DIARY FOR MARCH.

1. Mon.. *St. David.* Last day for notice of trial for Co. Court York. Sub-Treasurers of school moneys to report to County Auditor.
7. SUN. *4th Sunday in Lent.*
9. Tues General Sessions and County Court sittings in County York.
14. SUN. *5th Sunday in Lent.*
17. Wed. *St. Patrick's Day.*
21. SUN. *6th Sunday in Lent.*
25. Thur. *Lady Day.*
26. Fri .. *Good Friday.*
28. SUN. *Easter Sunday.*
29. Mon.. *Easter Monday.*

The Local Courts'

AND

MUNICIPAL GAZETTE.

MARCH, 1869.

DIVISION COURTS ACT.

Much difficulty has been felt by clerks and bailiffs in meeting the requirements of the late Act, with regard to the forms necessary to carry it out. The consequence has been that different forms are in use in different counties, none, however, with the sanction of authority, and of course there is not that uniformity which is so desirable. All concerned will therefore be glad to learn, that a Board of County Judges has been appointed, under sec. 22 of the Act, which gives them full power to frame rules of practice and proceedings in the Division Courts, with authority from time to time to make rules for the guidance of clerks and bailiffs and as to their fees.

This addition to their powers will be exercised, we feel sure, with a due regard to the interests and rights of both officers and suitors, and will be the means of effecting many useful reforms both as to procedure and fees, besides settling the practice and forms under the late Act.

We learn that temporary rules have been agreed on by the Board, but as the Superior Court Judges are absent on Circuit it is not probable that the rules prepared can have their approval, which is necessary, for some weeks yet. After hearing from all the judges in answer to questions proprosed to them, a full body of rules will be passed by the Board for use in the Division Courts. The middle of May will bring probably the time of meeting for the purpose indicated.

The Board is composed of, Judge James R. Gowan, of Simcoe, Chairman; Judge J. Jones, of Brant; Judge D. J. Hughes, of Elgin; Judge James Daniell, of Prescott and Russell, and Judge James Smith, of Victoria. It is very well appointed, though we should like to have seen Judge MacDonald of Wellington, and perhaps one or two more added to it. The Judges, under the guidance of their indefatigable and most competent chairman will rapidly perform the labours assigned to them. We should therefore, advise clerks and bailiffs not to lay in a large stock of forms, as they will more or less be rendered useless by those that will be promulgated by the Board.

We reserve most of our space this number for the reports of some interesting cases. The topic, however, most interesting at present to many of our readers will be the new Division Court Act, which, in the hands of most Division Court officers for some time past, has within the last few days appeared in its proper place in the last volume of Statutes for Ontario. We publish a letter on the subject which takes as pleasant a view of it as possible, but we think that Division Court Clerks and Bailiffs, at least, have little to be thankful for.

SELECTIONS.

THE HIGH SHERIFF.

The office of Sheriff is one of those institutions which, forming an essential part of the machinery of the English constitution, is at once a subject of popular interest and of daily importance to the legal practitioner.

In Serjeant Atkinson's well known work on "Sheriff Law,"—the fifth edition of which has just appeared*—we find described, in a very lucid style, the practical duties at this day of the High Sheriff and his subordinates, as returning officer in the election of members of Parliament and coroners—as judicial officer in the trial of writs of enquiry of damages, and compensation cases, &c.; as assisstant to the presiding judges at the assizes and quarter sessions; as chief executive officer in civil and criminal cases in carrying out the judgment and sentence of the law, and as chief conservator of the peace in suppressing riots or resistance to the law.

This short summary of the learned Serjeant's Sheriff law suffices to show how various and

* "Sheriff Law, a Treatise on the Office of Sheriff, Undersheriff, Bailiff, &c.," by George Atkinson. Serjeant-at-Law, B. A., Oxon; 5th edition. London: Sweet, 3, Chancery Lane. 1669.

important are the legal functions of the High Sheriff who, in the language of Sir Edward Coke, "is an officer of great antiquity, and of great trust and authority, having from the Queen the custody, keeping, command, and government in some sort, of the whole country committed to his charge and care."

As to the antiquity of the office, learned writers somewhat differ in their speculations, and we may readily acquiesce in the observations of Mr. Serjeant Atkinson on the antiquarian aspect of the subject: "In England there are many good institutions whose beginnings, like the sources of great rivers, seem to baffle discovery. The office of Sheriff is of this kind."

It may suffice for all useful purposes to say that at every period of the English constitution the office of Sheriff appears as an integral part of its system, forming a feature which no power of the Crown, no resistance of the populace, no intrigues of the aristocracy, have ever been able to efface.

The office of High Sheriff really forms one of the most popular features of our constitution, carrying with it, as Blackstone observes, a strong trace of the democratical part of it. The common law, indeed, vested the whole power of election in the people, in order, as an old statute* expresses it, "that the commons might choose such as would not be a burthen to them." A statute passed under very bad auspices† deprived the people of this power, and the mode adopted ever since of assigning High Sheriffs has been by certain dignitaries holding office under the Crown, who annually nominate three sufficient persons in each county for the office, from whom the Crown selects usually the first on the list for actual service. Fortunately the practice has grown up of these duties wholly devolving on the Judges meeting at Westminster Hall; and thus a guarantee afforded at all events against men being improperly selected for the shrievalty, and the High Sheriff has little cause to fear a comparison between his own just title to office and that of some whom he has occasionally to proclaim on the hustings as "duly elected."

The office of High Sheriff is still a very important one, and so regarded not only in the letter of the law, but socially by all classes. The duties are rarely neglected, but it would perhaps be an advantage if those who are selected for the shrievalty regarded more their personal obligations on taking office.

The High Sheriff, as we are told by Serjeant Atkinson, "has a right of precedence within his county of every nobleman during the time he is in office,"‡ and his duties, already referred to, show on what various occasions he is called upon to act. We are among those who would gladly see the power and dignity of this ancient office fully vindicated, instead of the more active duties being so much delegated to others, the undersheriffs and their subalterns the Sheriffs' officers and the javelin men; and even the pomp and ceremony of the office being only observable during the parade and scramble of the commission day at the assizes; and its concommitants, the Sheriff's ordinary and the Sheriff's ball.

On the very many occasions in the course of his year of office on which public meetings of the various classes within his county are, or ought to be held, we would have the High Sheriff take his legitimate part; we would have the principal exercise more power, and the deputies less. It is not too much to ask of a gentleman selected for a single year for such an important office that he should give personal attention to its numerous duties.

Had High Sheriffs during their year of office generally been at the pains to personally inquire whether one important part of their functions, viz., the returning the jury panels, was conducted in a proper manner, whether abuses in the working of our system, lately shown to have grown up in almost every district, were or were not perceptible in the routine of business in their own several counties, the recent exposure of the abuses of our jury system might have been avoided.

If high Sheriffs, in whose name the unpopular work of executing legal process against the goods and persons of debtors, had during their year of office always deemed it a part of their duty, as gentlemen and men of honour, to see that the process so executed in their names was not made a medium of abuse and extortion, much private misery and wrong would have been saved.

If the Sheriff as returning officer at elections had, in days gone by, in the exercise of his common law power, duly inquired into glaring instances of bribery and corruption, before declaring at the hustings unscrupulous aspirants to the rank of M.P. *duly elected*, we should hardly have needed the costly machinery which from time to time has been called into existence with the vain design of suppressing bribery, intimidation, and other corrupt practices at elections. Not only would we have the High Sheriff now personally oversee the performance of his various duties by his subordinates, but we should be glad to find that high functionary hold his own on all public occasions—be something more than a mere attendant in the execution of the commissions of assize, &c., and act in every instance up to the station the law assigns to him—the chief official within his county, showing favour or subservience to none: poor or rich, noble or commoner, popular or unpopular.—*Law Magazine.*

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* 28 Edward I., c. 8. † 9 Edward II., st. 2.
‡ Sheriff Law, 3.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

GIFTS, FATHER TO SON.—A gift can only be upheld if clearly proved; and where evidence of loose, casual, and inconsistent admissions and statements was offered to prove a gift of all the donor's means, the evidence was held insufficient.

There is, ordinarily, no presumption of undue influence in the case of a gift from a father to a son, unless it is proved that the son occupied towards the father, at the time, a relation of confidence and influence; but if that is proved, the gift may need for its support the same evidence of due deliberation, explanation, and advice, as a gift to any other person occupying such relation of confidence and influence.

Where there is no proof of *mala fides* or of an unfair exercise of influence, a gift of a trifling sum, as compared with the donor's property, does not stand in the same position as a gift of his whole property.

If the donee is a son who occupied to his father (the donor) a relation of confidence and influence, though a gift of the whole of his father's means, if large, may not be upheld without the evidence, required in other cases, of due deliberation, explanation, and advice, the gift of more than a trifling proportion may be sustainable without such evidence.—*McConnell* v. *McConnell*, 15 U. C. C. R. 20.

FI. FA. AGAINST EXECUTOR BEFORE PROBATE—INJUNCTION.—The title of an executor being derived from the will and not from the probate, the Court refused to restrain execution against the lands of a deceased debtor on a judgment recovered against the executor before probate.—*Stump* v. *Bradley*, 15 Chan. R. 30.

WILL—PROVISION IN LIEU OF DOWER.—*Quære*, whether a provision for the maintenance of the testator's widow, charged on the real estate, is by implication in lieu of dower.

