or jury as damages"—the word "assessed as damages" implies a right to damages at all events to twenty dollars, with such further sum added as the plaintiff may, upon the evidence, appear to be entitled to. The words "*by the court or jury*" are very material in determining the point. In actions for personal wrongs none of the courts of record determine questions of damages without the intervention of a jury, but the Division Courts do. The judge is "sole judge in all actions," * * * and "determines all questions of law and facts in relation thereto," except in cases where a jury is demanded; and for this reason it seems clear that the Legislature must have had in view when passing the Act, the bringing of actions in the Division Courts. Otherwise why are the words "*court or jury*" which imply that in some cases it would belong to a court (without the intervention of a jury) to assess the damages—upon no other construction can effect be given to every part of the clause.

But it may be said if this argument has weight, and if in the clause under consideration the legislature by using the words "assessed by the court," must have meant the Division Court, that an action for one hundred

dollars could be sustained under section 40, and there is some difficulty there, we suppose, unless we admit that section 40 has the effect of enlarging the Division Court jurisdiction in the case specified. Of course an explanation might be given of the use of the words referred to by reference to newspapers and individual dealings; but these are not proper elements in construing the terms of an Act of Parliament, and it might lead us to say something about a certain ambitious Durham boat-man who put out his pole to propel a vessel in Upper Canada waters, but unfortunately found nothing to bottom it on; or on the other hand, of there being such paucity of hands in the west that we were compelled to ship a man from the east to rig up the new Temperance boat.

We have not heard of any action brought under this section, and if any of our readers are aware of any such in the Division Court, we should be glad to hear from them.

There must be many distressing cases where the inhuman cupidity of liquor dealers in furnishing intoxicating liquors to a "drinking" husband, has caused loss and suffering in a family; and some of the Temperance societies or some humane person would do an act of charity by furnishing a poor wife, anxious to punish a delinquent, but unable to pay court fees, with the small sum necessary to bring an action in the Division Court.

PRACTICE OF BAILING BY JUDGES IN CRIMINAL CASES.

On page 165 of Vol. 7 of the *Law Journal* will be found an article on the law and practice of bail in criminal cases, to which we refer our readers in connection with *The Queen* v. *Chamberlain et al.*, published in another place in the present number. The writer of that article suggested as allowable the practice which has been sanctioned by Mr. Justice Wilson, in the case named, that is to say, to have the depositions certified by the County attorney; and expressed his belief that the better course in all cases would be (as suggested in that article) to obtain copies from that officer, rather than from the committing justice. We subjoin an extract therefrom on this point.

The writer, after mentioning that the procedure is not traced out in the particular enactment, goes on to say—"but enough may be collected from the several enactments bearing on the subject, to show the proper practice in such cases. Suppose, then, a practitioner instructed to apply to the county judge for an order to bail a party committed for a crime. The first step will be to procure certified copies of the examinations and papers upon which the judge is to act. If the party charged be actually in gaol, it may be assumed that the papers are filed with the County attorney; for section 39 of the Consolidated Act, before referred to (Con. Stat. C. ch. 102), and section 9 of the Local Crown Attorney's Act (c. 106, U. C.), require the depositions and papers to be 'delivered to the County attorney without delay,' and so in respect to coroners, by section 62 of the first named act. The words 'without delay' must be taken to mean without unreasonable delay, and in practice the papers are usually sent by the next mail, or are at once sent in an enclosed packet by the constable intrusted with the execution of the warrant of commitment, to be by him delivered to the County crown attorney, when he lodges his prisoner in gaol. But if on inquiry it is found that the committing magistrate has not transmitted the papers to the County attorney, that officer would doubtless call upon the magistrate at once to forward them; and that without prejudice to any proceeding that would lie against the magistrate for default in not obeying the requirements of the statute. In some cases it may save time to apply directly to the committing justices; but, unless in very urgent cases, it is better to obtain the certificate from the County crown attorney — for unless every thing is in form the papers may require to be again sent to the committing magistrate for correction, and, in any case, notice will probably be required to be given to the County attorney."

As remarked by Mr. Justice Wilson, it would be impossible for the committing magistrate, after he has complied with the law in transmitting the papers to the County attorney, to certify in the manner required by the act; and, "in favor of liberty," the learned judge made the order to bail on the depositions transmitted and certified by the County attorney.

But after all, the 63rd section of the Consolidated Satutes of Canada only provided an additional mode of verifying the depositions, &c., on the application to a judge to bail, and the judge might, we take it, act upon any

proof which satisfies him, under the extensive powers given by the 54th section of the same act; and the official certificate of a County attorney is at least as reliable as the like certificate from a justice of the peace.

There are, however, two provisions bearing on this question which do not appear to have been mentioned by counsel in the case of *The Queen* v. *Chamberlain* Section 5 of ch. 80, Con. Stat. Can. provides that "in every case in which the original record could be received in evidence, a copy of any official or public document in this province, purporting to be certified under the hand of the proper officer or person in whose custody such official or public document," &c., shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, &c.; and section 60 of Con. Stat. C. ch. 102 enacts, that after examinations taken before magistrates have been completed, and before the first day of the court to which the prisoner is committed to be tried, &c., the prisoner *may demand from the officer or person having custody of the same* copies of the depositions on which he has been committed, &c., on payment of a reasonable sum for the same, not exceeding five cents for each folio.

Under one or both of these enactments the judge might well receive certified copies of the depositions from the County attorney, if express authority were needed for receiving that species of evidence of depositions taken in the charge upon which a prisoner applies to be admitted to bail.

SECURITIES BY PUBLIC OFFICIALS.

A correspondent suggests the advisability of allowing Judges in Division Courts to receive the security offered by an assurance or guarantee society, instead of the security of private individuals. If this is advisable for Division Court officers, why not equally so for municipal and county officials? As far as the former are concerned, none are better aware of the difficulties and unpleasantness of their task than the county judges themselves.

The practice is fast coming into vogue for public companies to accept the securities offered by the bonds of guarantee societies for the due and faithful performance of duties by secretaries, treasurers, clerks, servants, &c., in their employ. This course has many obvious advantages, both to the servant and his employer, and we think that it might, with proper safeguards, be still further extended.

We understand that notice has been given of the intended introduction of a bill next session with the above object in view, but of general application. We shall be better able to give an opinion on the subject when we see what the proposed enactment provides.

MUNICIPAL ELECTIONS.

We have been enabled, in the present and in three former numbers, to present to that class of our readers who are interested in municipal affairs, a number of decisions by judges of the Superior Courts, of more or less importance, with reference to disqualifications affecting various members of municipal councils. We also commenced, in the April number, to collect, amongst the notes of cases affecting "Magistrates, Municipal and Common School Law," a series of decisions on the same subject, which we shall continue in future numbers as space permits, and which will, when complete, be found very useful to municipalities when discussing this important branch of the law.

SELECTIONS.

QUACKERY.

The conviction of Wray *alias* Henery aroused the virtuous indignation of the British press to a degree that is inexplicable, as the offence of which he has been found guilty has been known to have been committed daily by the hundreds of quacks who carry on their nefarious but profitable practice in London and every town in the kingdom, and as the proprietors of the newspapers that have been loudest in his condemnation, and in the expression of indignation, have not hesitated to give to his advertisements, and those of others of the same class, a place in their pages. How few of our daily papers can be safely admitted into the family circle, owing to the highly objectionable nature of the advertisements of these quacks, by which alone they are enabled to live. If their advertisements were refused admission in the newspapers, half their trade would be gone. It is said that one London quack alone spends £10,000 a year upon his advertisements. This circumstance is itself enough to show how profitable a business this must be; and we recently heard of a case which explains the manner in which it is made so.

A nervous gentleman—so runs the tale—was induced to consult one of these fellows on a subject of extreme delicacy; the quack, seeing with whom he had to do, left the room

mysteriously, and returned with a glass of stagnant water, into which he made this poor nervous man look with a magnifying glass, and, perceiving therein all kinds of creeping things, he became very much alarmed. The quack, seizing the opportunity, assured his patient that what he saw was the cause of complaint, and that there was no man in London able to cure him but himself, and he refused to prescribe until he was paid £500, and a cheque was immediately drawn for the amount. How he worked upon the nervous fears of this poor man can well be imagined, into whose purse he contrived, there can be little doubt, to dip still deeper.

