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DIARY FOR SEPTEMBER.

1. Tues.....Ct. of App. Sittings. Long vac., H. C. J., ends. Solicitors' Ex. Beauharnois, Governor of Canada, 1726.
2. Wed.....Barristers' Examination.
3. Thur.....Divisional Court Sittings, Chan. Div., H. C. J.
6. *Sun* .....*14th Sunday after Trinity.*
7. Mon.....Trinity Term Law Society begins.
8. Tues.....County Court Sittings (York) begin.
10. Thur.....Sebastopol taken, 1855.
11. Fri. .....Peter Russell, President, 1796.
12. Sat. .....Frontenac, Governor of Canada, 1672.
13. *Sun.* .....*15th Sunday after Trinity.* Quebec taken by British under Wolfe, 1759. O'Connor, J., C.P., 1884.

TORONTO, SEPTEMBER 1, 1885.

WE understand that Mr. Thomas Hodgins, Q.C., is preparing, and will shortly issue, an edition of the Franchise Act, with notes similar to the "Manual on Voters' Lists," published by him a few years ago.

WE have much pleasure in publishing in this issue a learned and exhaustive paper by His Honor Judge Senkler, of St. Catharines, on the Jurisdiction of the Courts of General Sessions of the Peace in the Province of Ontario. It is a very valuable summary of the learning on the subject. The paper was read before the Board of County Judges at their last meeting.

A CORRESPONDENT calls attention in a letter which we publish elsewhere to what he considers a serious abuse, viz., allowing barristers and solicitors to practise as such whilst holding office as police magistrates and justices of the peace. These fountains of justice should be kept free from even the appearance of pollution, and the subject is one worthy of consideration by those in authority. If the objections alluded to are well taken let police magistrates be properly paid and retire from all professional business. It might also in connection with the above be considered whether these magistrates should have the power to try some of the very important cases which now sometimes come before them. We should be glad to have the views of correspondents on this subject.

ASSIGNMENT OF CHOSE IN ACTION—RIGHT OF SUIT.

Prior to the 35 Vict. c. 12 (O.), now R. S. O. c. 116, ss. 6-11, a difference prevailed at law and in equity in this Province as to the effect of an assignment of a chose in action. At law, except in the case of negotiable instruments, an assignee of a chose in action could not in general sue for its recovery in his own name. An exception existed where the chose in action was a debt, and the debtor had expressly assented to the assignment (*Surtees* v. *Hubbard*, 4 Esp. 204). Privity between the debtor and assignee was absolutely necesssary, otherwise no direct liability from the former to the latter was created (*Price* v. *Easton*, 1 N. & M. 303). Theoretically, at law, a chose in action was not assignable. The inconveniences resulting from this theory, were, however, to some extent surmounted even at law, by the right which the assignee had, to use the name of the assignor as plaintiff in any action he might desire to bring for the recovery of the chose in action assigned.

On the other hand this theory of the common law was never adopted in equit

and Courts of Equity were accustomed to recognize the right of an assignee of a chose in action arising on contract, and would entertain a suit by the assignee in his own name for the recovery of the chose in action assigned. The Court of Chancery would not, however, entertain jurisdiction prior to R. S. O. c. 49, s. 21, to enforce such claims where the assignee could recover at law by using the name of the assignor as plaintiff.

With regard to equitable choses in action assigned, these being only recoverable in equity, wherever the assignment was absolute, the assignor was an unnecessary party to a suit for its recovery. If, however, the assignor retained an interest in the chose in action assigned, he was required to be a party to the proceedings. With regard to suits in equity respecting legal choses in action, the case was different, and the assignor was required to be added even though the assignment were absolute, because any proceedings by the assignee would not constitute a bar to proceedings at law by the assignor for the recovery of the chose in action assigned.

The effect of R. S. O. c. 116 s. 7, was to enable legal choses in action arising out of contract to be assigned, so as to confer on the assignee a legal title which he could enforce in a court of law in his own name. While a good equitable assignment of a chose in action arising out of contract may be made by parol (*Heath* v. *Hall*, 2 Rose 271; 4 Taunt 326), an assignment of a legal chose in action, to be a valid transfer of the legal title under the statute, must be in writing.

Since the Judicature Act the difference which formerly existed between courts of law and equity is abolished, the court which now exists for the determination of civil rights, is at once a court of law and a court of equity, and according to the oft quoted sec. 17. and the Judicature Act ss. 10, whenever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity are to prevail.

It therefore becomes a question whether the former rules of equity or the rules of the common law, as altered by statute (R. S. O. c. 116), as regards parties to suits for the recovery of choses in action which have been assigned, are to govern the High Court of Justice.

In the recent case of *Ward* v. *Hughes*, 8 O. R. 138, it seems to have been assumed by the Common Pleas Division that the question is now altogether governed by the statute. It seems open to doubt, however, whether this is the proper conclusion. In that case the action was brought on a covenant in a mortgage for the payment of the mortgage debt. The plaintiff was the mortgagee, but he had assigned the mortgage to one Turner, who had assigned it to the plaintiffs' wife. The defendant contended that the action should have been brought by the latter. Evidence was given, however, on behalf of the plaintiff to show that the assignments though absolute in form were not so in fact, but only assigned part of the beneficial interest in the mortgage debt, and it was argued that therefore the assignments were not within the statute R. S. O. c. 116, inasmuch as the assignee was not entitled to the whole beneficial interest in the chose in action assigned. Under such a state of facts as was disclosed by the plaintiff, a court of equity would have held that both assignor and assignee were necessary parties to the action, but the majority of the judges of the Common Pleas Division seem to have been of opinion that the question was governed entirely by the statute, and that the assignee taking under an assignment absolute in form must sue, and they appeared to incline to the opinion that he alone was a necessary party. A

new trial, however, was granted with leave to amend, and Rose, J., therefore refrained from giving any opinion on the point of practice.

It might be said that as regards purely common law demands the rules of the common law as altered by statute are still to prevail. But the fact is that even prior to the Judicature Act the Court of Chancery had by statute acquired a complete concurrent jurisdiction with the courts of law in all civil proceedings (R. S. O. c. 49. s. 21).

Prior to the Judicature Act, therefore, the Court of Chancery could have entertained jurisdiction to enforce payment of a purely common law demand, and would have applied to a suit brought in respect of such a cause of action the same rule as to parties as it applied to other suits within its jurisdiction. The R. S. O. c. 116, though it enlarged the jurisdiction of courts of law by enabling them to entertain suits by assignees of choses in action in certain cases, did not, according to well understood equity doctrine, deprive the Court of Chancery of jurisdiction, or alter or interfere with its procedure. It gave in effect a legal status to the assignee, where before he had a merely equitable one. This enlarged the jurisdiction of the courts of law but did not affect the jurisdiction of the Court of Chancery.

We are inclined to think, therefore, that the question of parties to actions to recover choses in action which have been assigned, is now governed not exclusively by the statute R. S. O. c. 116, but rather by the practice formerly prevailing in the Court of Chancery as modified by the R. S. O. c. 116. For example, as we have seen in suits respecting legal choses in action, the assignor was, in equity, a necessary, party even though the assignment were absolute, because he would not otherwise be barred from proceeding at law, but since the statute, R. S. O. c. 116, in those cases where the assignee acquires a legal title that reason would no longer prevail, and the presence of the assignor might, therefore, be dispensed with.

The question, it appears to us, is no longer whether in a court of law an assignee could have sued alone, but whether in a court of equity he could have sued alone, and each Division of the High Court being as we have said a court of law and equity is bound to see that according to the principles of equity the proper parties are before it.

JURISDICTION OF THE COURTS OF GENERAL SESSIONS OF THE PEACE IN ONTARIO.