A testator devised his farm to his eldest son in tail, upon condition, amongst other things, that he should support the testator's widow during her life; that she should be mistress and have the control of the dwelling-house on the farm, and should have the proceeds of one-half the cows and sheep kept on the premises; that the farm should be a home for the testator's son John, so long as it might be necessary for him to remain, and for another son, Donald, should any misfortune happen to him.

Held, that the widow was not entitled to dower in addition to the provision made for her by the will.—*McLennan* v. *Grant*, 15 Chan. R. 65.

WILL, CONSTRUCTION OF—UNDISPOSED OF RESIDUE.—Where a will does not dispose of the whole personalty, the executors are trustees for the next of kin, unless the will expressly shews that the testator intended they should take the residue beneficially.

Where money, mortgages, and promissory notes, were bequeathed to a legatee for life, it was held, that she was not entitled to the possession and disposition of the same, but to the income only; though of farming stock and implements given for life by the same clause she was to have the use in specie.—*Thorpe* v. *Shillington*, 15 Chan. R. 85.

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27 AND 28 VIC. CH. 18, SEC. 40.—DEATH BY "ACCIDENT."—MEANING OF.—DAMAGES.—The Statute 27–28 Vic. ch. 18, sec. 40, makes a tavern-keeper liable in case any person, while in a state of intoxication from excessive drinking in his tavern, has come to his death, "by suicide or drowning, or perishing from cold, or other accident caused by such intoxication."

The deceased in this case being intoxicated fell off a bench in the bar-room, and was placed upon the floor in a small room adjoining, with nothing under his head. While there he died from apoplexy, or congestion of the brain, brought on, as the plaintiff alleged, by placing him in an improper position while intoxicated.

Held, not a case of death by "accident" within the Statute, but of death from natural causes induced by intoxication.

Whether under this Act proof of some pecuniary damage must be given, or whether, without it, the damages are fixed by the Act at not less than $100, was a question raised, but not decided.—*Bobier, Administrator of Henry Bobier* v. *Bobier*, 27 U. C. Q. B. 438.

DEPOSIT-RECEIPT FOR MONEY—DONATIO MORTIS CAUSA.—GIFT INTER VIVOS.—Plaintiff's wife held a Bank deposit receipt for $1,000. Shortly before her death she directed the trunk containing this receipt to be sent for, or sent for it herself, at the same time expressing her intention of giving the receipt to the wife of defendant, and also delivering to her the key of the trunk. The trunk did not, however, arrive until after her death:

Held, assuming that plaintiff's wife could dispose of the money as if she were sole, that the

instrument, not having been actually delivered by the donor before her death, did not pass to the defendant's wife as a *donatio mortis causa*.

Held, also, that even if there had been an actual gift of the deposit receipt, with the intention of passing to defendant's wife the money mentioned in it, as a gift *inter vivos*, and she had accepted it, though there was no actual delivery, the gift, being a mere chose in action, would not pass as a mere gift *inter vivos*.—*McCabe, administrator* v. *Robertson et al*, 27 U. C. C. P. 471.

LIBEL.—JUSTIFICATION.—The declaration was for libelling the plaintiff, in the defendant's newspaper, in the following words, "Old S., who was naturalized by serving a term in the penitentiary of New York State," charging the meaning to be, that the plaintiff had served a term, as a convict, in said prison.

The defendants pleaded, in justification, by setting up a conviction of the plaintiff of an indictable offence before the Recorder's Court in Buffalo, prior to the publication of the libel, his sentence and condemnation to imprisonment in the State prison of New York State for the term of two years, and his subsequent committal to that prison and detention there for that period.

Replication, that within three months from the time of the alleged conviction, and before the plaintiff was imprisoned for the said term in said State prison, the conviction was reversed by the Supreme Court of the State of New York, and the plaintiff released from custody upon the charge against him.

Held, on demurrer, replication good.—*Davis* v. *Stewart et al.*, 18 U. C. C. P. 482.

PROMISSORY NOTE PAYABLE IN U. S.—A note made here payable at a place in the United States, but "not otherwise or elsewhere," is payable generally, and the law and currency of the place of contract must govern.

Declaration on a note, made at Toronto, payable to plaintiffs, for $302 79. *Plea*, that the note was payable in Rochester, in the United States, where the plaintiff resided; that when it fell due Treasury notes of the U. S. Government were a legal tender in payment of all notes; that if the defendant had then tendered the amount of the note in Treasury notes it would have been a good tender; that $144 53 of lawful money of Canada then equalled in value Treasury notes to the amount of the note; and defendant brings that sum into Court.

Held, assuming the note to have been payable at Rochester, but without the words not otherwise or elsewhere, that the plea was bad.—*Hooker et al* v. *Leslie*.—27 U. C. Q. B. 295.

NEGLIGENCE. — Declaration that defendant wrongfully, negligently, and improperly hung a chandelier in a public-house, knowing that the plaintiff and others were likely to be therein and under the chandelier, and that the chandelier, unless properly hung, was likely to fall upon and injure them; and that, the plaintiff being lawfully in the public-house, the chandelier fell upon and injure him. *Held*, bad, on demurrer, as not disclosing any duty by the defendant towards the plaintiff, for breach of which an action would lie. —*Collis* v. *Seldon*, Law Rep. 3 C. P. 495.

PROMISSORY NOTE.—A promissory note expressed on time for payment, and, while it was in the possession of the payee, the words "on demand" were added without the maker's assent. In an action by the payee against the maker, *held*, that as the alteration only expressed the original effect of the note, and was therefore immaterial, it did not affect the validity of the instrument — *Aldous* v. *Cornwall*, L. R. 3 Q B. 573.

COMPANY.—1. A company incorporated for the working of collieries contracted with A. to erect a pumping engine and machinery for that purpose, and paid him part of the price. *Held*, that the company could maintain an action against A. for the breach of the contract, though the contract was not under seal.—*South of Ireland Colliery Co.* v. *Waddle*, Law Rep. 3 C. P. 463.

2. Directors of a joint-stock company, who neglect its rules, are liable to make good to the shareholders any loss occasioned thereby; their liabilty in this respect does not differ from that of ordinary trustees.—*Turquand* v. *Marshall*, Law Rep. 6 Eq. 112.

HUSBAND AND WIFE.—A woman, living for sufficient cause apart from her husband, had living with her their child, against her husband will, the court having given her the custody. She had no adequate means of support. *Held* (COCKBURN, C. J., *dissentiente*), that she had authority to pledge her husband's credit for the reasonable expenses of providing for the child. —*Bazeley* v. *Forder*, Law Rep. 3 Q. B. 559.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

TIMBER LIMITS.—ROAD ALLOWANCES.—Licensees of the Crown of timber limits, covering allowances for roads, are not liable to be sued for cutting timber on such road allowances, under the authority of the Crown, when no steps have been

taken by the Municipality to pass a By-law dealing with such timber.—*The Corporation of the Township of Burleigh* v. *Campbell et al*, 18 U. C. C. P. 457.

MUNICIPAL ELECTION — QUALIFICATION — ASSESSMENT ROLL.—This was an application to unseat one of the councillors elect for the Town of Sandwich, on the ground that he was not possessed of sufficient property qualification.

JOHN WILSON, J.—A person desiring to qualify as town councillor cannot supplement his qualifition on his real estate, which was assessed on the roll at $750 ($50 less than the required amount) by adding thereto $400 of personal property.

The assessment roll is conclusive as to the rating, and there can be no enquiry behind this as to whether the candidate has more real property than that for which he has rated on the roll.—*Reg. ex rel. Fluett* v. *Semandie*, 5 U. C. L. J., N. S. 69.

MUNICIPAL ELECTION—TOWN OF SANDWICH.—The Town of Sandwich was incorporated by 30 Vic. c. 91, which also provided for election of mayors and councillors, &c. This enactment was not expressly repealed by the late Municipal Act, with which, however, it clashes.

This application was to unseat the mayor elect on the ground that he was not properly elected, in that he was elected by the people, and not from among the councillors.

JOHN WILSON, J.—A special Act of Parliament cannot be repealed by a general enactment, except when there is express reference to it. The Statute 20 Vic. cap. 94, is not therefore repealed by 29, 30 Vic. cap. 51, sec. 428.

The late act amending the Municipal Act of 1866 (31 Vic. cap. 30, sec. 6, Ontario), must be read in connection with the act incorporating the Town of Sandwich (20 Vic. cap. 94, secs. 2, 3), and so reading them, the Town of Sandwich having only one ward is entitled only to three councillors, in addition to a Mayor and a Reeve, elected by the people.

No costs were given, as the point was doubtful, owing to the loose way in which the repealing clause in the Municipal Act was drawn — *Reg. ex rel. Arnold* v. *Wilkinson*, 5 U. C. L. J., N. S. 70.

MUNICIPAL ELECTION—DISQUALIFICATION—INTEREST IN CONTRACT.—This was a similar application to the last, the ground alleged being that the defendant was interested in a contract with the Corporation of Sandwich, to which he had been elected a councillor.

JOHN WILSON, J.—I do not think that it is necessary that a vaild contract should be shewn binding on the corporation. If there is no contract binding on the corporation the danger is the greater of the party improperly using his position to his own advantage and to the prejudice of the Municipality. The policy of the law is, that no man should be a member of a municipality who cannot give a disinterested vote on a matter of dispute that may arise. If his judgment is likely to be clouded by self-interest in a matter of contract or *quasi* contract he should not be a member of the council.