Now, we do not imagine that the refusal of their advertisements would absolutely deprive these gentry of the publicity which is essential to them, but it would deprive them of that kind of recommendation which an advertisement in a respectable newspaper conveys to the mind of the ignorant and unreflecting who very often imagine that the proprietor of a high class newspaper would not admit into his columns an advertisement if he did not know something of the character of the advertiser. The description of persons fitted to be their victims being very well known to them, and their whereabouts, in whatever locality they are to be found, the post will be made the medium of conveying their filthy advertisements to their dupes. But then this mode of advertisement is within the grasp of the law. There is another mode of advertisement to which they resort—viz., the distribution of their works at the public museums, to the annoyance and disgust of those who frequent our leading thoroughfares. This too, can be suppressed by the strong arm of the law. Surely that which Lord Campbell's Act has done with regard to obscene prints, can be done in the case of obscene publications, and the exhibitions of loathsome and disgusting figures and busts.

No quack is permitted to practise in France. When a man is about to commence the practice of medicine in any town there, he is obliged to present to the mayor, or other authority of the town, his diplomas, and if they are not *en regle*, he is not allowed to open his practice. The result is, that the public health and the purses of individuals are alike protected. Why cannot that which is done in France be done in England?

Doubtless there is this grave difficulty. According to our English mode of thinking, it is a serious and generally reprehensible interference with the liberty of the subject to extinguish a profitable trade, as this is, by legislative enactment, and there must be a very clear and cogent case of public benefit to compensate us for the sacrifice of personal liberty. "What," say the objectors, and not without force, "interfere with the right of a British subject to make any contract respecting his own pocket or health that in his own discretion he may himself please? Why should the Legislature interfere to protect men against their own folly? In seeking to suppress these publications, we may prevent scientific and medical inquiry? Why should we, in effect, revive an obsolete monopoly? This would be a gross, wanton, and un-English interference with that which is most dear to us—our free, uncontrolled, unfettered liberty;" and so forth. And it is not enough to say that similar objections may be and have been made to every project of reform brought under the consideration of the Legislature, and that, nevertheless, the reforms have been effected with advantage to the public. The real question at issue here is not whether the arbitrary suppression of these quacks would or not be a public benefit —no one can deny that it would be so, except the quacks themselves—but whether there is or not involved in this suppression a principle so fraught with danger as to render its adoption a greater evil than the nuisance it is desired to suppress. We cannot deny that to watch over the moral conduct of the population by law savours somewhat suspiciously of "paternal government." When the New England colonists declared adultery to be a crime punishable with the pillory, few people in this country doubted that, however excellent the morality of the statute in question, it was, practically, tyrannical. The question for us, then, is, have we, declamation apart, a right to prevent the open exercise of this most "noxious trade?" and we do not hesitate to say that we have.

Why is cheating a criminal offence? Because it is the duty of law to protect *property*, and cheating is an invasion of the rights of property. Is it, then, less the duty of law to prevent the weak and credulous from being deceived out of their health, which is property, and made furthermore to pay their money for that which cannot be taken to be "valuable consideration." Moreover, public decency is within the proper scope of the law, and these exhibitions and advertisements offend against public decency.

We admit freely that the task is not an easy one; but that is no reason why the attempt should not be made. Lord Campbell, in dealing with the Holywell-street obscenities, had similar difficulties to encounter, yet he made the attempt, and practically succeeded in his object.

The failure of the Medical Registration Act to suppress these evils is another proof of the necessity of a public prosecutor. The medical council consider, and probably with justice, that they are not called upon to institute proceedings, at their own risk, against quacks, who, by their assumed titles, hold themselves out to the public, who have no means of knowing better, as duly-qualified medical practitioners; and a kind of sanction is believed to be added to this representation by the appearance of their advertisements in respectable newspapers. As the law at present stands, there is no person or body compelled to prosecute.

The first step necessary sounds a strong one, but it is really right in principle. Let

it be made a misdemeanour to assume the title or qualification of a medical man, unless authorised by the diploma of some recognised or legalised body or institution; then appoint a public officer bound to institute legal proceedings against all persons who violate the law in this respect, on a proper *primâ facie* case being shown; next prohibit any man from practising medicine in any place until his diplomas have been submitted to some magistrate, and a proper opportunity afforded for any person who may be so minded to test their genuineness. Let the presentation of a false diploma be declared a misdemeanour, and power of summary conviction (subject to the right of appeal) given to the magistrates; next the magistrates should be invested with power to close those museums that disgrace our leading thoroughfares, wherever found, and the provisions of Lord Campbell's Act should be extended to the circulation of those filthy publications.

This latter is, perhaps, the most difficult branch of the subject, because it may fairly be said, where is the line to be drawn between a scientific and a filthy publication. Many duly-qualified practitioners devote themselves to the treatment of what are called "secret diseases," and write skilful treatises upon the subject. This is unquestionably so, and, while there is no necessity for the public to read these books, it is as absolutely necessary that the profession should be in possession of them as of any other medical works. They must therefore be advertised in the usual style in which other learned books are offered to the profession, but not otherwise; and it may well be confided to the authorised tribunals to deal with the authors of such works, and to say, under all the circumstances of each case, whether the advertisement was or not a legitimate one, and, if not, then to treat it as a misdemeanour.

It is not necessary here to enter into the details by means of which these provisions might be carried out, as they will easily suggest themselves to every experienced draftsman. Let the principle but be admitted that the men are public nuisances, as deserving of being stopped as unqualified solicitors or unauthorised brokers, and that the publications are an offence against public decency, and the rest will follow upon well-established precedents, almost without the necessity of consideration.—*Solicitor's Journal.*

THE LAW & PRACTICE OF THE DIVISION COURTS.

(*Continued from page* 55.)

The general provision contained in section 71, as to where suits may be entered and tried, may be departed from in certain cases, by leave of the judge, under section 72. The object of the enactment is shewn in the preamble to the clause (one of the few preambles retained in consolidating the statutes of Upper Canada). It is as follows: "The places fixed for holding the sittings of the courts, and the offices of the clerks thereof, being in some instances situated at an inconvenient distance from the place of residence of certain parties residing in such divisions, while a court is held in an adjacent division, in the same or in an adjoining county more convenient for such parties, and it being desirable that procedure in the Division Courts should be made easy and inexpensive to suitors."

It is then enacted that in case any person desires to bring an action in a Division Court other than that in which the cause of action has arisen, or in which the defendant resides, any judge may authorize by special order a suit to be entered and tried in the court of any division *in his county* adjacent to the division in which the defendants or any one of the defendants resides, whether such defendant or defendants reside in the county of the judge granting the order or in an adjoining county.

The 20th general rule of practice provides that the proper leave may at any time be procured on production of an affidavit to the effect of the form given in schedule to rules 1 and 2, or upon oath to the same effect, at any sittings of the court in which the action is brought; and that no written order for such leave shall be necessary, but that the insertion of the words, "issued by leave of the judge," in the summons, shall be sufficient.

The recent enactment of 27 & 28 Vic. cap. 27, has, to a great extent, left the provisions of section 72 of little practical value; but there are yet cases not covered by that act, in which section 72 may be brought into play, with a view to convenience and economy in procedure.

The statute 27 & 28 Vic. cap. 27, has greatly modified the general enactment as to venue (sec. 71). It is very general in its character, making contiguity to the place where the court is held the rule as to in what court the defendant may be called on to answer a claim.

The object of the act, declared in the preamble, is to lessen the expense of proceedings, and to provide as far as may be for the convenience of parties having business in the Division Courts. This act is, by section 3, incorporated with the Division Court Act, and a place assigned to its clauses: they are to be inserted next after section 71 of the act, and

the rule making power (under sec. 63) is extended to its provisions.

By section 1, "any suit cognizable in a Division Court may be entered and tried and determined in the court, the place of sitting whereof is the nearest to the residence of the defendant or defendants; and such suit may be entered and tried and determined irrespective of where the cause of action arose, and notwithstanding that the defendant or defendants may at such time reside in a county or division other than the county or division in which such Division Court is situate and such suit entered."

It will be observed that the power to select a tribunal under given circumstances is conferred on the person who enters a suit. It is permissive, and may or may not be made use of. The defendant cannot compel a plaintiff to proceed under this clause, nor can he, if a suit be entered under the authority of section 71 that might be entered under this section, object that it would be more convenient to him to have the case entered in the nearest court to him.