The office of Justice of the Peace and the Court of Quarter Sessions were evidently in existence in what is now the Province of Ontario before the meeting of the first Parliament of the Province of Upper Canada. This is clear from the language of several of the statutes passed at the first session of this Parliament which met at Niagara on the 17th September, 1792. By chapter 5 the magistrates of each and every district in the Province in Quarter Sessions assembled were empowered to make orders and regulations for the prevention of accidental fires within the same. By chapter 6 any two or more justices of the peace, acting under and by virtue of his Majesty's commission within the respective limits of their said commissions, were empowered to hold Courts of Request within their respective divisions, which divisions were to be ascertained and limited by the justices assembled in General Quarter Sessions, and by chapter 8 the justices of the peace for the several districts in Quarter Sessions assembled were authorized to procure plans and elevations of a gaol and court house, and approve of one of

them and contract for the building of such gaol and court house. By statutes passed in subsequent sessions of the same Parliament the times of holding these Courts were fixed and changed, and by subsequent Parliaments the existence of these Courts was recognized, but it was not until the first session of the third Provincial Parliament which met on the 29th May, 1801, that the statute 41 George III., chapter 6 was passed, by which —after reciting that doubts had arisen with respect to the authority under which the Courts of General Quarter Sessions of the Peace, the District Courts, the Surrogate Courts and the Courts of Request had been created and were then holden in the several districts of the Province, and also the authority under which commissions of the peace, commissions of assize and nisi prius, commissions of Oyer and Terminer, commissions to sheriffs and other persons concerned in the administration of justice had been issued in and for the said districts respectively—it was declared and enacted "that the authority under which the said Courts and commissions had been erected, holden and issued, and also all matters and things done by or by virtue of the same, are so far as relates to the authority under which the same have been so erected, holden, issued and done good and valid to all intents and purposes whatsoever, and that the provisions of all the acts of the Legislature of this Province respecting the said Courts and commissions, or any of them, are hereby declared to extend and be enforced (except as hereafter mentioned) in each and every the said districts respectively."

This enactment, so far as it relates to the authority under which commissions of the peace have been issued and the Courts of General Quarter Sessions of the Peace have been held, was embodied in the Consolidated Statutes for Upper Canada chapter 17, section 1, and in the Revised Statutes of Ontario chapter 44, section 2, and no doubt is the authority under which the Courts of General Session of the Peace are now held in Ontario.

It will be observed that this enactment did not create the Courts nor even define their jurisdiction. It simply gave the sanction of the Legislature to the Courts and to the authority under which they were held, and did not indicate what that authority was.

I think, however, there can be little doubt but that the first commissions of the peace were issued in what is now Ontario in consequence of the introduction of the English criminal law, and as a part of that system.

I have not found any decision to that effect, but it seems the reasonable conclusion from the ascertained circumstances, and it is the view adopted by the writer of an article in the CANADA LAW JOURNAL of February, 1871, on the Jurisdiction of the Courts of General Sessions of the Peace in case of perjury; in which article the question of the origin and jurisdiction of these Courts is considered and dealt with so fully as really to leave but little to be said on the subject.

It is almost unnecessary to say that the criminal law of England was introduced by royal proclamation into the then Province of Quebec in 1763, a few months after the cession of that Province to Great Britain under the Treaty of Paris, and that on the extension of the limits of that Province so as to include all the present Province of Ontario, by the Imperial Act, 14 Geo. III. chapter 83, it was by the 11th section of that Act, after praising the certainty and lenity of the criminal law of England and the benefits and advantages resulting from the use of it, which had been sensibly felt by the inhabitants from an experience of nine years, during which it had been uniformly administered, enacted that the same should

continue to be administered and should be observed as law in the Province of Quebec, as well in the description and quality of the offence as in the method of prosecution and trial; and that by the Provincial Act 40 George III. chapter 1, passed in July, 1800, after reciting the Imperial Act just referred to, it was enacted that the criminal law of England, as it stood on the 17th September, 1792 (being the date of the meeting of the first Provincial Parliament), should be and was declared to be the criminal law of the Province.

I think, then, it may be fairly assumed that the Courts of General Quarter Sessions of the Peace in the Province of Upper Canada possessed whatever jurisdiction the same Courts had in England on the 17th September, 1792.

As the County of Lincoln was settled early in the history of this country, the first Parliament of the Province being held within its limits, I was in hopes of finding some old commissions of the peace which might throw light on the mode in which they were originally issued. The earliest in date that I have been able to find, however, was issued in 1817. It appears to follow closely the form given in Archbold's Practice of the Quarter Sessions of the Peace as used in England, even retaining among the offences to be inquired into and punished by the justices appointed by it, "enchantments, sorceries, arts magic." The same words are included in the commissions of 1823 and 1828, but omitted in that of 1833, and all subsequent thereto. Of course they had no effect, all prosecutions for these offences, except for pretending to practise witchcraft, having been abolished by 9 George II. chap. 5. Their retention only affords another instance of forms surviving the object for which they were created.

The jurisdiction of the Courts of Quarter Sessions in England has been so reduced and limited by the English statute 5 & 6 Vict. cap. 33, passed 30th June, 1842 (which has never been adopted in this country), that the English decisions since that time are of no assistance to us but are rather calculated to mislead, and but little help can be obtained from modern treatises which are of course written with a view to the existing practice in England. A very clear and succinct statement of the jurisdiction of these Courts under the commission (as distinguished from jurisdiction under subsequent statutes) will, however, be found in Archbold's Practice, already alluded to at the commencement of the work (to which I refer my readers), and of which I will merely give a brief outline and the results.

The Courts of General Quarter Sessions were established by the Act 34 Ed. III. cap. 1, by which it was enacted that in every county in England should be assigned for the keeping of the peace one lord and with him three or four more of the most worthy in the county with some learned in the law, and that they should have power to restrain the offenders, rioters and all other barrators; and to pursue, arrest, take and chastise them according to their trespass or offence, and to cause them to be imprisoned and duly punished according to the law and custom of the realm; and also to hear and determine at the king's suit all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid.

In the commissions issued in pursuance of the statute the language of the statute is amplified, a good deal, but the words "all and all manner of felonies and trespasses" (or trespassings, as I see in the later commissions in this Province) are always used, and the jurisdiction of the Court is governed by the construction put on these words.

What is the proper construction was in former times a matter much disputed, and

during these times it was settled that neither perjury at common law nor forgery at common law was within the jurisdiction of the Court; and this was recognized and affirmed by Lord Kenyon in the case of *Rex* v. *Higgins*, 2 East 5; and although he admitted he did not know the reason for the decisions, he considered them so well established that he would not interfere with them. Subject to those two exceptions, Mr. Archbold says that in modern times the general opinion of the profession is that the Court of Quarter Sessions has jurisdiction by virtue of the commission of all felonies whatsoever, murder included, though not specially named, and of all indictable misdemeanours, whether created before or after the date of the commission. As to the word "trespasses," he says the word used when the commissions were in Latin was "transgressiones," which was a word of very general meaning, including all the inferior offences under felony, and also those injuries for which the modern action of trespass lies. It was usually rendered into law French by the word "trespas," and that is the word used in the original French of the statute 34 Edward III. chap. 1, and it is there rendered into English by the word "trespasses." It is said that when a statute creates a new offence, and directs it to be prosecuted before a Court of Oyer and Terminer or general gaol delivery, without mentioning the General or Quarter Sessions, that is deemed to be an implied exclusion of the jurisdiction of the Sessions with respect to that particular offence (*Rex* v. *Rispail*, 1 Wm. Bl. 368; 3 Burr. 1320).