An order was made to unseat the defendant, but it was unnecessary, owing to the decision in the last case, to order a new election. No costs. —*Reg. ex rel. Fluett* v. *Gauthier*, 5 U. C. L. J., N. S. 70.

TAXES PAID TO SHERIFF—LIABILITY OF COUNTY —NON-RESIDENT LAND FUND.—The plaintiff, in order to prevent his lands from being sold under a Treasurer's warrant for taxes assessed upon them as non-resident lands, paid under protest to the Sheriff the sum claimed, including costs, and then sued the County as for money had and received, to recover back part of the amount, consisting of commutation of statute labor, which he disputed.

Held, that he could not recover, for the Sheriff was not the agent of the defendants, and there was nothing to shew that he had paid it over to their Treasurer.

The non-resident land fund is so far the property of the County that they may be liable for it in such an action.—*Robertson* v. *The Corporation of the County of Wentworth*, 27 U. C. Q. B. 336.

ONTARIO REPORTS.

QUEEN'S BENCH.

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

REID v. MCWHINNIE AND MARTIN.

Selling liquors without license—Form of conviction and warrant of distress—Pleading.

On demurrer to an avowry justifying under a conviction for selling spirituous liquors without license, and a distress warrant issued thereon—

Held, 1. That it was sufficient to state the offence in the conviction as selling "a certain spirituous liquor called whisky," though the clause, (29-30 Vic., ch. 51, sec. 254) creating the offence says "intoxicating liquor of any kind"; for intoxicating liquors and spirituous liquors are used in the Act as convertible terms; and in the Customs Act of the same Session whisky is recognised as a spirituous liquor.

2. No objection that the proceedings were not stated to have been begun within twenty days from the offence, for the fact appeared on the face of the conviction.

3. The offence alleged was selling "a certain quantity, to wit, one pint." *Held*, sufficient, without negativing that it was a sale in the original packages, within the exemption in sec. 252, for it would be judicially noticed that a pint was less than five gallons or twelve bottles, which such packages must at least contain.

4. No objection that the costs of conveying the defendants to gaol, in the event of imprisonment in default of distress, were specified.

As to the other objections suggested, it was held a sufficient answer that the conviction followed the form prescribed by the Act, Consol. Stat. C. chap. 103, which were intended as a guide to magistrates and to prevent failure of justice from trivial objections.

As to the form of the warrant, *held* unnecessary to allege that it was under seal, or that it was directed to any one, it being averred to have been duly issued and delivered for execution to defendant M., the constable.

Held, also, that the avowry, set out below, sufficiently shewed that defendant M. was a constable, and that it was delivered to him for execution.

Held, also, that the mention in the warrant of the $1 for costs of conveying defendants to gaol could not vitiate, for it authorized a distress only for the penalty and costs of conviction.

Appeal from the County Court of Oxford.

Replevin. Avowry and cognizance, that the goods in the declaration mentioned were taken and detained under a warrant of distress duly issued by the said defendant John McWhinnie, as and being a justice of the peace in and for the County of Oxford, for non-payment of penalty and costs adjudged to be paid by the said plaintiff under the terms and provisions of a certain conviction duly made on, to wit, the 30th day of April now last past, and in the words and figures ing:

Province of Canada, county of Oxford. Be it remembered that on the thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, in the town of Woodstock, in the said county of Oxford, William A. Reid is convicted before the undersigned, two of Her Majesty's Justices of the Peace for the county of Oxford, for that he, the said William A. Reid, at the said town of Woodstock, on the twelfth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, did sell to one Henry Chapman a certain quantity, to wit, one pint, of a certain spirituous liquor called whisky, he, the said William A Reid, not then being licensed by any competent authority in that behalf to sell any spirituous liquor; against the form of the statutes in such case made and provided. And we adjudge the said William A. Reid, for his said offence, to forfeit and pay the sum of twenty dollars, to be paid and applied according to law, and also to pay to the informant, John Brian, the sum of four dollars and twenty cents for his costs in this behalf. And if the said several sums be not paid forthwith on or before the tenth day of May next, we order that the same be levied by distress and sale of the goods and chattels of the said William A. Reid, and in default of sufficient distress we adjudge the said William A. Reid to be imprisoned in the common gaol of the said county of Oxford, at Woodstock, in the said county of Oxford, for the space of fifteen days, unless the said several sums, and all costs and charges of the said distress, and the costs and charges of conveying the said William A. Reid to the said common gaol, to wit, the sum of one dollar, shall be sooner paid.

Given under our hands and seals the day and year first above mentioned, at the town of Woodstock, in the county of Oxford aforesaid.

(Signed),

WILLIAM GREY, J. P. (*Seal*)
JOHN McWHINNIE, J. P. (*Seal.*)

And of which said offence the plaintiff was convicted by the said John McWhinnie and William Grey, Esquires, two of Her Majesty's justices of the peace in and for the said county of Oxford, and which said conviction yet remains in full force and effect. And because the said plaintiff made default in paying the said penalty and costs so adjudged to be paid, and the same were unpaid at the time when, &c., the said warrant of distress was issued as aforesaid, and was delivered for execution to the said defendant Richard Martin. And the defendant John McWhinnie well avows, and the said defendant Richard Martin, as and being a constable of and in the said county of Oxford, and as being the bailiff of the said John McWhinnie, well acknowledges, the taking and detention of the said goods under the said warrant and conviction, and justly, &c., as a distress for the penalty and costs so adjudged to be paid by the said plaintiff, which still remain unpaid, wherefore the defendants pray judgment, and a return of the said goods and chattels.

The plaintiff demurred to this avowry, and judgment having been given in his favor on such demurrer in the court below, the defendants appealed. The grounds of demurrer are sufficiently stated in the judgment of this court.

J. A. Boyd, for the appellants, cited *Wray* v. *Toke*, 12 Q. B. 492; *Hawk*, P. C. Vol. II., ch. 37, sec. 27; *Rex* v. *Symonds*, 1 East 189; *Re George Bailey*, 3 E. & B. 607; *Skingley* v. *Surridge*, 11 M. & W. 503; *Rex.* v. *Chandler*, 1 Salk. 378; *Regina* v. *Faulkner*, 26 U. C. R. 529; *Clarke* v. *Carrall*, 17 C. P. 538.

Harrison, Q. C., contra, cited *Fletcher* v. *Calthrope*, 6 Q. B. 880; *Howard* v. *Gossett*, 10 Q. B. 359; *Lindsay* v. *Leigh*, 11 Q. B. 455; *Re Turner*, 9 Q. B. 90; *Attorney General* v. *Bailey*, 1 Ex. 281, 292; *Paley* on Convictions, 193, 195; *Rex* v. *Ferguson*, 3 O. S. 220; *Chaddock* v. *Wilbraham*, 5 C. B. 645; *Moore* v. *Jarron*, 9 U. C. R 233; *Phillips* v. *Whittsed*, 2 E. & E 804; *Rex* v. *Dove*, 3 B. & Al. 596; *Kerford* v. *Mondel*, 28 L. J. Ex. 303.

MORRISON, J., delivered the judgment of the court.

The two material points which arise on the pleadings are whether the conviction set out is a valid one, and whether the warrant and delivery, &c., of it to defendant Martin, is properly pleaded, and justifies the taking of the goods.

Various objections were taken to the conviction; among others, that it did not shew any offence committed by the plaintiff: that the statute under which the plaintiff was convicted, 29-30 Vic. ch. 51, sec. 254, only authorizes a conviction for selling intoxicating liquors of any kind, while this conviction is for selling a certain spirituous liquor called whisky. Now the statute itself, in various sections refering to licensing and sale of liquors, uses the expression spirituous liquors, and in the very section creating the offence we find these words in reference to the notice to be exhibited by persons licensed; and the 256th section, which provides that all prosecutions for penalties incurred by persons vending wines, rum, &c, or other spirituous liquors, without license, shall be recoverable, &c., evidently including as one of the penalties that of selling intoxicating liquors; and by the 261st section the word "liquors" shall be understood to mean and comprehend all spirituous and malt

liquors, and all combinations of liquors or drinks which are intoxicating; so that we find the expression intoxicating liquors and spirituous liquors in various sections as convertible terms, and used by the Legislature as meaning and referring to the same kind of liquors.

It was also argued that the conviction specified whisky, which we could not on demurrer judicially notice as being an intoxicating or spirituous liquor, but we find in the same session of Parliament, that in the Customs Act, ch. 6, under the head of spirits and strong waters for duty, is specified brandy, gin, rum, whisky, &c., and other spirituous liquors; and the Legislature thus recognizes whisky as a spirituous liquor.

We see nothing in the objection that it does not appear by the conviction that the proceedings were commenced within twenty days from the date of the offence, limited by the 259th section, as the fact sufficiently appears on the face of the conviction.

It was also contended by Mr. Harrison that the conviction should have negatived that the sale charged was a sale in original packages, under the exception contained in the 252nd section, which requires no license to sell. But the conviction charges the plaintiff with selling a pint of whiskey, which fact itself takes it out of the exception, for we cannot but judicially notice that a pint is less than five gallons or one dozen bottles, and that fact is not consistent with the innocence of the plaintiff, as suggested by Mr. Harrison.