The section will in many cases give the plaintiff the choice of several tribunals, *e. g.*, in the court for the division where the cause of action arose, where the defendant resides, or the court the place of sittings whereof is the nearest to the residence of the intended defendant.

MAGISTRATES, MUNICIPAL & COMMON SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Quarter Sessions.—Contempt.—Counsel.—A Court of Quarter Sessions being a court of record has jurisdiction to fine for contempt of court; and a counsel was fined for using insulting language to a juryman, and thereby obstructing the business of the court. The Court of Queen's Bench will exercise a supervision in such cases, and see that the inferior court has not exceeded its jurisdiction. (*In re Pater*, 13 L. T. M. C. 142.)

False Pretences—Indictment.—To sustain an indictment for obtaining or attempting to obtain money by false pretence, the indictment must state with certainty the pretence of a supposed existing fact—A statement that prisoner pretended to H. P. (the manager of T.'s business) that H. P. was to give him 10s., and that T. "was going to allow him 10s. a week." *Held* insufficient. Blackburn, J., and Pigott, J., *dubitantibus*. (*Reg.* v. *Henshaw*, 33 L. J. M. C., 132.)

Criminal Law — Evidence.—An indictment charging prisoner with shooting at A. B. with intent to do him grievous bodily harm, is well supported by evidence, showing that he fired a loaded pistol indiscriminately into a group of persons intending to do grievous bodily harm, and that he hit A. B. (*Reg.* v. *Fretwell*, 33 L. J. M. C., 128.)

Municipal Corporation—Retainer of Attorney.—A corporation, as a general rule, cannot bind itself except under its common seal; and the retainer of a solicitor to oppose a bill in Parliament is not an exception to that rule. (*Sutter* v. *Spectacle Makers' Company*, 12 W. R. 742.)

By-Law — Powers of Town Council with regard to sale of Provisions, &c—Licenses to Butchers—Punishment imposed for Breach—Whether it must be fixed in By-law or may be left to the Magistrate.—The corporation of a town by by-law enacted that no person should expose for sale any meat, fish, poultry, eggs, butter, cheese, grain, hay, straw, cordwood, shingles, lumber, flour, wool, meal, vegetables, or fruit (except wild fruit), hides or skins, within the town, at any place but the public market, without having first paid the market fee thereon, as therein provided, except all hides and skins from all animals slaughtered by the licensed butchers of the corporation holding stalls in the market. *Held*, bad, as being beyond the power of the corporation.

Also, that meat, fish, *poultry*, *eggs*, *cheese*, *grain*, hay, straw, cordwood, *shingles*, lumber, *flour*, *wool*, *meat*, *vegetables*, or *fruit*, except wild fruit, should not be exposed for sale within the municipality, except in the market, before 12 o'clock, noon.

Held, bad, as to the articles printed in italics, power being given as to the others only, by sec. 294, sub-sec. 10, of Consol. Stats. U. C., ch. 54.

Also, that before 10 a.m. during May, June, July, and August, and before 11 during the other months, no huckster, butcher, dealer, trader, runner, agent, or retailer, or any other person purchasing for export or to sell again, should buy, bargain for, engage or offer to buy any article of household consumption brought to the market, excepting pork, grain, flour, meal, or wool. *Held*, bad, except as to hucksters and runners, they only being included in sub-sec. 12.

Also, that all persons exercising the trade of a butcher within the town should be licensed each year, as provided, the fee for each license to be 5s. *Held*, clearly bad, under secs. 217, and 294, sub-sec. 31.

Also, that any person breaking any of these provisions should, upon conviction before the mayor or any other magistrate of the town, forfeit and pay a fine not exceeding $50, nor less than $1, and costs, and in default thereof, and of distress out of which to levy, should be committed, with or without hard labour, for not more than 21 days. *Quære*, taking together sec. 243, sub-secs. 6, 7, 8, and secs. 206, 207, 360, 866, whether the statute authorizes a discretion as to the amount of fine and term of imprisonment to be thus given to the magistrate, or whether it must not be fixed by the by-law. There being room for doubt as to this point, and reason to believe that many convictions might have taken place under similar provisions in other by-laws, the court refused to quash upon this objection. (*Re Fennell and Corporation of Guelph*, 24 U. C. Q. B. 238.)

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Insurance—Interim receipt by Agent, how far binding — Principal and Agent. — The agent of an insurance company, employed to receive applications, on application by the plaintiff, and receipt from him of the usual premium, gave to the plaintiff a receipt therefor, "subject to approval by the board of directors, money and note to be returned in case application is rejected." It was alleged that this was verbally understood between the agent and the assured to be a final agreement for the policy and an acceptance of the risk. The directors having refused to effect the proposed insurance, and returned the premium note given to the agent, *held*, that the company was not liable to make good a loss. *Held* also, that the agent's authority did not extend to the making of final agreements for insurance, or to the insuring temporarily of property not of the classes specified in printed circulars of the company, or such as they were accustomed to insure. (*Henry* v. *The Agricultural Mutual Assurance Association*, 11 Grant, 125.)

Principal & Surety—Release—Discharge. The payee of a promissory note, endorsed for the accommodation of the maker, having obtained judgment against the maker and endorser, executed a release to the maker, reserving all his rights against the endorser. *Held*, that he was entitled to do so, and might still proceed to enforce the judgment against the endorser. (*Bell* v. *Manning*, 11 Grant, 142.)

Contract for sale of land—Growing crops. The plaintiff agreed to buy an estate, "including the hay, growing crops, &c." The time fixed for completion was the 24th June, but it was afterwards extended till the 29th September, and in the meantime the defendant had cut and sold the hay and crops. *Held*, that the plaintiff was entitled to those crops only which were in existence at the time of completion, and that he had no right to the proceeds of the sale of the crops which were cut and gathered before the 29th September. (*Webster* v. *Donaldson*, 13 W.R. 515.)

Negligence—Servants. — If the owners of dangerous machinery employ a young person about it, inexperienced in its use, without giving that person proper directions as to the mode of using it, they are in law responsible for any injury which may ensue from the use of the machinery. (*Grizzle* v. *Frost*, 3 F. & F. 622.)

False Imprisonment—Justification.—A person unlawfully in another's house and creating a disturbance, and refusing to leave the house, may be forcibly removed; but if he had not committed an assault, the circumstances do not afford a justification for giving him into the custody of a policeman. (*Jordan* v. *Gibbon*, 3 F. F. N. P. Cas. 607.)

Executors—Renunciation.—Renunciation by an executor need not be under seal. A letter by which he renounces probate is sufficient, and the letter should be recorded in court as his renunciation. (In the goods of *Boyle*, Prob. 3, 5, 64; 33 L. J. N. S. 105.)

Injury resulting from the Clearing of Land—Refusal to interfere with Verdict of Jury.—A man must exercise care and discretion as to the time and mode of clearing his land; and if his neighbour be injured by rashness or inconsiderateness on his part, he will be liable to him for the damage.

It is, however, always a question for the consideration of the jury whether or not a man has exercised his own right to the injury of his neighbour; and where the case has gone fully to the jury, with all proper directions on the law by the presiding judge, their verdict will not be disturbed by the court, unless it is contrary to

law, even though the evidence would fully have warranted a different finding. (*Wilkins* v. *Row*, 1 U. C. L. J., N. S, 151.)

PARTNERSHIP — ASSIGNMENT FOR BENEFIT OF CREDITORS.—When a partner has absconded, the remaining partners may make an assignment for the benefit of creditors, without his consent. (*Palmer* v. *Myers et al*, 1 U. C. L. J., N. S., 165.)

UPPER CANADA REPORTS.

COMMON PLEAS.

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

SQUIRE QUI TAM v. WILSON.

Property qualification of Justices of the Peace—Con. Stats. C. ch 100, sec. 3—Conflicting evidence—Judge's charge.

In a *qui tam* action against defendant for acting as a Justice of the Peace without sufficient property qualification, where the evidence offered by plaintiff as to the value of the land and premises, on which defendant qualified, was vague, speculative, and inconclusive, one of the witnesses in fact, having afterwards recalled his testimony as to the value of a portion of the premises and placed a higher estimate upon it; while the evidence tendered by the defendant was positive, and based upon tangible data:—

Held (*A. Wilson, J., dissentiente*), that the jury were rightly directed, "that they ought to be fully satisfied as to the value of the defendant's property before finding for the plaintiff; that they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favour of the defendant."