Where, however, a statute required that the offenders against it should be carried before a justice of the peace, and by him committed to the county gaol there to remain until the next Court of Oyer and Terminer, great session or gaol delivery, the Court held that as the offence was a misdemeanour only, and the defendant might be prosecuted for it without being apprehended or in custody, the clause in the Act did not prevent the indictment being preferred at the Sessions (*Rex* v. *Cook*, 4 M. & S. 71).

It would seem from this latter case that the Sessions would only be barred jurisdiction where there was an express direction that the offence should be prosecuted before the Court of Oyer and Terminer or general gaol delivery.

Although Lord Kenyon, as I have already mentioned, in recognizing the fact that perjury and forgery at common law were exceptions to the class of offences which, being violations of the law of the land, have a tendency as it is said to the breach of the peace and are therefore cognizable by the Sessions, uses the expression, "why exceptions I know not," it seems clear that the reason why it was held that the Sessions had not jurisdiction over them was that it was considered these offences had not a direct and immediate tendency to cause such breaches of the peace as some other offences, which for that reason had been held to be indictable at the Sessions. In 2 Hawkins' Pleas of the Crown, book 2, chap. 8, sec. 64, it is said: "Yet it hath of late been settled that justices of the peace have no jurisdiction over forgery and perjury at the common law, the principal reason of which resolution, as I apprehend, was that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence; and the word 'trespass' in its most proper and natural sense is taken for such kind of injuries, it shall be understood in that sense only in the said statute and commission, or at the most to extend to such other offences only as have a direct and immediate tendency to create such breaches of the peace as libels and such like, which on this

account have been judged indictable before justices of the peace."

This passage is quoted by Mr. Justice Wightman in his judgment in *Ex parte Henry Bartlett*, reported in 7 Jurist 649, decided in 1843, where the question of the power of a justice to commit for trial on a charge of forgery was discussed at considerable length.

This reasoning seems to be adopted and approved of by Chief Justice Wilson in the case of *The Queen* v. *McDonald*, 31 U. C. R. 339, when he says perjury and forgery not being attended with a breach of the peace the Courts of Quarter Sessions cannot try them.

Assuming then that the Court of Quarter Sessions in Upper Canada had the same jurisdiction as these Courts in England, and consequently jurisdiction over all cases of felony and misdemeanour except perjury and forgery, and such new offences, as by the Act creating them, were directed to be tried at the Courts of Oyer and Terminer and general gaol delivery; it remains to consider the changes effected by Canadian legislation and the decisions of our own Courts.

The statute 7 William IV., chapter 4, abolished the distinction between grand and petit larceny, and enabled the Sessions to try all cases of simple larceny (under certain restrictions when they were not presided over by a barrister). This statute seems to follow substantially the English Act 7 & 8 George IV. chapter 29, sections 2 & 3, although in the English Act the Court of Quarter Sessions is not mentioned, but every Court whose power as to the trial of larceny before was limited to petty larceny was given the power to try every case of larceny, the punishment of which could not exceed the punishment therein mentioned for simple larceny.

It is said in Dickenson's Guide to the Quarter Sessions that in England prior to this Act the Courts of Quarter Sessions only professed to try petty larcencies.

The various enactments in force as to the Sessions were consolidated in chapter 17 of the Consolidated Statutes for Upper Canada, and most of those are now in chapter 44 of Revised Statutes of Ontario.

No definition or limitation of the jurisdiction of the Court is to be found in either of these statutes, although in the Consolidated Statutes, chapter 17, section 3, is to be found sec. 5 of 7 William IV. chap. 4, declaring that it shall not be necessary for any Court of Quarter Sessions to deliver the gaol of all prisoners who may be confined upon charges of simple larceny, but the Court may leave any such cases to be tried at the next Court of Oyer and Terminer, if by reason of the difficulty or importance of the case, or for any other cause it appears to them proper to do so.

In the Dominion Statutes, passed in 1869, 32 & 33 Vict., there are several important enactments affecting the jurisdiction of the Sessions.

They are 32 & 33 Vict. cap. 29. sec. 12, by which it is enacted that no Court of General or Quarter Sessions or Recorder's Court nor any Court but a Superior Court having criminal jurisdiction shall have power to try any treason or any felony punishable with death or any libel.

This is, except as to the prohibition against libel, a re-enactment of 24 Vict. cap. 14 in substance.

Mr. Taschereau in his book on the Criminal Acts has given a list of the offences in respect of which the Sessions have not jurisdiction, in which he has included administering poison or wounding with intent to murder, and carnally knowing a girl under ten years of age. In both cases the death penalty has been abolished since the publication of his book, and I presume the offences are now within the jurisdiction of the Court.

Then 32 & 33 Vict. cap. 20 sec. 48 by which it is enacted that neither the justices of the peace, acting in and for any district,

county, division, city or place, nor any judge of the sessions of the peace, nor the recorder of any city shall at any session of the peace try any person for any offence under the 27th, 28th and 29th sections of that Act, that is for causing injuries by the explosion of gunpowder or other explosive substance or any corrosive fluid to persons or buildings, ships or vessels, and 32 & 33 Vict. cap. 21. sec. 92 by which it is enacted that no misdemeanour against any of the sixteen last preceding sections of that Act shall be prosecuted or tried at any Court of General Quarter Sessions of the Peace; these sixteen sections all relate to frauds by agents, bankers or factors.

Chief Justice Wilson in the case of *The Queen* v. *McDonald*, 31 U. C. R., at page 339, refers to the three statutes which I have just mentioned, and says: "The exceptions contained in the last three named statutes, and the excepted cases of forgery and perjury, define as nearly as may be what the general jurisdiction of the Sessions of the Peace is: the unexcepted offences they may try."

This judgment was pronounced in 1871. Since then the Dominion Act, 37 Vict. cap. 9, was passed in 1874. By section 118 of this it is enacted that no indictment for bribery or undue influence, personation or other corrupt practices shall be triable before any Court of Quarter or General Sessions of the Peace.

This Act refers to elections of members of the House of Commons, but it is suggested by Mr. Justice Taschereau that perhaps the words of the section I have quoted are wide enough to extend to elections of the Local Legislature and to municipal elections.

I do not know of any other provisions limiting the jurisdiction of the Sessions. It is quite possible that some have escaped my observation as the little time at my disposal has not allowed me to make as close and thorough an examination of the statutes as I could have wished. I did not, however, expect to make this paper exhaustive of the subject. In any case which may come up for trial of an unusual character or under any special statute the provisions of the Act creating or defining the offence will always have to be carefully examined to ascertain what provisions, if any, have been made as to the mode of trial.

In addition to the offences I have named, Mr. Taschereau suggests that counterfeiting coin is declared to be treason by different statutes, and consequently is not triable at the Sessions. No doubt counterfeiting the king's money in former times was treason, but under the Canadian Statutes it is expressly declared to be felony; the form of indictment given in the Criminal Procedure Act uses the word feloniously, and so do the forms I find in the books on criminal pleading. I doubt the offence now being punishable as treason.

Mr. Taschereau also suggests that subornation of perjury is by common law not within the jurisdiction of the Sessions and refers to Dickenson's Quarter Sessions in support of his view. This authority sustains him, but the cases referred to in Dickenson do not seem directly in point. The reason, however, for excluding perjury seems equally forcible for excluding subornation of perjury.

I have more than once referred to the case of *The Queen* v. *Macdonald*, 31 U. C. R. 337, in which it was laid down that the Sessions had no jurisdiction in cases of either forgery or perjury. This case follows, on the question of forgery, the decision of Chief Justice Robinson in *The Queen* v. *Dunlop*, 15 U. C. R. 118, and is supported, on the question of perjury, by the subsequent decision of *The Queen* v. *Currie*, 31 U. C. R. 582.