It seems to us that there is nothing in the objection that the conviction specifies the amount of costs ($1), of conveying the plaintiff to gaol, provided sufficient distress should not be found. The form given by the statute provides that it shall be stated the defendant shall pay such costs, the same being contingent only, and if a warrant issues the form given is set out; but we see no good reason why the justices should not state the amount in the conviction, or if stated that it vitiates the conviction. Specifying the amount is only a notification to the defendant what he shall have to pay in the event of no distress and he is arrested.

Several other objections were suggested, but we think they are all answered by the fact that the conviction follows the form given by the 103rd chapter of the Consol. Stat. C., which is made applicable and to be followed in convictions of this nature, under the 259th section. These forms were intended by the Legislature for the guidance of justices, and to provide for them a simple form, with a view of preventing a failure of justice, to meet such trivial objections as were taken in the court below, and it is the duty of this court to carry out the object of the Legislature, and to strive to support convictions against objections of a mere technical character.

Having thus disposed of the objections to the conviction, we have now to consider the objections taken to the manner in which the warrant is set out. The avowry states that the goods were taken, &c., under a warrant of distress, duly issued by the defendant McWhinnie, as and being a justice of the peace of the county of Oxford, for non-payment of the penalty and costs adjudged to be paid by the plaintiff under the terms and provisions of the conviction; and because the plaintiff made default in payment of the said penalty and costs, and the same were unpaid at the time when the warrant of distress was issued as aforesaid, and was delivered for execution to the defendant Martin, &c.; and then it proceeds, and the defendant Martin, as being a constable of, &c., in the county of Oxford, and as being the bailiff, &c., well acknowledges the taking, &c., the goods under the said warrant as and for a distress for the penalty and costs so adjudged to be paid to the plaintiff.

It was first objected that the warrant did not appear to be under seal, but we think the objection is disposed of by what Mr. Chitty in his Pleading, vol. 1, p. 244, says: "So where it is pleaded that the sheriff made his warrant, it is unnecessary to say that it was under his seal, for it could not be his warrant if it were not."

It was also objected that it does not appear that the warrant was directed to any one, or that it was delivered to the defendant Martin, or that he was a constable. It is answered it was duly issued, and to be duly issued on demurrer we may assume that it was directed to all or any of the constables, &c., of the county of Oxford, in pursuance of form (N. 1), appended to chapter 103; and it says, was delivered for execution to the defendant Martin.

We cannot concur in the view taken by the learned judge in the court below, that there is no averment in the avowry that defendant Martin was a constable, &c., and that the warrant was delivered to him to be executed. The avowry sets out, because default was made by plaintiff, &c., because the warrant was delivered to Martin, defendant McWhinnie avows, &c., and also defendant Martin being a constable, &c., he well acknowledges the taking, &c. Mr. Chitty in his Pleading, Vol. I., p. 333, says, "An averment may be in any words amounting to an express allegation that such a fact or facts existed," and among the words as examples he gives "because" or "being."

Nor do we see any objection affecting the warrant arising from the statement of the $1 costs for carrying the plaintiff to gaol. The warrant of distress, being duly issued according to the terms and provisions of the conviction, could only authorize a distress for the amount of the penalty and costs of conviction (see form N. 1) which the avowry states. It would be putting a forced construction on the words of the avowry to hold that it shews the warrant of distress directed a distress for the costs of conveying the plaintiff to gaol, such costs being only contingent, and for which the plaintiff was not liable by the conviction itself unless no distress could be found. The same objection would apply if the $1 costs had not been mentioned in the conviction.

We are therefore of opinion that this appeal must be allowed, and that the judgment of the court below be reversed, and that judgment on the demurrer be given for the defendants.

Appeal allowed.

In re Mackay et al v. Goodson.

Division Court—Judgment summons—Commitment under—Effect of discharge under Insolvent Act—Deputy Clerk of the Crown—Privilege from arrest.

A discharge under the Insolvent Act does not prevent a party from being committed upon a judgment summons under the Division Courts Act.

If it did, a party applying for protection from arrest should shew clearly that the name of the plaintiff was in his

schedule, and this is not sufficiently done by putting in a copy of the schedule, without swearing that the plaintiff's name is there.

A Clerk of the County Court, being also *ex officio* Deputy Clerk of the Crown and Clerk of Assize, is privileged from arrest only while engaged in his official duties, or while going to and returning from his office; and this Court therefore discharged a rule to prohibit the County Court Judge from issuing an order of commitment against such officer.

During last Trinity Term, *Harrison* Q. C., obtained a rule calling on the plaintiffs, and upon the Judge of the County Court of the County of Brant, to shew cause why a writ of prohibition should not be issued, directed to the said Judge, to restrain all further proceedings in the said Division Court under the order made by the said Judge for the arrest and imprisonment of the said Goodson, who is and was at the time of the making of the said order Deputy Clerk of the Crown and Pleas, Clerk of the County Court, and Clerk of Assize, in and for the County of Brant, on the following grounds: 1. That the said Goodson being such Deputy Clerk of the Crown, &c., is privileged from arrest. 2. That the said Goodson before the making of the said order for his arrest had obtained a discharge from his creditors under the Insolvent Act of 1864; and on grounds disclosed in affidavits and papers filed in chambers; and why the order of Mr. Justice John Wilson discharging a summons herein for a prohibition with costs, should not be rescinded.

It appeared from the affidavits and papers filed, that the defendant was Clerk of the County Court holding his office under the Great Seal, &c.: that in December 1859 the plaintiffs recovered a judgment against the defendant for $42: that in May 1864 he was examined before the Judge, under section 160 of the Division Courts Act, and then ordered to pay $5 a month to the plaintiffs, there being then due $37.53. By the 19th September, 1864, the defendant had paid the plaintiffs $16, but paid nothing since. On the 3rd April, 1866, defendant made an assignment of his estate to the official assignee for the County of Brant. He had been previously summoned by the Judge to appear before him on the 4th April, to shew cause why he should not be committed for not obeying the order to pay $5 a month, and he then appeared and claimed that no further order could be made against him, and the matter stood over until the 28th April.

In the interim the defendant obtained the consent in writing of the requisite number of creditors, representing the requisite proportion in value required by the Insolvent Act of 1864, as he contended, to give validity to such consent to his discharge under the Act and his discharge from the debt in question. Notwithstanding such proceedings, on the 28th April the learned Judge in the Court below made an order in this cause directing the defendant to be committed for not paying the said money according to the terms of the order of May 1864, the Judge staying the issue of the order for twenty days to give the defendant time to pay the money or to take steps to relieve himself from the order.

The defendent then obtained a summons in the Court below on the 4th May, to rescind the order, on the ground that he had obtained a discharge under the insolvent Act, which summons was discharged, but the issue of the order for commitment was stayed to give the defendant an opportunity of applying for a writ of prohibition.

And on the 3rd May a summons was obtained in Chambers for the issuing a writ of prohibition to restrain all further proceedings in the cause, on the ground that the defendant had obtained his discharge, &c., and on the ground of the defendant being Clerk of the County Court, &c., and as such being privileged from arrest.

That summons was discharged with costs, the learned Judge in Chambers being of opinion that the Judge of the County Court was right in refusing to rescind his order, upon the ground of the defendant not being discharged from the debt under the Insolvent Act. And as to the point of privilege from arrest, he was of opinion that, on the authority of the case of *Henderson* v. *Dickson* (19 U. C. R. 592) the defendant was not entitled to the privilege he claimed. *Mackay* v. *Goodson* (2 U. C. L. J. 210, N. S.)

During this term *Moss* shewed cause, citing *Abley* v. *Dale*, 11 C. B. 378; *Copeman* v. *Rose*, 7 E. & B. 679; *George* v. *Somers*, 11 Ex. 202; *Ex parte Christie*, 4 E. & B. 714; *Henderson* v. *Dickson*, 19 U. C. R. 592; *Ex parte Dakins*, 16 C. B. 77.

Harrison, Q. C., contra, cited, *Mackay* v. *Goodson*, 2 U. C. L. J. 210, N. S.; *Adams* v. *Ackland*, 7 U. C. R. 211; *Dyer* v. *Disney*, 16 M. & W. 312; *Ockford* v. *Freston*, 6 H. & N. 466; *Ex parte Foulkes*, 15 M. & W. 612; *Ex parte Kinning*, 4 C. B. 507; *George* v. *Somers*, 16 C. B. 538; *Thomson* v. *Harding*, 3 C. B. N. S. 254; *Wallinger* v. *Gurney*, 11 C. B. N. S 182; *Markin* v. *Aldrich*, 11 C. B. N. S. 599; *The Queen* v. *Owen*, 15 Q. B. 476; *In re Boyce*, 2 E. & B. 521; *Naylor* v. *Mortimore*, 10 C. B. N. S. 566; *Basterfield* v. *Sprye*, 6 E. & B. 376; *Kinning's* case, 10 Q. B. 730; *Re Kinnaird*, 7 L. T. Rep. N. S. 25; *Re Willsmere*, 8 L. T. Rep. N. S. 853.

MORRISON, J. delivered the judgment of the Court.

It is much to be regretted that a question of privilege of this kind should arise.

The defendant holds office under the Great Seal as Clerk of the County Court of the County of Brant, the Court over which the learned Judge presides who is made a party to this rule. By Statute the defendant is also *ex officio* Deputy Clerk of the Crown, and as such an officer of this Court. He is also by Statute *ex officio* Clerk of Assize and Marshal. These are all offices entirely connected with and necessary to the administration of justice.