Observations on the principle of the valuation of land with a view to determining the property qualification of Justices of the Peace.

[C. P. H. T., 1865.]

This was a *qui tam* action against the defendant for acting as a Justice of the Peace in and for the United Counties of Huron and Bruce without being qualified, according to "The Act respecting the qualification of Justices of the Peace," Con. Stats. C. cap. 100

The declaration contained eleven counts.

The defendant pleaded not guilty to all, and as to ten counts, an action *qui tam* pending against defendant at the suit of one David Paulin.

The plaintiff joined issue on the first plea, and replied to the second that the action of Paulin was commenced and prosecuted by fraud and collusion between Paulin and the defendant.

On this replication the defendant joined issue.

The cause was tried before Hagarty, J., at the last assizes held at Goderich, and a verdict found for the defendant.

In Michaelmas Term last, *Robert A. Harrison* obtained a rule *nisi* to set aside the verdict and for a new trial on the grounds of misdirection in this, that the learned judge told the jury that if there was any doubt as to the sufficiency of the defendant's property qualification as a Justice of the Peace, to give him the benefit of the doubt; and for non-direction in this, that the judge refused to tell the jury that by law the onus of proving a sufficient qualification was cast upon the defendant, and that if the jury doubted as to its sufficiency the verdict should be against the defendant; and upon grounds of improper rejection of evidence in this, that he refused to hear the testimony of Charles A. Harte, a witness called on the part of the plaintiff; and on grounds of surprise, and grounds disclosed in affidavits and papers filed.

During the present term, *C. Robinson*, Q.C., shewed cause —There is no reason for complaining of non-direction, for the presumption is always in favor of the good faith of a public officer. Before acting the defendant had to make oath that his property was worth $1,200. This he did, and he has proved by two witnesses that the property is of this value. It is true that the plaintiff produced as many and more witnesses to prove that in their opinion it was worth less, but they had not seen the property so fully as to be able to estimate its value, and after all it was but their opinion. It is true, too, that the statute requires the property qualification to be $1,200, but it is easy to get witnesses honestly to undervalue the property, and thus cast a doubt upon its value; but a doubt thus cast should be in favor of the defendant, because the presumption always is that a man is acting rightly, not wrongfully.

As to the rejection of the evidence of Harte, it must be admitted that his knowledge of the circumstances as to which he was called to speak was derived from the defendant during the relationship of attorney and client, and the evidence was, therefore, properly rejected. As to the affidavits filed by the plaintiff, they disclose no new facts, but a repetition of opinions of value, which are met by affidavits on the part of the defendant representing its value to be $1,200. There is no surprise, and no ground on which a new trial ought to be asked for or granted, for the defendant was the owner in fee of the land.

On the question of misdirection he referred to Con. Stats. Canada, ch. 100, secs. 3, 6; on the alleged non-direction to *Great Western Railway Company of Canada* v. *Braid*, 8 L. T. N. S. 31, S. C. 9 Jur. N. S. 339; *Taylor* v. *Ashton*, 11 M. & W. 401, 417; Taylor on Ev. 4 ed. 366-369; *Connell* v. *Cheney*, 1 U. C. R. 307; and as to the surprise, *McLellan q. t.* v. *Brown*, 12 U. C. C. P. 542.

Harrison, in support of the rule, animadverted upon that part of the judge's charge, wherein he directed the jury not to weigh in scales too nicely balanced the value of the defendant's property. He argued that the statute required the qualification to be $1,200, and that the legal presumption was against the defendant if doubt was thrown upon its value; for he was bound without reasonable doubt to have property of the clear value of $1,200, and the whole onus of proving this lay on the defendant. He cited *The Lexington F. L. & M. Ins. Co.* v. *Paver*, 16 Ohio, 324; Best on Presumptions, 29, 57.

J. WILSON, J.—The 6th sec. of the Con. Stats. C., cap 100, enacts that "the proof of his qualification shall be upon the person against whom the suit is brought." The defendant, in answer to the plaintiff's charge, that he had acted without the proper qualification, put in his oath of qualification, dated 17th of April, 1861, on certain property in Clinton, described therein. He called the person from whom he purchased the property in January, 1865, who proved that the defendant had then paid for it $1,200, and had since expended $400 more upon it, and that it was worth as much at the time of trial as it was when he

purchased it. He proved by another witness, who had opportunities of examining it, that the lot on which the house stood was an eighth part of an acre, and was worth at least $1,200; that an adjoining lot of double the size, but with a house worth $400 less than the defendants, had been sold for $1,600 within three months.

To displace this evidence, the plaintiff called three witnesses to speak to the value of the property. The first was the assessor for the years 1859,'60 and '61. He said that he had assessed its yearly value in 1861 at $36, representing an absolute value of $600, which he said was a fair value. The lot is over forty feet front by two chains deep, and might be now worth $200 or $300, and the buildings might have cost $500 or $600, but are not worth what they cost: he was never inside the house, and had never examined it, with a few to value it, for three years. The next witness said he thought the property worth $700 to $800; he had been inside the house, but never up stairs; but he admitted he had never looked at it with a view to value, for he did not expect to be asked. The third and last witness said that before the repairs he thought it worth about $600, but he had not seen it since the repairs; he should not like to give $900 now; some might give more, and, perhaps, if he had examined it through, he might value it at more.

The learned Judge reports to us that he directed the jury, "that they ought to be fully satisfied as to the value of the defendant's property before finding a verdict for the plaintiff; that he thought they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favor of the defendant."

The last part of this charge is what is complained of in the rule; but in the argument the mode in which the jury were directed to weigh the matter was insisted upon as objectionable.

In both respects we think the charge was right.

(To be continued.)

In the matter of O'Neill and the Corporation of the United Counties of York and Peel.

Purchase of public roads from Government by County Council—Price and time of payment—By-law unnecessary—Con. Stat. U. C. cap. 54, sec. 226, C. cap. 28, sec. 76.

The county council of any municipality has power, under Con. Stat. U C. c. 54. sec. 226, to contract with the government for the purchase, *at a price beyond* $20 000, of any public works, roads, &c, in Upper Canada, and to issue debentures for the payment thereof *in twenty years, without a by-law being passed to authorize the same.*

Semble, that if it be thought *desirable* to pass such a by-law it need not be first submitted to the ratepayers for assent thereto.

Con. Stat. C. cap. 28, sec. 76, specially authorise the sale to any municipal council by the government of the public roads lying *beyond* the limits of such municipality.

[C. P., H. T., 1865.]

In Hilary Term last, *J. Blevins*, for T. H. O'Neill, obtained a rule *nisi* to quash with costs the following by-law or resolution of the council of the said corporation, passed on the 2nd November last:

"That the warden be, and he is hereby instructed to enter into an agreement with the government to pay them for the York roads the sum fixed bp the arbitrators appointed to settle the price, in six per cent. debentures, running twenty years, in accordance with the original propositions, and that the seal of the corporation be affixed to this resolution.—Adopted.

(Signed) "Wm. Tyrrell, *Warden.*

"2nd November, 1864.

(Signed) J. Elliot, *C. C.*" [L. S.]

The following grounds were taken in the rule:

1. That being a by-law or resolution for raising upon the credit of the municipality of the united counties a sum of money exceeding twenty thousand dollars, not required for its ordinary expenditure, and not payable within the same municipal year, it was not, before the final passing thereof, or at any time, submitted to the electors of the said municipality for their assent, as required by the municipal institutions, &c., of Upper Canada; and that the said by-law or resolution was uncertain in not fixing the amount for which the said debentures should be issued.

2. That the said by-law or resolution did not ascertain or state the amount of ratable property of the said municipality, nor the amount of the debt created thereby, or intended to be paid, nor the total amount required to be raised annually by special rate for the payment of the said debt and interest, nor the amount of the whole ratable property of the said municipality, according to the last revised assessment rolls, nor the annual special rate in the dollar for paying the interest and creating an equal yearly sinking fund for paying the principal of the said new debt intended to be created; that no rate, or other provision whatever, was stated or made by the said by-law or resolution to meet or pay off the said debentures, or the interest thereon, nor was there any other by-law providing for the same, or supplying the said several defects; that a portion of the said roads was without the limits of the said corporation, and lay within the limits of the county of Ontario, an independent municipality. Or, why that portion of the said by-law or resolution, which authorised the issuing of debentures, should not be quashed with costs for all or any of the reasons aforesaid, and on the grounds, that the same was uncertain in not fixing the amount for which the said debentures should be issued, and on grounds disclosed in affidavits and papers filed.

