DIARY FOR DECEMBER.

1. Satur... Michaelmas Term ends. Clerk of every Municipality except Counties to return No. of resident ratepayers to Registrar General.
2. SUN.... *1st Sunday in Advent.*
3. Mon..... Last day for notice of trial for County Court.
8. Satur... Conception of the Blessed Virgin Mary.
9. SUN.... *2nd Sunday in Advent.*
11. Tues.... Quarter Sessions and County Court Sittings in each County.
13. Thurs.. Last day for service for York and Peel. Last day for Collector to return Roll to Chancery.
16. SUN.... *3rd Sunday in Advent.*
17. Mon..... Recorder's Court sits.
21. Friday, *St. Thomas.*
23. SUN.... *4th Sunday in Advent.*
24. Mon..... Declare for York and Peel.
25. Tues.... Christmas Day.
26. Wed..... *St. Stephen.*
27. Thurs... *St. John the Evangelist.* Sittings of Court of Error and Appeal.
28. Friday. *Innocents.*
30. SUN..... *1st Sunday after Christmas.*
31. Mon..... Last day on which remaining half of G. F. S. payable. End of Municipal year.

The Local Courts'

AND

MUNICIPAL GAZETTE.

DECEMBER, 1866.

EXEMPTIONS IN ATTACHMENT CASES.

A correspondent requests our opinion as to whether goods which are exempt from seizure under 23 Vic. Cap. 25 on an execution against the goods of a debtor are also exempt from seizure under a writ of attachment. The point though of great importance, has never, so far as we know, been finally determined.

Section 199 of the Division Courts Act empowers the bailiff or constable "to attach, seize, take, and safely keep all the personal estate and effects of the absconding, removing, or concealed person within such County *liable to seizure under execution for debt.*" This, therefore, is the guide that we must follow. It does not say that the bailiff is to attach, &c., *all* the property, but only, all that is liable to seizure under execution for debt; that is, such property as is liable to seizure under execution for debt, and no more.

Property seized upon any warrant of attachment is liable to seizure and sale under the execution to be issued upon the judgment to be obtained against the debtor (sec. 204.) So here again, attachments and executions are in this matter placed upon the same footing; and goods which are exempt under the former writ would also appear to be exempt under the latter.

Section 4 of the 23 Vic. cap. 25, is as follows: "The following chattels are hereby declared exempt from seizure under any writ issued out of any Court whatever in this Province, namely," &c., describing certain articles. The statute speaks both of "the debtor and his family"—"provided for family use"—"tools and implements, &c., in the debtor's occupation"—and "the debtor may select," &c. We do not at present see (notwithstanding the apparent allusion to these exceptions in a case hereafter referred to) that any argument can be drawn from the use of the word "debtor" in these connections, as implying that the debtor's presence is in any way necessary. Nor does it follow that every case were an attachment has issued from a Division Court that the debtor has absconded, and this is perhaps material in reading the judgment in the case alluded to.

In the Superior Courts the wording of the Act authorising the sheriffs to seize an absconding debtor's property are more general, and may reasonably be said to include *all* his property, no limitation being expressed, and no reference being made which would imply that only goods liable to seizure under execution can be taken on an attachment.

In *Regina* v. *Davidson*, 21 U. C. Q. B. 41, certain property, which had been left by the defendant on his absconding from the Province, in the possession of his wife and family, and all of which would, under ordinary circumstances, have been exempt, was seized under a writ of attachment. The wife claimed the goods, and the question was submitted to the court, whether or not this exemption could be claimed by the wife, the defendant at the time being an absconding debtor. *Robinson*, C. J., said, "It is my opinion at present, looking at the whole statute, 23 Vic. cap. 24, that when a debtor has absconded from his dwelling in this Province, the bed, bedding, &c., which would have been exempt from execution against him in ordinary cases, if he had been residing with his family, will not be exempted when they are no longer in his use, but only in the use of his family whom he has left behind. There are several expressions in the statute which lead to that conclusion, but perhaps on further consideration I might come to a different conclusion on that point, though it is material to consider that in cases of attachment against the goods of absconding debtors there is no exemption."

In commenting upon this case we cannot do better than use the words used in Mr. O'Brien's Division Court Manual, page 75, where he says, "This judgment was not given with any reference to the Division Courts Act, and the words in section 199 which empower the bailiff to make the seizure of the absconding debtor's goods, are 'all the personal estate and effects, &c., *liable to seizure under execution for debt.*' It may therefore be doubted whether the same conclusion would have been arrived at, if the question had come up on an execution issued from a Division Court."