The defendant contends that by virtue of his discharge under the Insolvent Debtors Act of 1864, he is not liable to be committed upon a judgment summons, and that if he is liable he is privileged from arrest, holding the offices above mentioned.

As to the first point taken, we are of opinion that the decision of the learned Judge in Chambers was correct, and that a discharge under the Insolvent Debtors Act does not prevent a party being committed upon a judgment summons under the provision of the Division Courts Act. The cases of *Abley* v. *Dale*, (11 C. B. 378), and *George* v. *Somers*, (16 C. B. 539), are conclusive authorities on the point.

But if any doubt existed in that respect, we do not think that the defendant has shewn that the names of these plaintiffs were inserted in his schedule. Upon an application of this nature, it is the duty of the applicant to shew specifically

that the creditor's debt appears in the schedule. Here the defendant only swears to a copy of the schedule attached to the affidavit, without stating the fact, and we are compelled to look over a great number of names to ascertain whether the plaintiff's names are inserted. Upon an examination we cannot find any debt inserted as owing to the plaintiffs. We do find a debt as owing to one Duncan Mackay, probably one of the plaintiffs and intended for the debt claimed in the cause, but we cannot say so.

As to the second point, it is laid down in all the books of practice and in the various abridgments and other old authorities, in general terms, under the title of Privileges, that officers of the Court are privileged from arrest, but we can find no decision in the English Courts exactly in point to guide us in a case like the present, and we have to deduce from those authorities by their uniting under one head the ordinary officers of the Court with barristers and attorneys, and from the principles and reasons assigned for the privilege of the latter class, that officers like the defendant employed in and about the business of the Courts have certain privileges, and among others that of exemption from arrest for debt, under particular circumstances. But although we have been unable to find any English precedent precisely in point, we find in the Courts in Ireland that applications of this nature have beeen frequently made, and that in recent times, and by persons holding offices analogous to those held by this defendant; and in our opinion the practice and law is there well settled, after full argument of the cases and a review of all the English authorities.

The result of these decisions is unfavorable to this application, and we may here remark that that it is evident for obvious reasons that the Courts do not favour this species of privilege, and unless compelled by precedent would not give effect to it, and consequently they confine the privilege to the narrowest limits.

In the Irish cases the actual arrest of the officers took place, and we gather from these decisions that officers of the Court are privileged from arrest for debt while in the performance of their duties and while on their way to their offices or Courts, and also while returning to their homes; but beyond this the privilege ceases.

In *Bryan* v. *Carthew*, (1 Hudson and Brooke 87), the defendant was a secondary of the Court, and was arrested in execution on his way home. There the Court decided, on the authority of the cases cited, that under such circumstances he he should be discharged. During the argument the plaintiffs' counsel pressed that if an officer could not be taken in execution, the public would be left without remedy against the officer; but Pennefather, B., said "That objection might hold if the Court were to put this construction on the rule, that the officer was *at all times* privileged, but our decision, if in favour of the officer in this case, would not go that length. And O'Grady, C. B., in giving judgment said: "We have considered this case, and the decision of the Court is, that the defendant is entitled to his discharge. The majority of the Court act entirely on the precedents which have been brought before us. I do not wish, for my part, that the same kind of matter should come before me again, for I confess I am strongly inclined to give a different opinion."

And in *In re*——— (3 Ir. Law Rep. 301), which was also the case of a clerk in one of the offices of the Court, who was also arrested, the only question was whether when arrested he was *bonâ fide* on his way home from Court. The decision was adverse. Burton, J, said: "The Court is of opinion that the petitioner has not acted in such a manner as to entitle him to the privilege which he claims. There can be no doubt that an officer of the Court as such is privileged in in the course of his business at Court, and while going to and returning from his office, with the view of preventing the public business of the Court from being impeded." And Crampton, J., said: "We are bound to take care that the privilege is not made a cloak to avoid payment of the just debts of the party who claims it."

And in *Magrath* v. *Cooper* (10 Ir. Law Rep. 332), the defendant was Clerk of the writs, appearances, and seal of the Court. He was arrested at his own house, as he alleged, by fraud in being called to the door to see one of his clerks, when two men rushed into the parlor and arrested him on an execution. Blackburn, C. J., in giving judgment says: "The defendant insists that as an officer of the Court he has a general unqualified privilege from being arrested on final process. On such process, generally speaking, every subject is liable to arrest, and where there is a claim of exemption the right must be distinctly established. The privilege of attorneys from arrest is well established, but it has its limitation, founded on or defined by the duties they have to perform. Are officers of the Court entitled to a larger privilege? I think not; and as the defendant was not arrested when engaged in his official duties, nor on his way to or from his office, but in his own house, he was not in a condition to claim exemption from arrest;" and the rule was discharged.

Such being the law and practice adopted after full consideration by very able Judges, we are bound to follow these decisions.

The present rule is to prohibit the learned Judge from issuing an order of commitment. It is quite clear that it is a matter within his jurisdiction, and the making or issuing of such an order is in no way affected by the question of privilege. The execution of the order may be, and that depends entirely upon the time and circumstances under which it is enforced. We cannot therefore restrain the issuing of the order because it is possible that the bailiff might act upon it at a time when the defendant is privileged from arrest.

Upon the whole case, we are of opinion that the rule must be discharged, for the reasons stated in *Magrath* v. *Cooper*, and with costs (*a*).

Rule discharged.

(*a*) It is there said "As the motion has been refused on the same ground as it was argued before Judge Crampton, it must be refused with costs."

INSOLVENCY CASES.

(Before Hon. Geo. Sherwood, Judge of the County of Hastings.)

In re Huffman, an Insolvent.

Insolvency—Notice.

Notice of application for discharge published in *Canada Gazette*, and not in *Local Gazette*: *held* sufficient.

It is sufficient to publish notices of application for discharge in the *Canada Gazette*.

The insolvent filed his petition on the 2nd Feb. 1868, for discharge.

Jellett, appeared for a creditor, and objected, that notice of application should have been published in the *Ontario Gazette*.

Other matters came up in this application to which it is not necessary to refer.

Sherwood, Co. J.—By the 91st clause of the Insolvent Act, 30 & 31 Vic. c 3. I find among other things that the Parliament of Canada has exclusive legislative powers in matters of bankruptcy.

The Insolvent Act of the late Province of Canada, requires that all notices under that statute shall be published in the *Canada Gazette*, and this paper was, prior to the passing of the Act of Confederation above mentioned, the evidence of all official notices in matters relating to the administration of justice in the former Province of Canada.

The 3rd sec of the Act of the Ontario Legislature, 31st Vic. cap. 6, enables the Lieutenant Governor to authorize the publication of an official gazette, to be called the *Ontario Gazette*, for the publication of official and other matters, and all such matter whatever as may be from time to time desired; and that all advertisements, notices and publications, which by any act or law in force in this Province, are required to be given by the Provincial Government or any department thereof or by any sheriff or officer, person or party whatsoever, shall be given in the *Ontario Gazette*, unless some other mode of giving the same be directed by law. And if in any act in force in Ontario, of the late Province of Upper Canada, or of the late Province of Canada, any such notice is directed to be given in the *Upper Canada Gazette* by authority or in the *Canada Gazette*, the *Ontario Gazette* shall be understood to be intended; and it repeals c. 13 of the Con. Stat. of Canada, which heretofore related to that part of the late Province of Canada, now Ontario.

If the Act of Ontario above mentioned, is to be construed literally, it interferes directly with the statute of Canada respecting insolvency which is now in force in Ontario, and deals with a subject which the Imperial Legislature has placed exclusively under the Parliament of Canada. I must confess I feel great reluctance in coming to the conclusion I have. It appears however to me, on full consideration of the subject, that the Act of Ontario was only intended to apply to notices that were connected with matters over which it had control, either exclusively or jointly, with the Legislature of Canada, and not to those within the authority of the last mentioned Legislature. The Act of the late Province of Canada should govern, I think, as to notices in bankruptcy, and the publication of notices in the *Canada Gazette* is therefore sufficient.

Discharge ordered, but on other grounds suspended for six months.

In re John Sullivan an Insolvent.

Assignment, to what official a signment—Assignment must be in duplicate—Neglect to keep books of account.

This was an application for the discharge of the insolvent. It was opposed on the ground that the insolvent, according to his own statement, never was in business for himself, but had for several years both worked as foreman for his father and brothers in getting out and bringing lumber down the Trent. They resided in Seymour, and their business was there transacted, except as to receiving advances and selling their lumber, which was principally done at Trenton. The insolvent set out in his petition that at a meeting of his creditors called pursuant to the statute, his sole creditor attended the meeting, and appointed William Henry Delaney of the Township of Murray, in the County of Northumberland, his assignee, who refused to act, and that on such refusal, he appointed George Dean Dickson, an official assignee for the County Hastings. The assignment appeared only to have been executed in one part to the official assignee, and no copy was filed with the clerk of the court.

Lazier opposed the discharge of insolvent on the part of his creditor.

Sherwood, Co J.—The 4th sub-sec. of the 2nd sec of the Insolvent Act, provides (among other things), if the assignee appointed at the meeting refuses to act, the insolvent may make an assignment to any official assignee of the county in which the insolvent has his place of business. The insolvent has no place of business, and was foreman to persons whose place of business seems to me, by his own statement, to be within the County of Northumberland; and we may fairly infer that the insolvent's place of business was the same, if he had any business at all. His residence was within that county, and I think that the assignment should have been made to the official assignee of that county.