The affidavit of O'Neill, besides shewing that he was a freeholder in the township of Vaughan and a ratepayer, and interested in the by-law, and that his attorney procured the copy of the by-law or resolution annexed to his affidavit, stated that he had not become aware of the passing of the said by-law or resolution until some time after Michaelmas Term last; that he was informed and believed that the arbitrators referred to in the by-law or resolution fixed the price to be paid by the said corporation to the government for the said roads at seventy-two thousand five hundred dollars, and that he was also informed and believed that the corporation were immediately about to issue debentures by authority of the said by-law or resolution for the purpose of raising the said sum of seventy-two thousand five hundred dollars on the credit of the said municipality.

There was also an affidavit by James Cotton, that he was well acquainted with the roads

known as the York roads, and especially that portion thereof called the Kingston road, the management of which he had superintended for some time. The Kingston road extends from the city of Toronto, beyond the limits of the said united counties, into the county of Ontario about three quarters of a mile.

During the term, *D. McMichael* and *Robert A. Harrison* shewed cause. The by-law or resolution does not create the debt in terms, but authorises an agreement to be entered into to pay for the roads in a certain way; and if it does not create the debt, the municipality may properly pass the resolution. It is under seal, and in that respect complies with the requirements of Con. Stat. U. C. cap. 54, sec. 189, to constitute it a by-law. Courts will endeavour to construe the by-law so as to give it effect: *Cameron* v. *Municipality of Nissouri*, 13 U. C. Q. B. 190. There is nothing illegal on the face of this by-law: sec. 226 authorises the council to contract a debt, and the resolution merely authorises the warden to enter into an agreement to pay in a certain way. There is nothing on the face of this resolution to shew that any debentures are to be issued under it, and the court will not look behind the resolution to see if anything that may be illegal will be done under it: *Secord* v. *The Corporation of the County of Lincoln*, 24 U. C. Q. B. 142.

J. O'Connor, contra.—None of the provisions of sections 223 and 224, of the statutes referred to, have been complied with in this by-law. It does not name the day on which it is to take effect: it does not settle a special rate per annum, nor shew the amount of ratable property in the municipality, nor any means of paying off the debentures and interest. There is no other by-law supplying these defects; and what is a more serious objection, the by-law or resolution was not submitted to the electors for their assent before or since the passing thereof. The by-law in fact creates and raises a sum of money upon the credit of the municipality exceeding $20,000, and ought, under section 224, to receive the express assent of the electors. The latter part of section 226 says, "such by-laws, debts, bonds, &c., shall be valid, though no special or other rate per annum has been settled or imposed to be levied in each year as provided by the then preceding sections;" but this does not make the by-law legal unless assented to by the electors. It may not, perhaps, be necessary that it should contain the special provision about rate per annum, sinking fund, &c., but the assent of the electors must be had, for that is not dispensed with. One of the roads extends beyond the limits of the municipality, and it is not contemplated that municipalities shall acquire property out of their limits, except for special purposes. Sections 187, 243, 331 & 339 of the statute apply more or less on this point. He cited *Clapp* v. *Thurlow*, 10 U. C. C. P. 533; *Paffard* v. *County of Lincoln*, 24 U. C. Q B. 16; *Scott* v. *Peterborough*, 19 U. C. Q. B. 469; *In re Hawke* v. *Wellesley*, 13 U. C. Q. B. 636; *Edinburgh Insurance Company* v. *St Catharines*, 10 Grant's Ch. R. 379; *Carroll* v. *Perth*, Ib. 64.

RICHARDS, C. J., delivered the judgment of the court.

(To be continued.)

COMMON LAW CHAMBERS.

(Reported by ROBT. A. HARRISON, ESQ., *Barrister-at-law.)*

THE QUEEN v. CHAMBERLAIN ET AL.

Bail in criminal cases—Copies of information, examination, &c., how certified—Con. Stat. Can., cap. 102, *s.* 63.

Held, that where a prisoner makes application to a judge in Chambers to be admitted to bail to answer a charge for an indictable offence, under Con. Stat. Can., cap. 102, s. 63, the copies of information, examination, &c., may be received, though certified by the County Crown Attorney and not by the committing justice.

[Chambers, March 2, 1865.]

On 21st February last, defendant Chamberlain caused a notice to be served on the agent of the Attorney General to the effect that on the next day, at the hour of ten o'clock in the forenoon, an application would be made to the presiding judge in Chambers at Osgoode Hall for the admission to bail of the defendant Chamberlain to answer the charge for which he stood committed; and further, that certified copies of the depositions, &c., on which such application would be made had been brought from the office of the Clerk of the Crown into Chambers by judge's order for the purpose of the application.

The depositions, which were certified by the Clerk of the Peace in and for the county of Oxford, under the seal of the Court of Quarter Sessions in and for that county, disclosed the charge of forgery, which was the charge for which the accused stood committed.

Robt. A. Harrison shewed cause, and submitted that the only jurisdiction which a judge in Chambers had to bail on such a charge was either on writ of *habeas corpus* or under Con. Stat. Can., cap. 102, s 63, and that the latter statute requires a notice to the committing magistrate, and that the copy of information, examination, &c., should be certified close under the hand and seal of the convicting magistrate, which had not been done in this case, and so he argued that there was no jurisdiction to bail the accused.

J. B. Read, contra, referred to the County Attorneys' Act, Con. Stat. U. C, cap. 106, which now provides that the County Attorney shall receive all informations, &c., which the magistrates and coroners are hereby required to transmit to him. He also referred to s. 9 of the Act, which provides that the county attorney shall be "the proper officer" of the court to receive depositions where a party is committed to trial.

ADAM WILSON, J.—The committing magistrate must make a proper return of the informations to the County Attorney. After this has been done he cannot transmit such proceedings to the Clerk of the Crown, nor can he deliver the packet containing the same to the person applying therefor, because he has delivered the proceedings to the County Attorney, as he was bound, in whose custody they are and must afterwards remain.

I think in favour of liberty I shall make the order to bail upon the transmission and certificate of the County Attorney.

It would unquestionably be better to have this matter specially provided for by legislation, although it is not impossible now for the commit-

ting magistrate still to transmit a certified copy close under his hand and seal.

Order accordingly.*

ELECTION CASES.

(Reported by R. A. HARRISON, Esq., *Barrister-at-Law.)*

REG. EX REL. GRAYSON v. BELL.

Municipal Institutions Act, ss. 70, 175, 183—*Qualification—Declaration of qualification—Misstatement therein—How election affected thereby.*

The power of a judge under s. 128 of the Municipal Institutions Act as to the issue of a *quo warranto* summons is to be exercised upon a relator shewing reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person elected thereat was not duly elected; but where the relator admitted a qualification in fact, and made no complaint as to the legality of the election or the conduct of it, contenting himself with attacking the declaration of qualification subsequently made by the candidate, the writ was refused.

[Common Law Chambers, February 13, 1865.]

The relator complained that Robert Bell, of the city of Toronto, painter, had not been duly elected to, and had unjustly usurped the office of councilman for the ward of St. Andrew, in the said city of Toronto, under the pretence of an election, held on Monday and Tuesday the second and third days of January, 1865, at the said ward of St. Andrew, in the said city, and declaring that he the said relator had an interest in the said election, as an elector in the said ward, who gave his vote at the said election, shewed the following causes why the said election of the said Robert Bell to the said office should be declared invalid and void—

1st. That the said Robert Bell has not, and at the time of the said election had not the necessary property qualification as a freeholder for election as councilman, for the reasons following, namely: that at the time of the said election, and the making and subscribing the declaration required by the 175th section of the 54th chapter of the Consolidated Statutes of Upper Canada, the said Bell was not the proprietor in fee simple of the lands and premises mentioned and described by the said Bell in the said declaration.

2nd. That the said lands and tenements mentioned in the said declaration are the lands and tenements of the trustees of the Toronto General Hospital, and the said Bell is the lessee of the said trustees, and never was the proprietor of the said lands and tenements, or interested therein, except as tenant.

3rd. That before the election for councilman for the said city of Toronto for the year of our Lord one thousand eight hundred and sixty-five, the said Bell mortgaged his interest in the said leasehold premises for four hundred dollars or thereabouts, as appears by the records in the registry office in and for the said city of Toronto, and the said mortgage, as appears by the said records is still unpaid and undischarged.