In none of these cases is the distinction between forgery and perjury at common

law and the same offences by statute adverted to, nor does it appear what was the nature of the offence in these cases in this particular. In the English authorities I have referred to, the jurisdiction of the Sessions is denied in cases at common law, and it is admitted that the Sessions had jurisdiction in cases of perjury at all events under the statute 5 Eliz. chap. 9 (which relates to perjury by witnesses in Court), by virtue of the words of that statute. In the article in the LAW JOURNAL of February, 1871, to which I have already adverted, the view is sustained, that the Sessions still have jurisdiction in cases of perjury by witnesses in Court, and a distinction is taken between the language of our statute 32 & 33 Vict. cap. 23, s. 6, and the English Act, 14 & 15 Vict. cap. 100, s. 19, from which our Act is taken, as indicating that in this country the jurisdiction over such cases is not confined to the assizes only, as in England. The writer of that article, however, suggests that in view of the directions given by the statute of Edward to the Sessions in cases of difficulty, not to give judgment unless in the presence of a justice of one or the other Bench, or the justice assigned to hold the assizes, it is not probable that the justices in Sessions will take upon themselves to decide such cases, but will leave them over to be tried by the judge holding the assizes.

Since the decisions I have cited from 31 U. C. R. I think it still more likely that the course he suggests will be adopted.

I had thought of saying something on the jurisdiction of the Sessions in matters of appeal from magistrates' convictions, but this paper has been drawn out longer than I expected, and I find that all I could say on that subject can readily be found from the authorities in Robinson & Joseph's Digest.

I will conclude by saying that whatever may be the difficulties in reconciling the opinions expressed at different times on the subject, a safe guide to the present jurisdiction of the Sessions may be found in the words I have quoted from the judgment of Chief Justice Wilson in *The Queen* v. *Macdonald*, 31 U. C. R. 351, supplemented, of course, by whatever limitations may have been made by subsequent statutes.

SELECTIONS.

OBLIGATION OF LANDLORD TO REPAIR UNHEALTHY PREMISES.

THE questions whether or not a landlord must not let unhealthy premises; and whether or not, after having let them, he must keep such premises in a healthy condition and repairs are questions that have not been settled. The adjudications are conflicting and do not advance a principle or rule by which this subject can be governed. Some courts place the non-liability of the tenant for rent, and hence the obligation of the landlord to repair, upon the ground of fraud; others on the ground of the implied covenant to repair and keep the premises tenantable, while others deny the liability of the landlord to repair unhealthy premises unless bound to do so by writing. Stripped of the juridical reasoning exhibited in the adjudications, the proposition that a landlord must not rent unhealthy tenements, and must not, after notice, permit his tenement to become unhealthy for want of necessary repairs, is in harmony with justice, reason, humanity and the interests of government, and should be the universal rule of law. Between the landlord and the tenant, the contract is for tenantable premises, and premises cannot be and are not tenantable if they are or become unhealthy. The tenant rents the place to live in. This is the purpose and object of the contract. The landlord and tenant

both know this, and deal with each other for this object and purpose. If the premises at the time of renting are not healthy they are not fit to live in, and hence do not comply with the contract. If, after rented, they become unhealthy for want of repairs, they then become unfit to continue to live in, and hence unless made healthy the contract is not complied with.

The Conflict of Decisions.—The following cases[1] hold that the unhealthy condition of the premises at the time of renting, or becoming so during occupancy, is a constructive eviction and is ground to be released from the payment of rent, and hence assert the affirmative of the first proposition that the landlord must keep the premises in a healthy condition. On the other hand the subsequent cases[2] assert the contrary, and within some instances an incidental limitation.

Looking at these two different positions, one the opposite of the other, there should be no reason why the tenant is not relieved from the payment of rent when the premises become untenantable, or unhealthy for want of repairs, because of the fault or neglect of the landlord. The landlord's liability for personal acts of negligence or fraud should not be mixed with his duty to repair. The liability is separate and distinct.[3] The landlord is bound to repair where the law imposes the duty,[4] and where he has done, or omitted to do any act rendering the demise untenantable,[5] and such a condition certainly exists, when the landlord allows or permits such want of repairs as to make the tenement unhealthy.

Statement of the Law.—It is stated by Wood[6] that "Where certain defects exist that are likely to injuriously affect the health of the tenant or his family it is the landlord's duty to disclose the facts, and failing to do so he is liable to the tenant for all the damages resulting to the tenant which are the immediate and proximate result of such failure. There is a strong tendency to hold that the tenant is absolved from the lease (or rent) if there are latent defects in the premises or causes not readily discoverable on examination which render the premises unfit for occupancy, of which the landlord knew and did not inform the tenant; but this is not well established and is contrary to the weight of authority."

It is stated by Parsons[7] that a landlord is under no implied obligation to repair and that the uninhabitableness of a house is not a defence to an action for rent. But if the landlord does a positive wrong such as an erroneous or fraudulent misdescription of the premises or if it is made uninhabitable by the landlord's own acts the tenant can leave the premises. It is stated by Story,[8] that the landlord impliedly covenants that the premises are fit for beneficial occupation, as where the wall of a privy gave way and overflowed the kitchen with filth, and impregnated the water in the pump, and the landlord did not remove or repair it after notice, he cannot recover rent,[9] or where a furnished house was let and the beds were infested with bugs to such an extent as to render them unfit for occupation, the landlord cannot recover rent.[10] But this doctrine has been overruled in England

[1] Smith *v.* Marrable, 1 M. & W. 5; Edwards *v.* Hetherington, 7 D. & R. 117; Collins *v.* Barrow, 1 Moo. & R. 112; Salisbury *v.* Marshall, 4 C. & P. 65; Cowie *v.* Goodwin, 9 C. & P. 378; Gilhooley *v.* Washington, 4 N. Y. 217; Gallagher *v.* Waring, 9 Wend. 20; Van Bracklin *v.* Fonda, 12 Johns. 468; Gray *v.* Cox, 4 B. & C. 108; Laing *v.* Fidgeon, 6 Taunt. 108; Howard *v.* Holy, 23 Wend. 350; Pickering *v.* Dawson, 4 Taunt. 779; Jones *v.* Bright, 5 Bing. 533.

[2] Smith L. & T. 262; Woodfall L. & T. 493; Taylor L. & T. § 381; 1 Pars. Cont. 589; 1 Wash. R. Prop. 473; Sutton *v.* Temple, 12 M. & H. 52; Hart *v.* Windsor, 12 M. & W. 68; Chappell *v.* Gregory, 34 Beav. 250; Carstairs *v.* Taylor, L. R. 6 Exch. 217; Cleves *v.* Willoughby, 7 Hill, 83; Royce *v.* Guggenheim, 106 Mass. 202; Elliott *v.* Aiken, 45 N. H. 36; Alston *v.* Grant, 3 El. & Bl. 127; Leavitte *v.* Fletcher, 10 Allen, 121; Brewster *v.* DeFrancey, 33 Cala. 341; Doupe *v.* Genine, 45 N. Y. 119; 2 Story Cont. 422.

[3] Eaten *v.* Winnie, 20 Mich. 156; R. R. Co. *v.* Ogier, 35 Pa. St. 72; Garden *v.* R. Co. 40 Barb. 550; Ernst *v.* R. Co. 35 N. Y. 28.

[4] McAlpine *v.* Powell, 1 Abb. 427.

[5] Priest *v.* Nicholas, 116 Mass. 401; Norcrosse *v.* Thoms, 51 Me. 503; Kirby *v.* Ass'n, 14 Gray, 249; Gray *v.* Gas Co. 114 Mass. 149; Alger *v.* Kennedy, 49 Vt. 109.