The 6th sub-sec. of the same section enacts that the deed or instrument of assignment if executed in Upper Canada *shall* be in duplicate, and although it may be (as argued by the insolvent's counsel) that the assignment in one part passed all the insolvent's property to the assignee, it does not comply with the statute which is mandatory.

The insolvent has not, subsequent to the passing of the Act, kept any account book, shewing his receipts and disbursements in cash, nor was he able to give any account of them on his examination.

For these reasons I must refuse to grant his discharge.

PROBATE.

In re Hunter.

(In the Surrogate Court of the County of Norfolk.)

Appointment of Guardian—Parties—Notice—When application may be made—Persons for application—Second Marriage of Mother—Consent—&c.

This was an application made by the infant children of one John Hunter deceased, for the appointment of David Hunter as their Guardian.

In this notice, served upon the mother, and also in the published notice, it was stated that appli-

cation would be made before the Judge in his Chambers on Wednesday the 3rd of February, 1869, at 11 o'clock a.m. In consequence of the absence of the Judge on that day, no proceedings were then had. On the following day however both parties appeared by their counsel, when an appointment was made for the 16th February. Mr. Foley on behalf of Mrs. Sheldrick, the mother of the minors, raised the following objections.

1. That the application is informal and incorrect, in this, that there is no affidavit of the witness to the signatures of the infants, and further, that the witness should have been personally present for examination.

2. That the proceedings of to-day are illegal, not being in accordance with the written and printed notices.

3. That the notice served upon the mother is inconsistent with the notice published, in this, that it contains an addition viz, "or so soon thereafter as counsel can be heard" and that both notices should conform.

4. That no such notice as the statute requires of any proceeding to be had this day, has been given.

5. That the 20 days' notice required by the statute has not been given.

6. That the security required by statute has not yet been given.

7. That no reason has been assigned why the children should be removed from the care of their natural guardian.

8. That the affidavits are not entitled in any cause.

9. That the papers and affidavits filed, show that the mother had been legally appointed administratrix &c., and therefore had the legal right to the administration of the estate.

10. That the real estate is subject to Mrs. Sheldrick's dower.

For these reasons she objects and protests against the appointment of Mr, David Hunter as guardian of these children, believing it would be detrimental to their moral and material interests.

Livingstone on behalf of the infants urged, that as administratrix, Mrs. Sheldrick had no control over the real estate; that the petition from the minors shows their desire that a guardian should be appointed; that it is unnecessary to assign any special reason, and that Mr. Hunter is their nearest of kin; that the 20 days' notice is proved by the affidavit on file, and that in consequence of the absence of the Judge on the day named in the notice, that counsel could not be heard, but that on the opening of Chambers on the following day, the further hearing was adjourned to this day.

Judgment was deferred until the 1st March, when the following judgment was delivered.

Wilson, Co. J.—Having carefully examined the Act relating to guardians, with the Rules and Orders framed by the Judges appointed under the 14th Section of the Surrogate Courts Act of 1858, and having also considered all the objections and arguments of counsel, I have come to the conclusion that the contesting party is not properly before the Court until she has filed a caveat. I threw out a suggestion to this effect, when the parties were before me on the 16th ult., but no caveat has yet been filed. The proper practice appears to me to be, that in the event of the mother, or any one else objecting to the appointment proposed, it is for them to file a caveat with the Surrogate Registrar; *then*, when the application is made, the party contesting, must be warned to appear on some day to be named by the Judge, who will then hear the parties and decide the matter, either on affidavits, or he may take evidence *viva voce* if he thinks it advisable so to do.

With reference to the objection raised by Mr. Foley that by the printed and written notice, the application in this matter should have been made to me at my Chambers on Wednesday the 3rd of February, 1869, at 11 o'clock in the forenoon, and that as no such application was then made, therefore any subsequent application or proceeding would be irregular and illegal. I have no doubt that I had full power and authority to receive and entertain the application on the first day I was in Chambers, although this was after the day named in the notice. I had received no intimation of this appointment, neither had my convenience been consulted in any way, and if counsel will arbitrarily make appointments for me, they must submit to occasional disappointments. By the 3rd Section of the Act respecting the appointment of Guardians it is enacted, that after proof of 20 days' public notice of the application &c., the judge may appoint, &c. Now the usual form in such cases is to the effect that the person giving the notice, will apply to the Judge after the expiration of 20 days, &c., without naming any day or hour, and the application may in fact be made at any time after the period has expired, but even if a day has been named, (as in the present case). I am still of the opinion that it is immaterial whether the Judge is applied to on that particular day or not.

Several objections raised by Mr. Foley were overruled by me at the time, and as to his 7th, that no reasons have been assigned in the application for removing the minors from the care of their mother, I need only say that neither the Statute nor the Rules require such statement, and with reference to the objection that the appointment of Mr. Hunter would be detrimental to the moral and material interests of the infants, I can only repeat what I have already said, that to raise this issue properly, a caveat should have been filed as I suggested, when this allegation might have been fully investigated. In the absence of any evidence as to the unfitness of the proposed guardian, and from my own knowledge of his character and position in life, I am of opinion that Mr. Hunter, the paternal uncle, and next of kin should, on furnishing the necessary security, be appointed Guardian as prayed for.

The minors are of age to choose their own guardian, and the person of their choice, it appears to me, should be appointed, except it be clearly established, either that he is unfit, or that there are other good grounds of objection to his appointment. The second marriage of the mother, to a man who has children of his own, would in my opinion, constitute a good reason why *she* should not be appointed as guardian, but as she has made no application, and has filed no caveat, I must decide that the uncle, as next of kin, and the choice of the minors, is entitled to letters of guardianship.

The usual order was then made.

COUNTY COURT CASES.

William Nash v. Andrew Sharp and Owen Senate.

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

Overholding Tenants Act.

The Overholding Tenancy Act of the first session of the Legislature of Ontario, gives jurisdiction to the County Judge in cases when the tenancy has been determined by forfeiture for breach of contract.

Service of the demand of possession must be personal; and service of notice of inquisition, must either be personal or at the place of abode of the tenant.

[Hamilton, November, 1868.]

The facts in this case were as follows. Sharp held under a lease for a term of years, terminating 1st March, 1869, and had paid all rent due up to 1st September, 1868. The landlord applied in November, under the Overholding Tenancy Act of the first session of the Province of Ontario, alleging a forfeiture of the lease for breach of covenant. The lease contained a proviso for making it void on non-performance of covenants by lessee, and the breaches complained of were, neglecting to fall plough 20 acres, to clear 24 acres newly seeded down in clover, taking straw off the premises and subletting or assigning the term to Senate. The lessee Sharp it was alleged had left the country. The demand of possession and notice of holding inquisition were served on Senate. Senate appeared and filed an affidavit denying the sub-letting or assignment of the term to him, and alleging that he was merely left in charge of the premises to take care of them for Sharp.

R. R. Waddell, for the landlord.

J. W. Ferguson, for the tenants, contended that the Act did not apply to cases where the lease was determined by forfeiture, and that service both of the demand of possession and notice of inquisition must be personal. He also denied the truth of the alleged breaches of covenant, and cited *Patton* v. *Evans*, 22 U. C. Q. B. 606; 9 U. C. L. J. 320; and referred to 10 U. C. L. J. 1.

Logie, Co. J.—I think that the Act of the first session of the Province of Ontario, gives jurisdiction in cases where the tenancy or right of occupation has been determined by a forfeiture for breach of covenant committed by the tenant. The second section gives the judge jurisdiction not only in cases where the tenancy has even determined by notice to quit, but also in all cases where it has been determined *by any other act whereby a tenancy*, or right of occupancy *may be determined, or put an end to*. These words are sufficiently comprehensive to include cases where the tenancy has been put an end to, or become void in consequence of any breach of covenant by the lessee.

One of the breaches of covenant complained of, and relied on as having made the lease void is the alleged sub-letting or assignment of the residue of the term to Owen Senate. If he had gone into possession as sub-tenant or assignee of the term, it is very doubtful if the Act against tenants wrongfully holding over would enable the landlord to put him out of possession, on the ground that there is no privity between them. Under the Act of 4 Wm. IV., it was expressly held that *it* did not apply to a case where there was no privity between the owner of the land and the person in possession: *Bonser* v. *Boice*, 9 U. C. L. J. 213. Senate swears, however, that he is in possession under Sharp only for the purpose of taking care of the premises, and it is probably true that he has no legal right of occupancy. Then with regard to Sharp, two questions arise as to the sufficiency of the service on him: 1st, of the demand of possession, and 2nd, of the holding of this inquisition. In *Goodler* v. *Cook*, 2 Cham. Rep. 157, Sullivan, J. set aside the proceedings, on the ground that notice of the inquisition was not served personally on the tenant, he being at the time not resident on the premises. The clause under which that was decided is similar to section 4, of the Act of last session. If service of the notice of inquisition must be personal, or at the actual place of abode of the tenant, it seems to be much more necessary that service of demand should be personal; as the refusal to go out and reasons for the refusal, if given, must be stated in the application, which means to imply personal service.