4th. That at the time of the taking of the last assessment for the city of Toronto, he was not the owner of the property on which he claims to qualify as freeholder, and that he falsely and fraudulently represented in his said declaration of office that he was the owner in fee of the said lands and tenements.

5th. That inasmuch as the said Bell has not made and subscribed the declaration as required by the 175th section of the 54th chapter of the Consolidated Statutes of Upper Canada, and within the time required by the 183rd section of the said chapter of the said Statutes of Upper Canada, he, the said Bell, is therefore disqualified from holding said office of councilman for the said ward of St. Andrew for the said city of Toronto.

The relator made oath that he was at the time of the municipal elections held in the said city of Toronto, on the second and third days of January last past, a freeholder in the ward of St. Andrew, in the said city, and had been for upwards of one month next before the said election, and was at the time of said election, and still is, a resident in the said ward and a freeholder therein.

At the said election he gave his vote in the said ward for David Kennedy and William Moulds, candidates for election as councilmen for the said ward: that Robert Bell was a candidate for election at the said election as councilman for the said ward, and received votes thereat as such candidate, and at the close of the said poll on the second day of the said election was declared by the returning officer duly elected to the said office of councilman, and has since taken his seat as such councilman in the council of the corporation of the said city: that the said Robert Bell in his declaration in that behalf made and subscribed by him after the said election states, as his property qualification for the said office, an estate in freehold, to wit—three dwelling houses and premises in Camden street, in St. Andrew's ward, in the said city of Toronto: that the deponent examined the last revised assessment rolls for the said city of Toronto, for the year of our Lord one thousand eight hundred and sixty-four, and found that the name of the said Robert Bell appears thereon as stated for the said premises on Camden street as a leaseholder for $186, and that he is not rated for any other property in the said city: that the said premises on Camden street aforesaid on which the said dwelling houses are erected is leased by said Bell from the trustees of the Toronto General Hospital, being lot number three on the north side of Camden street aforesaid, with a frontage of fifty-two feet, and about eighty-six feet deep: that the deponent examined the records in the registry office of the said city, and it thereby appears that at the time of the taking of the assessment for the said city for the year of our Lord one thousand eight hundred and sixty-four, the leasehold interest of the said Bell in said premises on Camden street aforesaid was mortgaged by the said Bell for the sum of one hundred pounds, and the said mortgage does not appear from the said records to be discharged: that at the time the said Bell made and subscribed the declaration of office, as required by the 175th section of the 54th chapter of the Consolidated Statutes of Upper Canada, the said Bell falsely and fraudulently represented that he was the owner in fee simple of the said land and premises mentioned in the said declaration, as appears by the said declaration, when in fact he only held the said premises as tenant: that the

* See page 82.

declaration of office made and subscribed by the said Bell pursuant to the statute in that behalf, s in the words following:—

I, Robert Bell, do solemnly declare that I am a natural born subject of Her Majesty: that I am truly and *bona fide* seized or possessed to my own use and benefit of such an estate in freehold, to wit three houses and premises on Camden street, in St. Andrew's ward, as doth qualify me to act in the office of councilman for the ward of St. Andrew, according to the true intent and meaning of the said municipal laws of Upper Canada.

(Signed) ROBERT BELL.

H. J. Bradbeer made oath that he made inquiry in the office of the Toronto General Hospital Trust, and found that the said Robert Bell is lessee of lot number three on the north side of Camden Street, in the said city of Toronto, having a frontage on said Camden street of fifty-two feet, and a depth of about eighty-six feet: that the said property is leased to the said Bell for the term of twenty-one years, and said term commenced on the eleventh day of July, in the year of our Lord 1855, and that the rent paid by said Bell to said Hospital Trust is $36.40 per annum.

John Carr, the city clerk, certified that Mr. Robert Bell was assessed in the assessment roll for the ward of St. Andrew for the year 1864, upon which he qualified as councilman for St. Andrew's ward, for 1865, as follows—

Camden-street, N. S.

No. 718—Robert Bell, leasehold, Robert Bell, painter, leasehold $72 72
No. 719—Donald Grant, household, Robt. Bell, painter, leasehold..... 42 42
No. 720—Robert Johnston, household, R. Bell painter, leasehold 72 72

And that the above property was entered in the declaration of qualification book of the city of Toronto, as in "freehold," in place of, as property, in "leasehold."

A. McNab for the relator, referred to Con. Stat. U. C., cap. 54, ss. 72, 175 and 183.

HAGARTY, J.—The Municipal Institutions Act, section 175, requires that each person elected shall before taking office make a declaration of qualification. This was made by Mr. Bell, declaring that he was "seized or possessed to his own use and benefit of such an estate in freehold, to wit, three houses and premises on Camden-street, in St. Andrew's ward, as doth qualify him to act in the office of councilman, &c." It is now stated as a matter of fact that Bell is not the owner of an estate in freehold in the property mentioned.

On the assessment roll he appears as a leaseholder, rated for these premises at $186 per annum, and it is admitted that he is correctly assessed therefor at that rate. Now, section 70 of the act declares that $160 per annum is a sufficient qualification for a councilman. Mr. Bell therefore, as a matter of fact, was duly qualified when he was elected.

I am, however, asked to grant a *quo warranto* summons, on the ground that although true it is he was qualified, and made a declaration to that effect, yet as the declaration for some reason or other describes his estate as a freehold, instead of a leasehold for years, the election should be declared void.

The judge to whom application is made for a *quo warranto* summons under s. 128 of the act, may order the writ to issue, if there be reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person elected thereat was not duly elected. Nothing of this kind is here suggested. If Mr. Bell's declaration has been made in bad faith, there is ample redress provided therefor by s. 423 of the act, and I think I must leave all persons considering themselves aggrieved thereby to seek the remedy provided by the statute The candidate being in fact fully qualified, it is difficult to understand what evil motive could have induced the misstatement in the declaration. I am very far from adopting the confident assertions of the relator charging that such misstatement was made falsely and fraudulently.

As Bell was properly qualified, and nothing is alleged against the manner of his election, I do not see how I can interfere by *quo warranto*, because no apparent mistake has been made in the description of the nature of an estate in property, amply sufficient in itself as a qualification. If it were more than a mistake the parties have another and different remedy.

I refuse the summons.

Summons refused.

COUNTY COURTS.

In the County Court of the County of Essex.

In re TIMOTHY O'CONNELL, AN OVERHOLDING TENANT.

Overholding tenants—27 & 28 Vic. cap. 30—Procedure.

Held, that a landlord proceeding under 27 & 28 Vic. cap. 30, against an alleged over-holding tenant, must adduce some evidence to shew that the tenant refuses to give up the premises, and that his tenancy has expired.

Held also, that the affidavit of the landlord himself, filed under sec. 1, with a view to proceedings under the act, is not legal evidence against the tenant.

INSOLVENCY CASES.

Before the County Judge of the County of Lincoln.

McINNES v. BROOKS.

Insolvent Act of 1864, sec. 3, sub. sec. 2—Demand on Trader to make Assignment—Default—Attachment—Endorsing Writ—Computation of Time—Affidavits

A trader having ceased to meet his liabilities, a demand was served upon him on 31st January, requiring him to make an assignment. On February 6th (the 5th being on a Sunday) an order was granted for and an attachment issued. One of the affidavits filed on application for attachment was sworn to on February 4th. On an application to set aside the writ and all proceedings for irregularity, it was *held*,

1. That the order for the issuing of the writ was not made too soon.

2. That it was immaterial that one of the affidavits was made within the five days allowed for

petitioning under sub-sec. 3, or for making an assignment in accordance with the demand;

3. That the writ of attachment should have been endorsed, with a statement that the same was issued by order of the judge of the county court; but an amendment was allowed on payment of costs by plaintiffs.

4. Objections that the affidavits of the two credible witnesses were not filed at the time of issuing attachment, that the proceedings were not taken within three months, &c., and that sufficient time was not allowed to defendant to give notices required by act for taking proceedings on a voluntary assignment, were over-ruled.

DIVISION COURTS.

In the First Division Court of the County of Elgin.

PATON ET AL v. SCHRAM (JONES, CLAIMANT).

Interpleader—Execution—Attachment—Priority.

Goods seized under an attachment *held* liable to the execution of any creditor who may obtain a judgment and place it in the hands of the bailiff before the attaching creditor obtains judgment and execution.