[6] Landlord & Tenant, 624; citing Minor *v.* Sharon, 112 Mass. 477; Wilson *v.* Finch, Hatton L. R. 2 Exch. Div. 236; Eakin *v.* Brown, 1 E. D. Smith, 36; Wallace *v.* Lent, 1 Daly, 481; Staples *v.* Anderson, 1 Robt. 327; Meeks *v.* Bawerman, 1 Daly, 100.

[7] 3 Pars. Cont. 501.

[8] 2 Story Cont. 422.

[9] Citing Cowie *v.* Goodwin, 9 C. & P. 378.

[10] Citing Smith *v.* Marrable, 11 M. & W. 5.

and denied in America and the rule laid down that the fact that the premises are unwholesome will not entitle the tenant to quit them (1) where he knew or could have known the fact and (2) where the landlord has not been guilty of fraud or misrepresentation and is in no default.[11]

In substance these authors hold that a landlord is not obliged to repair unhealthy premises made so by want of repairs, and is not obliged to disclose the fact that the premises are unhealthy if the tenant knew or could have known it.

Analysis of the Cases.—In *O'Brien* v. *Capwell*[12] the Court said that the "law is well settled that where there is no fraud or false representation or deceit, no express warranty or covenant to repair, there is no implied obligation or covenant that the premises are suitable or fit for occupation or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use, or that they will continue so." In *Robbins* v. *Mount*[13] the Court said if there is no express agreement, there is no obligation on the part of the landlord that the premises shall continue fit for the purposes for which they were demised, or that they are in a tenantable condition, or that they will continue so. The same Court went further and held that there was no obligation to repair unless there is an express agreement or a fraudulent or mistaken misdescription.[14] This has been adopted in other cases.[15] *Scott* v. *Simons*[16] was an action for damages for injuries caused by the negligence of the landlord improperly constructing a drain and suffering it to remain defective whereby the tenant's goods were damaged by overflow of water for which cause the tenant left the premises. The Court held that the landlord was not liable, because he was only liable to repair the drain under an express covenant, the obligation to repair not being implied. In *Westlake* v. *De-Graw*[17] the premises were infected with sickening and noxious smells arising from dead rats. The landlord knew of the smells but did not disclose it to the tenant. The smell produced sickness. The landlord was informed and sent a carpenter to remove the cause, but the tenant abandoned the house before the carpenter got to work. The Court held the tenant liable for the rent. The Court must have placed the liability on the speedy removal of the cause by the carpenter, because it was certainly a fraudulent concealment of the facts for the landlord not to disclose the infection which he knew. The question of an implied covenant to repair did not arise. If this is the ground, it is contrary to *Whitehead* v. *Clifford*,[18] *Wallace* v. *Lent*,[19] and *Sutton* v. *Temple*.[20] The Court in *Wallace v. Lent* held that it was a good defence to an action for rent that the landlord did not tell the tenant of a stench in the house which he knew existed, and which subsequently caused the tenant's sickness; stating that "If the landlord knew of any cause which renders the house unhealthy he must disclose it. If he does not it is procuring an innocent person to rent a house which he knows is unfit." In *Sutton* v. *Temple* the Court announced the same doctrine, but held the tenant liable because the landlord did not know of the poisonous substance or smell.

In *Weeks* v. *Bawerman*,[21] the defence to the suit for rent was that the premises had been occupied as a brothel, which fact the landlord did not disclose to the tenant, and in consequence the tenant was insulted and annoyed by lewd persons calling at all hours of the night to such an extent that he had to leave and could not quietly and peaceably occupy the premises; the Court held that this was no defence; that the landlord was not bound to disclose the uses to which the premises had been previously put, and that there was no implied warranty that the premises were suitable for the purposes rented. "*Caveat emptor*" applies to this case, and to all transfers of property, and purchasers take the risk of its quality and condition

[11] Citing Westlake *v.* De Graw, 25 Wend. 669; Foster *v.* Peyser, 9 Cush. 242; Dutton *v.* Gerrish, 9 Cush. 89.
[12] 59 Barb. 504.
[13] 4 Rob. (N. Y.) 553.
[14] Cleves *v.* Willoughby, 7 Hill, 83.
[15] Howard *v.* Doolittle, 3 Duer. 464; Mumford *v.* Brown, 6 Cowen 475; see Chitt. Cont. 383; Taylor L. & T. 166.
[16] 54 N. H. 429.
[17] 25 Wend., 669.
[18] 5 Taunt., 503.
[19] 1 Daly, 482.
[20] 12 M. & W., 52.
[21] 1 Daly, 100.

unless protected by an express agreement; the only exception being sales of provisions for domestic use, as in *Van Bracklin* v. *Fonda*,[22] and a demise of ready furnished lodgings, as in *Smith* v. *Marrable*.[23]

In *Staples* v. *Anderson*,[24] and *Carnfout* v. *Fowke*,[25] it was a good defence to an action for rent that the landlord knew that the house had formerly been occupied as a brothel and concealed that fact from the tenant, who was compelled to remove in consequence of the annoyance. The Court held this to be a fraudulent concealment.

In *Minor* v. *Sharon*,[26] the landlord knew that the house was infected with the small-pox so as to be unfit for occupation, and to such an extent as to endanger health, and concealed this fact from the tenant. The tenant engaged the house and occupied it. He and his family took sick by reason of the infection. He was ignorant of the dangerous condition of the house, and no act on his part contributed to the sickness. The Court held the landlord guilty of actionable negligence and liable for all the injury the tenant sustained; stating, that as the landlord knew the house was infected, it was his duty to inform the tenant to refrain from renting it until it was properly disinfected, and as he did not do this, he was guilty of negligence. Although this case is cited to sustain the proposition as to the want of repairs, in fact it rests on the doctrine of negligence, which is sustained in the following cases.[27]

In some English cases,[28] and especially *Izon* v. *Garton*,[29] the tenant was released from the rent on the ground, first, that the landlord erred or fraudulently misdescribed the premises; or, secondly, that the premises were found or became uninhabitable by the wrongful act or default of the landlord himself. This conclusion was reached and sustained in *Hart* v. *Windsor*,[30] after a review of all the prior cases, and was adopted and followed in *Surplice* v. *Farnsworth*,[31] and in New York, Maine and Massachusetts.[32]

The case of *Dutton* v. *Garrish*,[33] asserts the same doctrine, but this was a case on a written lease, and the Court would not admit parol testimony to show that the landlord warranted it fit for occupation and to continue so, nor draw an implied warranty from a written lease. So in a late case in New York,[34] the tenant moved out of a house which had been declared by the board of health to be unhealthy on account of the bad condition of the plumbing, notice to that effect having been given to the landlord. The landlord brought suit for his rent, and the defence claimed that there had been a constructive eviction by reason of the unhealthy condition of the premises. The Court held that if the health of the tenant or his family is imperilled by the neglect of the landlord to make necessary repairs in the plumbing of the house the tenant is in effect deprived of the beneficial enjoyment of the premises, and may therefore move out without paying rent. This case asserts the proposition in conformity with a number of cases, and with the proposition set forth in the beginning, that if the premises become unhealthy because of the landlord's neglect to repair, after notice, it is a constructive eviction of the tenant, and he is not liable for the rent.—*Central Law Journal.*

[22] 12 Johns., 468.
[23] 1 Carr. & M., 479. See Cleves *v.* Willoughby, 7 Hill, 83.
[24] 3 Robt., N. Y. 327.
[25] 6 Mees. & W., 359.
[26] 112 Mass., 477.
[27] Sweeney *v.* R. Co., 10 Allen, 368; Carleton *v.* Iron & Steel Co., 99 Mass, 216; French *v.* Vining, 102 Mass. 132.
[28] Cowie *v.* Goodwin, 9 C. & P. 378; Salisbury *v.* Marshall, 4 C. & P. 65; Collins *v.* Barrow, 1 Mood & Rob. 112; Shepherd *v* Pybus, 3 M. & G. 867; Edwards v. Heatherington, 6 D. & R. 117.
[29] 5 Bing. (N. C.), 501.
[30] 12 M. & W., 68.
[31] 7 M. & G., 576.
[32] Foster *v.* Peyser, 9 Cush. 242; Libbey *v.* Talford, 48 Me. 316; Post *v.* Vetler, 2 E. D. S. 248: Ins. Co. *v.* Scott, 2 Hilton, 550; Gardner *v.* Keteltas, 3 Hill, 530.
[33] 9 Cush., 89.
[34] Not reported.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

Ontario.]