I think, therefore, that service of the demand of possession must be personal, and that notice of the holding of the inquisition must either be served personally, or be left at the place of abode of the tenant; and that service on a person in possession of the premises, the tenant being resident elsewhere, is not sufficient. The application must be discharged for the reasons stated.

The Corporation of Belleville v. Fahey.

(In the County Court of the County of Hastings.)

Promissory note—Consideration—Corporation—Demurrer.

A promissory note, made payable to the Treasurer of, and endorsed by him to a Municipal Corporation to secure a balance due the Corporation on a past transaction is not void under the Municipal Acts.

Sherwood, Co. J.—The plaintiff in this case declares upon a promissory note made by the defendant to Thomas Wills, Treasurer of the Town of Belleville, and states that Wills, as Treasurer, endorsed and delivered the note to them.

The defendant demurs, and gives as a ground, that plaintiffs cannot legally contract by promissory notes, neither can they make, endorse, &c., or otherwise negotiate by or in promissory notes.

The only case I find bearing on this point, is that of the *Municipality of Westminster* v. *Foy*, 19 U. C. Q. B., 203. In that case the demurrer was sought to be sustained, on the ground that the corporation could not take more than 6 per cent. interest, if they could take interest at all. In the argument, the same or nearly the same objection was taken as in the present case, but inasmuch as it was taken at the argument, the court seemed to think it too late; but the learned Chief Justice in giving judgment remarked that, for all that appeared, the note sued on may have been given upon a transaction having nothing to do with banking or any kind of business prohibited, as for instance, money over paid to the defendant on a contract. He therefore was of opinion that a note given with such a consideration might be recovered. There are other matters besides these, such as rent, that would be a good consideration.

It does not appear here, that this note was given for a bad consideration, or in any kind of business prohibited to a corporation such as this.

I cannot see that the note having been made to the treasurer, and by him endorsed to the plain-

tiff, would alter the case, and I must therefore hold that the plaintiffs can recover.

Judgment for plaintiffs.

ENGLISH REPORTS.

QUEEN'S BENCH.

FUENTES AND ANOTHER v. MONTIS AND ANOTHER.

Principal and agent—Factors Acts, 6 Geo. IV., c. 94; 5 & 6 Vic. c. 39—Authority of factor to pledge goods—Revocation.

If a principal entrusts goods to a factor for sale, and afterwards revokes the authority and demands back the goods, the factor is not "entrusted with the possession of goods" under the Factor Act, and cannot make a valid pledge of the goods.

[Dec. 1, 1868, 17 W. R. 203.]

Appeal from a decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendants.

The facts of the case, with the material sections of the Acts of Parliament, are fully set out in 16 W. R. 900 (and see L. R. 5 C. P. 268).

Pollock, Q.C. (*Archibald* with him), for the defendants, referred to the same authorities in the court below.

Sir. G. Honyman, Q. C. (*Channell* with him), for the plaintiffs, was not called upon.

COCKBURN, C. J.—I think it is quite clear that the judgment of the Court of Common Pleas was right. Mr. Pollock has been obliged to admit that but for the last Act, 5 & 6 Vic. c. 30, he would have no *locus standi*. By the law as it stood before the passing of that Act a man could only deal with goods which he had in his possession as the owner of them, if it was not known that he had possession of them as agent; but by it the power of dealing goods was extended, and it was enacted that "any agent entrusted with the possession of goods, or of the documents of title to goods, should be taken to be the owner of the goods," for the purpose of protecting persons making *bonâ fide* advances even with the knowledge of the agency. Mr. Pollock has contended that the proper construction of that Act is, that if a man has once been an agent he is still an agent, though the agency has been put an end to by a communica ion from the principal unknown to the public; and in like manner that if a man has once been entrusted he is still entrusted, though his authority has been terminated in a similar way. I think that if that had been the intention of the Legislature it would have been so expressed, and that we must not translate the language of the Act which is in the present tense as if it were in the past tense.

Kelly, C.B., Bramwell, B., Channell, B., Pigott, B, and Hayes, J., concurred.

CHANCERY.

HOLT v. SINDREY.

Will—Gift to children begotten or to be begotten—Illegitimacy unknown to testator—Description—Provision for future illegitimate children.

A testator bequeathed trust funds to M., whom he believed to be the lawful wife of L., for life, with remainder to all her children begotten or to be begotten equally. M. had by L. four children born or *in esse* at the date of the will, and three born afterwards, all illegitimate. *Held*, that the children begotten at the date of the will were sufficiently described, and took the fund; but as to those born afterwards, the gift was a provision for future illegitimate children, and therefore failed.

[V. C. S. 17 W. R. 249.]

William Holt, the testator in this petition, by his will, dated in the year 1827, directed his trustees, after the decease or second marriage of his wife, to stand possessed of so much of certain funds as would produce the sum of £35 a year upon trust during the life of his daughter Mary, the wife of John Lattimer, for her sole use, exclusive of her then present or future husband, and after the death of his said daughter, to pay the same unto all and every the child or children of his said daughter begotten or to be begotten, in equal shares, if more than one, and if there should be but one such child then the whole to be in trust for such one child, and to be vested in the same children when they attained the age of twenty-one years or died under that age leaving issue; and in case there should not be any such child of his said daughter Mary Lattimer, or in case all such children, if any, should die under the age of twenty-one years without leaving issue, then the testator gave the trust fund in trust for other persons.

The testator died in the year 1828, and his widow in the year 1831.

The chief clerk's certificate upon a decree for the administration of the testator's estate had certified that Mary Lattimer, then Mary Holt, spinster, was on the 4th of May, 1817, married to J. C. Flenly, but there was not any issue of the marriage, as the parties had separated immediately after the ceremony, and they never met again; also that J. C. Flenly died in July, 1850; also that on the 31st of January, 1818, Mary Flenly, as Mary Holt, was married to John Lattimer, and that of that marriage seven children were the issue, all of whom were born before the death of J. C. Flenly. John Lattimer died on the 23rd of October, 1850.

By an order of the Court made in the year 1858 the trust fund, which was then represented by a sum of Bank Annuities, was carried over to the account of "the legacy of Mary Lattimer, her children, and their incumbrances," and the dividends were ordered to be paid to Mary Lattimer during her life.

Mary Lattimer died on the 29th of August, 1868, without having had any lawful issue, and a petition was presented by some of the parties entitled under the testator's will to the trust fund in the event of there being no children to take under the bequest.

The evidence showed that the marriage between J. C. Flenly and Mary Holt was never consumated, and that the marriage took place without the knowledge of, and was never made known to, the parents of Mary Holt; also that four of the children of Mary Lattimer by John Lattimer were born or *in esse* at the date of the testator's will; the other three children were born after that date. The testator knew that his daughter had no other children except those by Lattimer.

Hinde Palmer, Q. C., for the children of Mary Lattimer, claimed the fund for the four elder, though he admitted though the three younger could not take. The children illegitimate, were sufficiently described.

Greene, Q. C, and *Renshaw*, for the parties entitled under the gift over, contended that the gift over had taken effect.

Bagshawe, *Fischer*, and *Langley*, for parties in the same interest.

The following cases were referred to:—*Howarth* v. *Mills*, L. R. 2 Eq. 389; *Warner* v. *Warner*, 15 Jur. 141, 1 Sm. & Giff. 126; *Pratt* v. *Mathew*, 4 W. R. 418, 22 Beav. 340; *Re Herbert's Trusts*, 8 W. R. 660, 1 J. & H. 121, 8 W. R. 660; *Godfrey* v. *Davis*, 6 Ves. 43; *Kenebel* v. *Scrafton*, 2 East, 530; *Harris* v. *Lloyd*, T. & R. 310; *Re Overhill's Trusts*, 1. W. R. 208, 1 Sm. & Giff 362; *Re Well's estate*, 16, W. R. 784, L. R. 6 Eq. 599.

STUART, V. C.—In order that any legatees may take, whether as a class or individuals, it is necessary that they should be clearly described. When there is a gift to a child or children as a class, legitimate children are understood, but if the object is clearly defined, it matters nothing whether the object be legitimate or illegitimate. In the construction of wills, however, the primary and proper signification of every word must be attended to. It is contended in the present case that the gifts to the child or children of the testator's daughter begotten must altogether fail. I think that the testator understood and thought that his daughter was the wife of Lattimer, and his lawful wife. In his will he refers to children begotten, so he knew that children were born, and the fact that were illegitimate seems to have nothing to do with the question whether they are sufficiently described when it is certain that there are none other than the children by the marriage with Lattimer. The words of the will are clearly intelligible, and I know that the testator intended children begotten of the marriage with Lattimer. In cases of this description fallacies are occasioned by the use of two words which require very accurate definition, namely, "children" and "class." If children are properly described as a class there is no rule to say that illegitimate children shall not take; this runs through every case except *Beachcroft* v. *Beachcroft*, 1 Mad. 430, and *Fraser* v. *Pigott*, 1 Yo. 354. The cases relied upon by the parties objecting to this gift are clear authorities in favour of gifts to persons clearly described. In *Godfrey* v. *Davis* (*supra*) it was decided that if there were no other children than illegitimate children to answer the description they must take, although in point of law they do not stand as children. This shows that there can be a valid gift to illegitimate children under the description as children begotten during the testators lifetime. *Pratt* v. *Mathews* (*supra*) and *Cowden* v. *Parke* (*supra*) were cases in which the gift was to children to be begotten, and it is against the policy of the law to allow such a gift, but a gift to a child begotten but unborn is valid although the child be illegitimate. There is, however, one point in this case which might raise a doubt, namely, the use of the word "such" in a subsequent part of the will, where it directs the interest to be vested when the children arrive at the age of 21, and makes further provisions in case there should not be any such children. I do not entertain any doubt upon the construction of the will as to the children begotten or the one *en ventre sa mere* at the time of the testator's death.