It was admitted that the goods were seized under an attachment issued in favor of the plaintiffs on the 9th October, 1863.

The claimants' judgment was recovered on 19th November, 1862, and execution issued upon it on 4th November, 1863, and placed in bailiff's hands.

The plaintiff's judgment was obtained on the 27th November, 1863.

Eight sheep were sold as the property of defendant, and realized $17.

Ellis, for claimant, claimed the proceeds of the sale under his execution, as having priority over the subsequent execution of the plaintiffs, and cited *Putnam* v. *Price*, 1 L. C. G. 9, and *Francis* v. *Brown*, 11 U. C. Q. B. 588; 1 U. C. L. J. 225.

Mann, for the plaintiffs, insisted that their attachment gave them a lien over all the goods of defendant as against all others but attaching creditors, whose writs of attachment should be sued forth within one month. He referred to the D. C. Act, secs. 204 to 209.

HUGHES, C. J.—I have carefully gone over the grounds and reasons for my judgment delivered in this court in *Putnam* v. *Price*, some time ago, in which Mr. Nichol was claimant of money the proceeds of a sale of property attached, under similar circumstances; and I have also read over attentively the case of *Ex parte Macdonald* in 1 U. C. L. J. 77, and the judgment of the court of Queen's Bench in *Francis* v. *Brown*, particularly the judgment of the late Mr. Justice Burns, wherein he made no distinction in favor of executions from the superior courts over those of inferior courts, but laid down broad principles which are common to both; and I think that the execution of Mr Jones, the claimant here, under the judgment and execution in his favor, the oldest in date and first in the hands of the bailiff is entitled to priority over the execution obtained aftewards by the plaintiffs under their attachment suit. The late Mr. Justice Burns said in that case, "There is no expression of words in the act of Parliament indicating that it was the will of the Legislature that the attaching creditor should have so much advantage over the non-attaching creditor; but the affirmative of the proposition depends upon the effect of the provisions respecting the duty of the bailiff, and then of the clerk who is made the depositee of the goods. The clerk is directed to take the property into his charge and keeping, and the same property is declared to be liable to seizure and sale under the execution upon such judgment as the attaching creditor may obtain. In this general provision, the Legislature must not be understood as dealing with the rights of parties other than the debtor and the attaching creditor. As between *them* the goods should be placed in the clerk's hands, and as between *them* the goods should be held liable to any execution that the creditor might obtain. In that sense the goods would be under the custody of the law, in case the debtor did not avail himself of the provisions for obtaining a return of them upon giving security." And again, "If the debtor has obtained a return of goods there can, I think, be no question that in his hands they would be liable to be seized upon any execution which another creditor in the meantime should obtain, and if so, it could not be pretended that, in order to defeat the execution, the goods were in the custody of the law. They are no more in the custody of the law because they happen to be deposited with the clerk as respects other creditors than if delivered back to the debtor upon security. The property and the right of property is not changed in any way by seizure upon attachment, but it is necessary that the attaching creditor should obtain an execution before the goods can be disposed of." And again, "An attaching creditor must proceed to judgment and execution, and if there be more than one attaching creditor, they are specially provided for, but in the cases of an attaching and a non-attaching creditor, as both must proceed to judgment and execution, I apprehend the rule "*qui prior est in tempore, potior est in jure*," as respects the execution must prevail, and no lien or priority is gained merely by the attachment."

Supposing this were a contention between these same parties and an execution creditor having a judgment and execution in and from a superior court, I apprehend that as between Mr. Jones and that superior court execution creditor the only question which could or would arise between them would not be to give priority to the superior court execution, merely because it issued from a court of record, but simply the priority of execution in the sheriff's or bailiff's hands, which under the 266th section of the C. L. P. Act would be decided by a reference to the precise dates or times when the executions were respectively placed in their hands. The sheriff would not be permitted to override, with the execution he might hold, the executions the bailiff of the division court might hold, simply because it was the process of a court of record, for the law makes no such distinctions or preferences. If so, surely the execution from this court could not upon any fair pretence be excluded from the priority upon any grounds which might not be urged against the execution of the superior court.

I therefore adjudge and order that the proceeds of the sale of defendant's goods be applied towards satisfaction of the execution of John H. Jones, the claimant.

ENGLISH REPORTS.

COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED, MAY 6.

(*Present, Lord Chief Justice* ERLE *and Justices* BLACKBURN, MELLOR, SMITH, *and Baron* CHANNELL.)

THE QUEEN v. MALANY.

Criminal law—County Courts—Perjury on examination on judgment summons.

The prisoner was indicted for perjury, committed in the County Court of Birmingham. He was a defendant in a suit. After judgment had been given in the case against the prisoner, the judge was about to decide as to whether he should make an order for immediate payment of the debt, or whether it should be paid by instalments, and he asked the prisoner whether his names were not Bernard Edward Malany, in which names he had been sued. The prisoner swore that his name was Edward Malany only. The judge of the County Court upon this struck out the cause. The prisoner was tried before Mr. Baron Martin, who reserved a point, whether, under the circumstances, the prisoner was indictable for perjury.

Gibbons now appeared for the prosecution, and urged that under the County Court Act it was expressly stated that no misnomer should vitiate the suit if the person was commonly known by the name. The question was, whether it was matesial to the issue, and that depended upon the view taken by the judge. He submitted that the judge had made it material, and the jury had found that it was corruptly false.

The LORD CHIEF JUSTICE said the alleged perjury was that the prisoner swore that his name was Edward, and not Bernard, and that in so saying he acted wilfully and corruptly. The objection was, that it was an immaterial inquiry. The court were of opinion that the objection could not be sustained. It was made material by the judge in the course of forming his judgment; he was going through the process, whether it should be judgment for instant payment or for payment by instalments, and in considering that he made inquiry as to the Christian names of the prisoner, and, in answer, the prisoner swore that which was false. He was of opinion that the conviction could be sustained. Conviction affirmed.

CORRESPONDENCE.

Fees on return of executions—Forfeited fees —Returns of.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN:—As you have given reason to expect that you will, in due time, give us your views upon the questions submitted by your correspondent, "CLERK, 2ND D. C. LINCOLN," and as you invite Division Court Clerks throughout the country to give their attention to the subject, I beg to submit the following observations, viz:

It seems to me that your correspondent is not sufficiently accurate in his questions and statements: e.g.: The 141st sec. Con. Div. Courts' Act, does not state "that all executions shall be *returned* by the bailiff within thirty days from the day the said execution issues to him." The section reads as follows: "Every execution shall be dated on the day of its issue, and shall be *returnable* within thirty days of the date thereof." (Quære? are the words *returned* and *returnable*, of the same signification.")

2. The 53rd section does not state, "If execution be not returned within the time *mentioned*, &c." but, "If the bailiff neglects to return any process or execution *within the time required by law*, he shall for each such neglect, forfeit his fees thereon."

3. I think also, that your correspondent is equally inaccurate in supposing that, "returns to the fee fund are done away with." The 38th sec. Con. Div. Courts' Act, provides for two distinct returns to be made by the clerk to the County attorney; the first is, "a full account in writing of the *fees* received in his court;" and the second, "a like account of all *fines* levied by the court." The former is done away with by the 6th section of 27 & 28 Vic., cap. 5, but the latter remains unaltered. I take it, but under submission to your better judgment, that the forfeited fees are of the nature of fines, and should be returned among them. I beg also to submit, though this merely in passing, that if such a return be made, the clerk making it is still entitled to retain $4, as that item in the tariff is not repealed.

But this discussion leads to another question of great importance to both clerks and bailiffs, to which I trust, when you come to give your views upon the questions submitted by your correspondent, you will direct special attention. It is this: what is the *time required by law*, for the return of any process or execution, and especially the latter? Practically, it is frequently inconvenient, if not impossible, for a bailiff to make a return within thirty days, without ruining or greatly delaying the prospects of the execution creditor. He may, for instance, have been unable to find any property till the 29th day after the date of his writ; or he may have made seizure of property of such a description as could not,

in thirty days, be converted into money; as growing crops, notes, or securities for monies not matured, &c. In such cases it seems to me plainly, not to be the duty of the bailiff to make return, and if it is not his duty, certainly he is not liable to the forfeiture of his fees.

In conclusion, I beg to say, that you will confer a great favour upon all clerks by a careful examination, and a distinct statement, in your columns, of what the law is in respect to the matter in question.