SYNOD OF HURON v. WRIGHT.

Member of Synod—Trust, construction of—Vested rights—Commutation fund.

The sum received for commutation under the Clergy Reserve Act was paid to the Church Society, upon trust to pay for the commuting clergy their stipend for life and when such payment should cease then "for the support and maintenance of the clergy of the Diocese of Huron in such manner as should from time to time, be declared by any by-law or by-laws of the Synod to be from time to time passed for that purpose." In 1880 a by-law was passed providing that out of the surplus of the commutation fund, clergymen of eight years and upwards active service should receive each $700 with a provision for increase in certain events. In 1873 the plaintiff became entitled under this by-law and in 1876 the Synod (the succession of the Church Society) repealed all previous by-laws respecting the fund and made a different appropriation of it,

Held, affirming the judgment of the Court below (FOURNIER and HENRY, JJ., dissenting), that under the terms of the trusts, the trustees were free at all times to repeal previous by-laws respecting the funds in question and make a different appropriation of it and that the plaintiff had no contract or vested right which entitled him to object.

Appeal dismissed with costs.

McCarthy, Q.C., and *Harding*, for appellant.

S. H. Blake, Q.C., for respondents.

Manitoba]

MCKENZIE v. CHAMPION.

Agent—Sale by—Duty of agent—Commission—Mis-trial.

The plaintiffs, real estate brokers at Winnipeg, were instructed generally by the defendants to sell certain lands of theirs at a certain price and terms of payment. The plaintiffs did make a sale of these lands and signed a receipt for $5,000 cash paid on account of purchase money which was paid to defendants. The purchasers subsequently refused to carry out the purchase and from the absence of writing signed by them they could not be compelled to do so. The plaintiffs then brought their action for commission upon the entire purchase money as if the contract had been carried out by the purchasers. The case came on for trial before a jury who followed the charge of the Chief Justice and found a verdict in favour of the plaintiffs for the full amount of their claim, viz., two and one-half per cent. commission upon the entire purchase money of the lands. The jury were not asked to pronounce upon the nature of the terms upon which the plaintiffs were employed. In review before the full Court a new trial was granted if plaintiffs were not willing to reduce verdict to commission of two and one half per cent. on the $5,000 paid,) on the ground that it was the duty of the plaintiffs to bind the purchasers as well as the defendants.

On appeal to the Supreme Court of Canada.

Held (STRONG, J., dissenting), affirming the judgment of the Court below, that there had been a mis-trial.

Appeal dismissed with costs.

Macmahon, Q.C., for appellants.

McCarthy, Q.C., for respondents.

New Brunswick.]

EX PARTE J. D. LEWIN.

St. John Assessment Act of 1882—Assessment of capital and joint stock of bank—Whether real and personal property belonging to may be assessed?

By "The St. John Assessment Act of 1882," sec. 25, all rates and taxes on the city are to be raised by an equal rate upon the real estate therein, and on the personal estate and income of the inhabitants and of persons declared to be inhabitants for the purpose of taxation, and upon the capital stock, income or other thing of joint stock companies or corporations, and shall be levied as follows: viz., by a poll tax of one dollar on all the male inhabitants of twenty-one years of age, and the residue upon the rateable property, real and personal, and rateable income and joint stock according to its true and real value provided that joint stock shall not be rated above the par value thereof."

By section 28, joint stock companies and corporations are to be assessed in like manner as individuals and the president or manager of such joint stock company, etc., is to be deemed to be the owner of the real and personal estate, capital stock and assets of such company, and shall be dealt accordingly.

By the Act incorporating the Bank of New Brunswick its capital or stock was fixed at one million dollars. In 1882, the appellant, President of the Bank, was assessed under the 28th section of the Assessment Act on real estate valued at $42,200 and personal estate of $1,057,800, making together $1,100,000. The value of the capital stock of the Bank was at par.

Held (reversing the judgment of the Court below), that all the property real, and personal, of the New Brunswick Bank formed its assets and should be assessed as capital stock, and only at the par value thereof.

Appeal allowed with costs.

Weldon, Q.C., for appellants.

Dr. Tuck, Q.C., and *Millidge* for respondents.

Prince Edward Island.]

THE QUEEN v. BANK OF NOVA SCOTIA.

Priority of the Crown as simple contract creditor—Acceptance of dividends by Crown not waiver.

The Bank of Prince Edward Island became insolvent and a winding up order was made on the nineteenth of June 1882. At the time of its insolvency the bank was indebted to Her Majesty in the sum of $93,494.20, being part of the public moneys of Canada which had been deposited by several departments of the Government to the credit of the Receiver General.

The first claim filed by the Minister of Finance at the request of the respondents, liquidators of the Bank of Prince Edward Island, did not specially notify the liquidators that her Majesty would insist upon the privilege of being paid in full. Two dividends of 15 per cent. each were afterwards paid and on the 28th of February, 1884, there was a balance due of $65,426.95. On that day the respondents were notified that her Majesty intended to insist upon her prerogative right to be paid in full.

At the time the liquidators had in their hands a sum sufficient to pay in full her Majesty's claim.

The following objection to her Majesty's claim was allowed by the Supreme Court of Prince Edward Island, viz.: That her Majesty the Queen, represented by the Minister of Finance and the Receiver General, has no prerogative or other right to receive from the liquidators of the Bank of Prince Edward Island the whole amount due to her Majesty, as claimed by the proof thereof, and has only a right to receive dividends as an ordinary creditor of the above banking company.

On appeal to the Supreme Court of Canada.

Held (reversing the judgment of the Court below), that the right of the Crown claiming as a simple contract creditor to priority over other creditors of equal degree cannot be disputed.

That this prerogative privilege belongs to the Crown as representing the Dominion of Canada when claiming as a creditor of a provincial corporation in a provincial Court.

That the Crown can enforce this prerogative

right in proceedings in insolvency under 47 Vict. ch. 23.

That the Crown by its acceptance of two dividends had not waived its right to be preferred to other simple contract creditors.

Appeal allowed with costs.

Burbidge, Q.C., for appellant.

Hodgson, Q.C., and *Fitzgerald*, Q.C., for respondents.

Not followed Regina v. Olmstead 10 Ont. 148.

Prince Edward Island.]

FITZGERALD v. MCKINLAY.

Canada Temperance Act 1878—*Sec.* 107—*Appropriation of fines*—31 *Vict. ch.* 1.—*Applicable to Province of Prince Edward Island*—*Sec.* 7. *sub-sec.* 22.—*Construction of.*

McK (the respondent) prosecuted one B. before F. (the appellant) as stipendiary magistrate for a breach of the 100th section of the Canada Temperance Act 1878. B. was convicted and fined $100 and the fine was paid F. as stipendiary magistrate. McK thereupon applied to the Supreme Court of Prince Edward Island and obtained a rule *nisi* for a mandamus to compel F. to pay over to him one half of the said sum of $100, and after argument the rule was made absolute. On appeal to the Supreme Court of Canada.