CORRESPONDENCE.

Division Court Garnishee Procedure.

TO THE EDITORS OF THE LOCAL COURTS GAZETTE.

GENTLEMEN,—After perusing the Amending Division Court Act, relating to garnishee process, passed at the recent Session of the Ontario Legislature, I have thought a few remarks might not be uninteresting to your numerous legal readers, especially those who take an interest in the Division Courts. It does not seem to me to be open to so much censure, as some indulge in, if indeed to any, under the circumstances of the country and the limited powers vested in Division Courts. I happen to know that the act was framed by one of the oldest and most experienced of our barristers, and a gentleman of large experience in Division Court law—having in fact once acted as a judge. I am pleased on the whole with the law, and only regret that the Division Court act, instead of being simply patched up (as it were) by detached acts, could not have been re-cast and carefully re-enacted with numerous other amendments consolidated in one act. At the same time there are undoubtedly some ambiguities in the act. The first clause of the new act was certainly required. It settles a debateable point as to the validity of judgments in those courts, when more than six years old. The second clause is one universally acknowledged heretofore as needed, and will save the costs of many cases, where in fact no real defence exists. If a defendant has no defence to a note or account when particulars are served, why put parties to the expense of a trial or witnesses? This clause is perhaps a little ambiguous in some things, and some questions may arise as to its future working. It is left somewhat uncertain whether execution may issue immediately on signing judgment. Is that the intention? It is left uncertain within what time the judge may set aside the judgment. Can he grant a new trial within fourteen days or at any time after? No time is limited as to his interference. The clause says: "*that final judgment may be entered on or at any time within one month after the return of summons.*"

It seems to me upon the whole, that the true meaning of the act is, that the clerk is to enter judgment on the court day, which is certainly the return day of the summons; or he may omit to do so at his discretion and let the matter lie over for a month, which would

be about the time the judge ordinarily would give. The clause says: "execution may afterwards issue at the request of the plaintiff." That means (I should suppose) at once on signing judgment. I see by a long letter, in many respects very ably written, making comments on the new act, published in the *Leader* newspaper on the 24th day of March, that the writer does not see his way clear at all as to this second clause. He cannot tell what time the clerk is to sign judgment—what return day of the summons means. I think it is plain the return day of a summons is the court day.

The error in the clause would seem to be in leaving it in the power of the clerk *to enter a judgment "at any time within a month after the return day"* (that is the court day). This is ambiguous or uncertain. He might enter judgment at any time within the month.

Section 5 of this act is one really worthy of all praise. It enacts if "A." have a just debt against "B.", and "C." owes "B." a debt, that debt (even if "A." has not yet got a judgment) may be garnished or taken hold of legally to pay "A." It might be well to apply this principle to the Superior Courts. It affords the creditor a great additional remedy, heretofore not in his power, unless under the attachment laws, when a debtor had left the country. So a debt under like circumstances, by this new act, may be garnished where the creditor has an unpaid judgment against his debtor. The Division Court law was always defective, on account of the want of such powers. It may be that there is a little ambiguity in some of the after clauses of this act, enacted to carry out the garnishing powers; but I think they will be easily worked and understood by the judges.

It will be seen that the creditor has two steps to take, or rather he may take two steps legally, to secure the money in the hands of the garnishee. He may, on affidavit filed, get a judge's attaching order, which may be served in any county in Ontario. That fixes the debt in his favor in the garnishee's hands. He then has to summon the garnishee and his debtor in the Division where the garnishee lives. That is the suit, in order to give the garnishee as little trouble as possible, must be brought home to his door, and the debtor called there too.

It is not to be wondered at that there is some doubt about the construction of these clauses, for this garnishing even in the Superior Courts, is a process very complicated and confused, and hard to work.

In the action against the primary debtor under the 5th section of the act, the suit against the garnishee goes on too, *pari passu*. Upon giving judgment against the debtor on particulars served, if the garnishee owes him, he must pay that debt, in discharge of the primary debtor's debt.

By section 6, sub-section 4, it is very usefully enacted that no attaching order need be taken out at all, if the creditor choose to take the course of only serving a summons on the garnishee. If the creditor does this, then the summons has the effect of a garnishing order.

Then this sub-section, it will be seen, allows the judge to make the summons returnable at any time at his Chambers; a very useful power. It would seem that this part of the law only applies where the primary creditor has a judgment against his debtor, for it says it shall not be absolutely necessary to summon the debtor, which is a practice similar to that in the Superior Courts.

The writer in the "*Leader*" objects very much to the 18th section of this act. I really think it a very useful section. There may be some impropriety in allowing a delegated person, not a bailiff, to execute process (especially executions), but if the person is authorized to do it by the clerk at the election of the plaintiff, who is the interested party, no one can object. This person must strictly comply with the law.

This act seems to have a good deal of confidence in the intelligence of clerks, and if all clerks were like the writer in the "*Leader*," they might very properly be trusted with large discretionary powers. In fact our Province has many very intelligent clerks.

This section 18 of the act, allows the clerk to send process and executions to any bailiff within his county (and as I understand it) to any bailiff in any other county for execution, and said bailiff is bound to enforce or serve the execution of process and return it. His securities are liable for his misconduct. The bailiff may of course, or if not he, the plaintiff or some one, run some risk in the transmission of money from great distances to the head county. In this, and in the matter of fees, this section may be found ambiguous again.

The act generally leaves the question of fees (especially fee fund fees) in great doubt. What was the Attorney General about when he left the Government in the lurch in this way I thought he was so careful of the public purse!

The 24th section is a useful one, only it may take fees out of the clerks pockets. It allows the renewal of executions without their re-issue. Section 26, grants the power to judges to give new trials in interpleader trials.

Section 17 repeals a part of the old Division Court law, with respect to the defence of set off, and (as the writer in the *Leader* says) leaves the whole matter of set-off *in a fog.* I have not much room here to enlarge on this part of the act. This act was intended to be framed with great care, and is so to a great extent, yet it shows how difficult it is often for the best lawyers, to be as clear as they ought to be, in framing laws, on matters with which their minds are familiar.

L. E. X.

24th March, 1869.

[We cannot say that we agree in all respects with our correspondent, nor do we think the act, admirable as many of its provisions are, is deserving of all the praise he bestows upon it. The Board of Judges may do much by their Rules to remedy defects, omissions and mistakes; of which there are undoubtedly many in the act. Section 17 is, we apprehend, intended to repeal section 95, not section 93. Ed.]

Master and Servants' Act—Refusal to "pay the piper."

To the Editors of the Local Courts' Gazette.

A. an innkeeper, employs B. a fiddler, to play for him at a ball on a given evening. B. performs his agreement, but A. for certain reasons, disputes his liability, whereupon B. lays an information before a magistrate under the Master and Servants' Act, Con. Stat. U. C., cap. 75 sec. 3, to recover the sum agreed upon.

As there is a difference of opinion among our magistrates as to whether such a case comes within the 3rd sec. of said Act, your opinion in the next number of the Local Courts' Gazette, will oblige,

A Subscriber.

Clinton, Feb. 25, 1869.

[The Magistrate has we think, no jurisdiction in such case.—Ed.]

Division Courts—Where a Bailiff may be sued.

To the Editors of the Local Courts' Gazette.

Dear Sir,—Can a bailiff be sued in adjoining Division in another County from which he officiates as bailiff, when such Division is nearer the clerk's office, or the holding of the court, than any other in the County where he is bailiff.

Your answer to the above will much oblige,

An Old Subscriber.

Galt, Feb. 20, 1869.

[If the Court be nearest to defendant—He can.—Ed.]

REVIEWS.

The Law Magazine and Law Review: February, 1869, London: Butterworth.

We draw largely from the masterly pages of this welcome quarterly. The last number contains articles on the following subjects:—Jettison and General Average—Considerations on the facilitating proceedings in Criminal matters—Lord Kingsdown, formerly known as Mr. Pemberton Leigh, who is spoken of as a lawyer of much ability, but whose name, he being a mere lawyer, though successful and upright, will be scarcely known to posterity—Post nuptial Settlements—The High Sheriff, which we copy—London Criminal Law and Procedure and Church Patronage, neither of which will interest us much here — Lord Cranworth—Amalgamation of the Professions —Recent decisions on the Equitable doctrine of notice, transcribed for the benefit of our readers—&c.

The American Law Review: Boston: Little, Brown & Co. January, 1869.

This comes naturally in order after the quarterly it would seem to take partly as a model. It commences with an excellent article on the confinement of the insane, then follow other articles of much interest to its readers south of us. It contains the usual excellent digests of cases, English and American, that we have so often alluded to.

Books Received.

We also acknowledge the regular receipt of The Solicitors' Journal and Weekly Reporter; The Law Times, with Reports; The American Law Register; Blackwood and the English Quarterlies; Lower Canada Jurist; Legal Intelligencer, Philadelphia; Legal Journal, Pittsburg; Chicago Legal News; Godey's Ladies Book, &c.