I am, Gentlemen, truly yours,

CLERK, 2ND D. C. OXFORD.

Securities by public officials — Guarantee Societies.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—A great deal of information has been given on the subject of Division Courts in the *Gazette*. But there is one matter to which I desire to draw your attention—I mean the importance of having respectable men to fill the offices of Clerk and Bailiff—with this object I suggest that an act be passed authorising the judges to accept the bonds of some guarantee society, instead of the security now taken, which is often nothing more than a form imposing much annoyance and trouble on judges. I think this course would be the means of introducing a better class of men to offices of trust, and add much to the efficiency of the Courts.

Yours, &c.,

A SUBSCRIBER.

Kinmont, April 25, 1856.

[See Editorial remarks on p. 83.]—EDS. L.C.G.

Insolvent Act.—Evidence of insolvent.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

Under the Insolvent Act of 1864, when the assignee sues in his own name in a Division Court, can the evidence of the insolvent be received to prove the claims.

RENFREW.

[We think it can be received in a Division Court. The insolvent does not seem to come within the Evidence Act; he is not a party to the suit "individually named in the record," or a person "in whose immediate or individual behalf" the action is brought, though he may be interested in the result of the suit, which however is not sufficient to disqualify him. This is the best opinion we can form in the absence of authority.]—EDS. L. C. G.

Insolvent Act of 1864.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—As a great difference of opinion seems to prevail in relation to the meaning of sub-section 16 of section 11 of the above act, I beg leave to submit the matter to the consideration of the profession throughout the province.

The sub-section is as follows: "The costs of the action to compel compulsory liquidation shall be paid by privilege as a first charge upon the assets of the insolvent; and the costs of the judgment of confirmation of the discharge of the insolvent, or of the discharge if obtained direct from the court, and the costs of winding up the estate, being first submitted at a meeting of creditors and afterwards taxed by the judge, shall also be paid therefrom."

Some legal gentleman are of opinion, and one county judge has decided, that the whole sub-section applies to cases of compulsory liquidation *only;* while others contend that part of the sub-section clearly applies to cases of "voluntary assignments," where the insolvent has obtained a discharge from his creditors, and afterwards gets a judgment confirming that discharge from the judge of the county court, and also to cases where a discharge is obtained "direct from the court," without any preliminary proceedings having been taken.

It is a rather startling interpretation to give the sub-section, to hold that it applies to cases of "compulsory liquidation only;" because the act was framed for the relief of those already bankrupt, rather than to provide for cases of future bankruptcy. And if the costs of obtaining a discharge under a voluntary assignment are not to be paid out of the assets of the insolvent in the hands of the assignee, how is it possible for him to reap any benefit from the act? He has already surrendered, on oath, to the assignee "all his estate and effects, real and personal," and it is not reasonable to suppose that the legislature intended that he should find his own costs in some way or other, after he had given up every thing. The disbursements range from fifty to sixty dollars, and if these are not to be paid out of the estate of the insolvent, then

the act is sadly defective. It is a stumbling block thrown in the way of the blind, and the sooner it is removed the better for those who expected some benefit from its provisions. It is a matter of the utmost importance to the community, and to the profession, and I trust that the county judges throughout the country will indicate, in some way, the interpretation which each is inclined to give it.

SOLICITOR.

Cobourg, May 27, 1865.

Court of Revision—Notice.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

Can Municipal Councils, when constituted as a Court of Revision for revising township assessment rolls, alter (by lowering or raising) the assessment of parties being duly assessed, without due notice being first given to the party or parties as to the intended alteration? Please give an answer to the above in the next copy of your Journal.

Yours, &c.

COUNCILLOR.

[As we understand the question that is asked, we should say that the notice must be given. A court sits for the purposes mentioned in section 58, namely, to "try all *complaints* in regard to persons being wrongfully placed upon or omitted from the roll, or being assessed at too high or too low a sum. Section 60 of the Assessment Act provides for the course of proceeding in the trial of complaints before Courts of Revision. Subsec. 2 makes it incumbent upon the clerk to give notice of the complaint both to the assessor and the person whose assessment is complained against; and subsecs. 7, 8, 9 show the form of the notice and the mode of service.]—EDS. L. C. G.

INSOLVENTS.

(*Gazetted March* 11, 1865.)

John Stickland	Brantford.
David Linklater	Mitchell.
Daniel Harmer	Montreal.
Samuel Morningstar	Bertie.
George S Morningstar	Bertie.
Levi Morningstar	Bertie.
James Doyle	Gananoque.
Benjamin Allen	Owen Sound.
Alfred Fisher	Sarnia.
Charles Page Cameron	Tp. Haldimand.
William Wilson	Port Hope.
William Mickle	Meaford.
Harrison C. Bettes	Brighton.
John Allen	Tp. Brock.
H. N. Case	Hamilton.
James Matchet	Tp. Nottawasaga.
Richard Dickson	Pembroke.
William Bennett	Port Hope.
Frederick Rumball	Clinton.
Henry C. Kaye	Guelph.
J. J. Marshall	Mount Forest.
U. C. Lee	Stratford.
James Charlton	Montreal.
John Sharpe	Asphodel.
Henry Fowlds	Asphodel.
Norbert Goderre	Montreal.
William Gorton	Millbrook.
Templeton Brown	Peterboro'.
Chas. Desjardins	Quebec.
A. Couture	Quebec.
Andrew Wallace	Goderich.
Robert Park	Goderich.

(*Gazetted, 18th March*, 1865.)

John Sullivan	Seymour.
Francis W. Heather	Peterborough.
Hector McLean	Tp. Mariposa.
Hugh McLean	Tp. Mariposa.
Archibald McLean	Tp. Mariposa
Thomas Gerrin jun	Mt. Vernon.
T. R. Cousens	Merrickville
Magloire Morrissette	Quebec.
A. Young & Son	Sarnia.
John David Fee	Stratford.
Heny Bechtel, jun	Tp. Waterloo.
Robert Jones	Guelph.
George Trock Morehouse	St. John.
J. Bte D'Aoust	St. Polycarpe.
William Browne	Ottawa.
J. W. Stone	Burleigh.
Giles Stone	Burleigh.
William Darley Pollard	Meaford.
Robert Sanderson	Hamilton.
Joel Carpenter	London.
Lachlin McQuarrie	Brampton.
W. A. McPherson	Richmond, C.E.
James Hickey	Kingston.
Adolphus Bourne	Montreal.
Peter Joseph Gilhausen	Ottawa.
John Carmody	Ottawa.
Anthony Gafney	Tp Horton.
David W. Wartman	Selby.
George L. Robson	Tp. Reach.
William Brogan	Ayr.

NOTE.—A mistake occurred in our last number, in inserting the name "Edward Robinson, Chatham," in the list of insolvents, which we hasten to rectify. Mr. Robinson is not an insolvent, but is an *assignee*.

Messrs. R. & H. McKenzie, of Sarnia, complain of the insertion of the name "D. & H. McKenzie" amongst the list of insolvents in the May issue, as it might lead some persons to suppose that the former were intended. All we can say is that such was *not* the intention. The insolvents do not, we understand, reside at Sarnia, though the notice of meeting of creditors was dated there.

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

HUGH McKAY, of Delta, Esquire, to be a Notary Public in Upper Canada. (Gazetted May 6, 1865.)

FREDERICK WILLIAM OLLARD, of Brockville, Esquire, to be a Notary Public in Upper Canada. (Gazetted May 13, 1865.)

THOMAS M. FAIRBAIRNE, of Peterborough, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada, (Gazetted May 27, 1865.)

JOHN CRAWFORD, of Vienna, Esquire, to be a Notary Public in Upper Canada. (Gazetted May 27, 1865.)

CORONERS.

ARTHUR MOBERLY, Esquire, M.D., Associate Coroner, County of Simcoe. (Gazetted May 27, 1865.)

STEPHEN F. SMITH, Esquire, M.D., Associate Coroner, County of Perth. (Gazetted May 27, 1865.)

WILLIAM HAWKINS VARDON, Esquire, M.D., Associate Coroner, County of Waterloo. (Gazetted May 27, 1865.

TO CORRESPONDENTS.

"CLERK 2ND D. C. OXFORD"—"A SUBSCRIBER"—"RENFREW"—"SOLICITOR"—"COUNCILLOR"—under "General Correspondence."