Held (reversing the judgment of the Court below), that whereas a mode of recovering penalties imposed by the Canada Temperance Act is given by section 107, viz.: under the Summary Convictions Act, 32-33 Vict. ch. 31, and said Act makes no appropriation of the said penalties, the same belong to the Crown.

That the Interpretation Act, 31 Vict. ch. 1 (D), is in force in Prince Edward Island, but that sub-sec. 22 of sec. 7 only applies to fines imposed for the infraction of an act which in itself appoints no specific mode for their recovery.

Appeal allowed with costs.

Davies, Q.C., for appellant.

Peters, for respondent.

Prince Edward Island.]

INGS v. BANK OF PRINCE EDWARD ISLAND.

Set-off by contributory in an action on a promissory note by liquidators of a bank—45 *Vict. ch.* 23. *sec.* 76—*Construction of.*

In May, 1883, the Bank of Prince Edward Island discounted the appellant's note for $6,000, and on the fifth of May, 1882, appellant purchased in good faith and for value a draft of the Prince Edward Island bank for $5,685.11. The Canada Winding-up Act was passed on the 17th May, 1882, and on the 19th June, 1882, a winding-up order was made on the Prince Edward Island Bank. The appellant was a shareholder and was settled on the contributory list. Appellant's note fell due on the 3rd June, 1882, and he set up the above draft of $5,685.11 of which he was then the holder and endorsee, as a set-off, and paid the difference in cash.

The bank refused to allow this set-off, and subsequently brought suit in the Supreme Court of Prince Edward Island on the note, to which the appellant pleaded the cash payment and the above draft as set off. A verdict was found for the respondents. The learned judge having charged the jury that sec. 76 of 45 Vict. ch. 23 was retrospective.

On a motion for a rule *nisi* for a new trial the rule was discharged by the Supreme Court of Prince Edward Island. On appeal to the Supreme Court of Canada.

Held (reversing the judgment of the Court below), that section 76 of 45 Vict. ch. 23 did not apply because the draft was bought before the Act was passed and because by its terms it is confined to cases of set-off by contributories against claims for contribution, and that appellant having purchased *bona fide* and for value the draft in question he was entitled to set it off against the note sued on.

Appeal allowed with costs,

Davies, Q.C., for appellant.

Fitzgerald, Q.C., and *Peters*, for respondents.

CHANCERY DIVISION.

Ferguson, J.] [July 6.

GRAHAME v. BOULTON.

Will, construction of—Conditional gift—Condition becoming impossible—Vesting—Gift over—Time of payment.

A testator bequeathed his chattels and $1,500 to his widow. His estate he directed to be sold and the $1,500 to be paid out of the proceeds. After providing for the investment of the estate he proceeded: "The yearly interest accruing from the same to be paid out to my said wife yearly for the term of six years or until my only son shall become twenty-one.

"5. It is my will that the above-mentioned gifts and bequests to my wife shall be given to her in lieu of dower and on the further condition that she will clothe, maintain, and suitably provide for my said son until he shall become twenty-one.

"6. It is further my will that on the coming of age of my said son, my executors shall pay over to him the whole of the principal sum of money remaining in their hands after satisfying the above expenses and legacies.

"7. In case my said son should die before coming of age then the money so remaining as above and to which he would then be entitled shall be paid over to my two eldest brothers."

The son died under twenty-one.

Held, that all the gifts to the widow were upon the condition of maintaining the son; but the condition having become impossible of performance by the son's death the gifts were denuded of the condition.

Held, also that the testator's brothers were not entitled to payment of the capital until the time at which the son would have attained twenty-one, if he had lived; and in the meantime the widow was entitled to the income.

Jeffereys, for the plaintiff.

Meredith, Q.C., and *R. M. Meredith*, for the several defendants.

PRACTICE.

Mr. Dalton.] [March 18.
Rose, J.] [July 4.

CANADA LIFE ASSURANCE COMPANY v. NUTTALL.

Allowing service out of jurisdiction—Making and breach of contract—Setting aside proceedings—Rule 45 O. J. A.

The defendant was the agent of the plaintiffs in British Columbia and his duty was to remit the balances of premiums received to the plaintiffs' head office at Hamilton. The action was brought to recover sums of money which should have been but were not so remitted by the defendant.

The contract under which the defendant became the plaintiffs' agent was made by correspondence. On the 5th of November, 1884, the plaintiffs wrote to the defendant, naming the amount of the guarantee bond required and stating what expenses they would pay in addition to the commission allowed. On the 29th of November the defendant answered by letter accepting the agency, and that letter closed the correspondence.

Held, that the final assent to the contract made between the plaintiffs and defendant having been given in British Columbia, the contract was not "made or entered into within Ontario" and service of the writ of summons effected on the defendant in British Columbia could therefore not be allowed under Rule 45 (b.) O. J. A.

The defendant's instructions were to remit to Hamilton all balances by the last day of each month and it was admitted that the defendant had always previously remitted by a bank draft from British Columbia.

Held, that the defendant's breach of duty was in not remitting by post, or in the usual way, which would have discharged him, and therefore that the breach of contract did not arise within Ontario and service could not be allowed under Rule 45 (c.)

Quære, per ROSE, J.—Whether it was necessary or proper to set aside the writ of summons, statement of claim and service, in addition to refusing to allow the service?

J. A. Culham, for the plaintiffs.

Mackelcan, Q.C., for the defendant.

Rose, J.] [July 10.

PURSLEY v. BENNET.

Mitigation of damages — Action for malicious arrest—Pleading and evidence.

In an action for malicious arrest the statement of defence set up that there was a warrant in the hands of a constable for the apprehension of the plaintiff on a charge of misdemeanour, that the plaintiff was avoiding arrest, that the defendant therefore watched him and when he endeavoured to escape detained him until the arrival of the constable and then gave him into custody, and that the defendant did this in the *bona fide* belief that he was justified in thus aiding the arrest.

Held, that, although these facts did not constitute an answer to the action, yet they could be given in evidence in mitigation of damages, and therefore it was proper that they should appear on the record.

H. J. Scott, Q.C., for the defendant.

Aylesworth, for the plaintiff.

CORRESPONDENCE.

DISQUALIFICATIONS OF POLICE MAGISTRATES AND JUSTICES OF THE PEACE.

To the Editor of the CANADA LAW JOURNAL:—

SIR,—On looking over the volume of the Statutes of Ontario just issued, there is a chapter (17) entitled an Act respecting Police Magistrates for Counties. These, with 41 Vict. (1878) c. 4, an Act respecting the Magistracy; and also the Revised Statutes of Ontario (1877), c. 72, an Act respecting Police Magistrates, comprise all the statute law of Ontario respecting the appointment, etc., of "the great unpaid," and the stipendiary magistrates.

I was disappointed at not finding a very necessary and wholesome disqualification attached to such offices, viz., that of practising as barristers or attorneys while holding office. There is at present no law in Ontario forbidding that very anomalous and immoral plurality of official functions. A police magistrate or justice of the peace can, in Ontario, continue to practise as a lawyer within the county or city for which he is appointed and acting as such justice of the peace or stipendiary magistrate.

To my knowledge there is one city in Ontario in which we find such a case existing, and we find a well-paid police magistrate openly practising as a barrister and attorney.

Let us turn to the law of England on this important matter. In the Stipendiary Magistrates Act, 1863, 26 & 27 Vict. c. 97, section 5, we read: "Any person assigned to keep the peace within any city or place under the provisions of this Act, shall, during the continuance of such assignment, execute the duties of a justice of the peace in and for the city and place for which he shall have been so assigned, although he may not have such qualification by estate as is required by law in the case of such persons being justices of the peace for a county; provided that such person be not disqualified by law to act as a justice of the peace for any other cause, or upon any other account, than in respect of estate, and shall sit and act as a justice of the peace within such jurisdiction as aforesaid on all matters where one or more justices are by law now required either alone or together with any other justice or justices of the peace of the city or place wherein his jurisdiction is situate, etc." Now, in the Imperial Act, 34 Vict., 1871, c. 18, we find the cause of disqualification other than estate set out as follows: "No person shall be capable of becoming or being a justice of the peace for any county in England or Wales in which he shall practise and carry on the profession or business of an attorney, solicitor, proctor, etc."

This common, moral-sense principle is further exhibited in a provision found in the before-cited Stipendiary Magistrates' Act, section 6, where the magistrate is required to appoint as his clerk an attorney-at-law, but this clerk is not to be concerned, either by himself or his partner, in any matter before the said magistrate, or arising out of or consequent thereupon in any other court, on pain of dismissal.

In 19 & 20 Vict. c. 48, 1856, Imp., applicable to Scotland only, we read, section 4: "Any writer, attorney, procurator, or solicitor who may be elected to the office of magistrate or dean of guild of any burgh, the magistrates or dean of guild of which are *ex officiis* justices of the peace by virtue of their election to such offices, shall, so long as he holds any such office, be entitled to act as a justice of the peace, provided he intimates to the clerk of

the peace for the county in which such burgh is situated that he and any partner or partners in business with him cease to practise before any justice of the peace court in such county, so long as he continues to hold such office as aforesaid; and it shall not be lawful for him or them thereafter, and during his continuance in office, so to practise."

Manitoba has wisely copied the English statute law provisions in chapter 7, section 20 of her Consolidated Statutes, 1880, by enacting that "No barrister, attorney or solicitor in any Court whatever, shall be appointed to act as a justice of the peace in or for any county in that Province during the time he continues to act as such." I sincerely trust that the Hon. Mr. Mowat will see fit to prevent the abuse complained of, and disqualify practising attorneys from holding the office of justice of the peace or police magistrate. The same arguments which sufficed to carry the County Justices Amendment Bill, 34 Vict. c. 18, 1871, in the English House of Commons, which I extract from the Hansard, will, I trust, be equally convincing and effective next session in the Legislative Assembly of Ontario.

Sir Roundell Palmer expressed his opinion that it was in reason and principle a good thing that solicitors practising in counties should not, as a rule, be magistrates in those counties, not because it was to be feared that they would abuse that position, but because it was deemed necessary that magistrates should be above suspicion. Mr. Sergeant Sherlock thought it for the interest of the profession itself that its members should not be open to the suspicion of preparing a case upon which they were called upon to adjudicate. Mr. Hinde Palmer suggested that the restriction should extend not only to the counties in which they practised, but to adjoining counties also. Sir Henry Hoare, Mr. Bruce and Sir Lawrence Palk approved of the Bill, only a single member moving an amendment which he afterwards withdrew.

Pardon the length of this letter,

Yours, etc.,

Ottawa. R. J. WICKSTEED.

ANNUAL MEETING OF COUNTY JUDGES.

The annual meeting of the County Judges of Ontario was held in the Benchers' Convocation Room at Osgoode Hall on Wednesday and Thursday the 24th and 25th days of June last.

There were about twenty judges present; Judge Jones, of Brant, presiding.

Judge Senkler, of Lincoln, read a very interesting paper on the Jurisdiction of the General Quarter Sessions. With the consent of Judge Senkler we print this instructive paper in another column.

Some interesting questions were debated by the judges; amongst others the practice in Surrogate matters; fees in probate matters; what estate should be considered personalty, etc., etc.

It was decided after some discussion that whenever a party to a suit in a County Court case desired to examine his opponent under the O. J. Act, after issue joined that an order of the judge was necessary, as no official was authorized to take such examination in a County Court case without such order.

The powers of County Judges and Local Masters in Superior Court cases were considered, and the opinion expressed by the judges was that the sections conferring these special powers should receive the most liberal construction, as the object of the Act of last session was to decentralize.

A committee was appointed to enquire into and report on all questions and matters concerning the administration of justice in the County Courts in view of possible legislation in the near future.

After debating and considering a number of questions of practice and procedure, the meeting, which had led to a very profitable exchange of views among the judges in attendance, adjourned till June, 1886, unless the judges were sooner called together by the chairman.

Law Society of Upper Canada.

OSGOODE HALL.

During Michaelmas Term the following gentlemen were called to the Bar, namely:—John Alexander MacKintosh, Adam Carruthers, Arthur Burwash, Henry Herbert Collier, James D. S. C. Robertson, John Douglas, James Alexander Hutcheson, Joseph Alphonse Valin, James Cæsar Grace, David Thorburn Symons, Dyce Willcocks Saunders, William Torrance Allan, Edmund Weld, Thomas Bulmer Bunting, William Travis Sorley, Isaac Norton Marshall, Frank Russell Waddell, Thomas James Decatur, Alexander George Frederick Lawrence, George Weir, William James Nelson, William David Jones, William Acheson Proudfoot, David F. McArdle; and the following gentlemen were admitted to the Society as Students-at-Law, namely:—Graduates: Frank Ambridge Drake, George Watson Holmes, Arthur Stevenson, Herbert Langell Dunn, John Frederick Dumble, Nicholas Ferrar Davidson, Clement Rowland Hanning, Edward Holton Britton. Matriculants: Alexander Clarke, Henry Augustus Wardell, Herbert Ferdinand Bonzé, Duncan Henry Chisholm, Fergus James Travers, John Thomas Hewitt, Richard Vercoe Clement, James Alexander Haight Campbell, Robert Lazier Elliott, Robert Gordon Smyth. Juniors: George Carnegie Gunn, Herbert William Lawlor, James Arthurs, William Pinkerton, George Davey Heyd, Forbes Begue Geddes, Robert Elliott Lazier, Frederick Forsyth Pardee, William Locklin Billings Lister, Reginald Murray Macdonald, Ernest Edward Arthur Duvernet, Frank Stewart Mearns, Arthur Trollope Wilgress, Stephen Dunbar Lazier, Robert Segsworth, James Henry McGhie.

During Hilary Term, 1885, the following gentlemen were called to the Bar, namely:—Frank Hedley Phippen, Francis R. Powell, Henry John Wickham, John Workman Berryman, Richard Henry Hubbs, Henry Lawrence Ingles, William Albert Matheson, John Bell Jackson, Norman N. A. McMurchy, Frederick Luther Rogers, John Lawrence Murphy, Thomas Irwin Forbes Hilliard, Hume Blake Elliott, Richard M. C. Toothe, Alexander Campbell Shaw, Joshua Denovan, E. A. Miller, Frederick W. Hill, Duncan Charles Murchison, Thomas Moffat, Manly German, George McLaurin, and the following gentlemen were admitted as Students and Articled Clerks, namely: Graduates, John Henry Cosgrove, Alexander Henderson, Jr.; John Arthur Tanner, Francis Alexander Anglin. Matriculants: Alfred E. Cole, Dioscore J. Hurteau, William Charles Mikel. Juniors: William Henry Moore, George Washington Littlejohn, Arthur St. George Ellis, George Smith McCarter, William Albert Smith, Ernest Napier Ridout Burns, Edmund Sheppard Brown, John Patrick O'Gara and William Walton passed the Articled Clerk's examination.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—North America and Europe.
- Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis. B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb, I., II. and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

Law Society of Upper Canada.

History and Geography.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

French.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

or Natural Philosophy.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jusisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Socity as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six