It may be argued, and it is doubtless to a certain extent true, that process of attachment is partly for the purpose of compelling the debtor's appearance, and effecting service upon him, and partly to obtain security to the plaintiff for his debt, but in either case the results of the humane instincts which led to the passing of the Exemption Act are practically as beneficial and necessary in the case of attachments, as they are when goods are seized under executions. Upon the whole, therefore, we incline to the opinion that goods exempted in one case are also exempted in the other.

MUNICIPAL ELECTIONS.

The question of qualification of electors has, as already observed, given rise to a number of questions under the late act, and in connection with this it is necessary to determine the meaning of "qualification." It is questionable whether the word can be read in its limited sense as referring only to *amount*,—many things being necessary to entitle a person to a vote besides amount; but it is clear, we think, that "disqualification" is included in "qualification," for if a person is disqualified he is not qualified, and this must be remembered in reading the act. See remarks of Hagarty, J., in *The Queen ex rel. Rollo* v. *Beard*, 1 U. C. L. J., N.S. 126.

Section 73 enacts that no person not having paid all taxes due by him shall be qualified to be a member of any Municipal Council; and section 75, as amended by chapter 52, provides that the electors of every municipality for which there is an assessment roll, and the electors of every Police Village shall be those who, amongst other things, had paid all municipal taxes due by them on or before the 16th day of December next preceding the election; and section 427, as amended by chapter 52, states that so much of the act as relates to the "qualification" of electors and candidates, shall not take effect until 1st September, 1867.

Now bearing in mind the rule that *disqualification* is included in *qualification*, it would seem to follow that the provision with respect to taxes, will not apply to the coming elections in January, 1867.

Section 73, at least, which refers to candidates, is placed under the general head of "Disqualification," and the word "qualified" is used, and if it is a matter of qualification as to candidates, why not so as to electors.

Then as to the right of an elector who has voted in one ward in a city or town, to vote also in another, under section 78, provided he has been rated for the necessary property qualification. Unless the matter of this section can be said to come under the general head of "qualification," the right given by it comes into force on the 1st January next; and this, we think, will be found the true construction of the act. It seems to be rather a substantive declaration of the rights of electors (who are properly qualified otherwise) than a mere incident of qualification. Great difference of opinion exists on the point, and eminent counsel agree to differ about it after mature consideration. It is a question which must, we imagine, very shortly receive a judicial answer.

It is a pity that in an act of so much importance, there are so many points upon which it is impossible to arrive at conclusions, which appear any thing like reasonably certain of being the right ones. Would it not have been better to have postponed the operation of the act altogether for a year, and give time thoroughly to understand it, so far as it can be understood without judicial interpretation, and further time to amend it, for amended and explained it doubtless will be in many particulars, though the parts of it which appear to be especially doubtful, have reference to matters which the simple lapse of a short time will set at rest.

ENGLISH POLICEMEN.

It is rather the habit of people in the "old country" to speak disparagingly of everything connected with colonies and colonists—sometimes making comparisons where comparisons are absurd, and on every occasion glorifying themselves and their institutions at the expense of others, and very generally exposing their ignorance of us and our affairs in doing

so. Our officials come in for their share of what is going; but for stolid and unutterable stupidity we will back a certain class of English officials against the world. We often come across newspaper items which astonish us, but any thing so painful in its consequences, in this connection, as the following, which we take from an English legal periodical, we do not at present remember:

"Had not the facts been given in evidence before a coroner by several witnesses, we could not have believed that such stupidity and inhumanity as the police seemed to have exercised at a recent fire in the Hampstead-road was possible. From the evidence we gather that at the time the fire was first discovered the master of the house was absent, having left his six children in bed in charge of two servants. As soon as the alarm was raised one of the servants ran into the street with the baby, which she handed to a bystander, and essayed to return to save the other children. It will scarcely be credited that notwithstanding, there was, as proved by the witnesses, plenty of time, the police absolutely and persistently refused to allow her to return and save those who had been left behind. Fortunately two other of the children were saved by the man who discovered the fire, but the police refused to re-admit him to save the rest, and as the result three of the children died of suffocation.

"It is quite right that on the occasion of a fire the efforts of the police should be directed to the prevention of robbery and the saving of valuable property from promiscuous plunder, but surely their instructions to that intent do not extend to a disregard of human life. If the police were on this occasion only carrying out their instructions, so much the worse for their superiors; but if they were merely acting on a too rigid interpretation of a general rule, as is possible, the proper limits of their discretion should be more distinctly pointed out, so that when they first take charge of a burning building, before the arrival of engines and escape-ladders, they may satisfy themselves either that all the inmates have been removed, or that all possible efforts to save them have been made and failed. Who is the responsible person in this matter it may be difficult to determine. If the Chief Commissioner be to blame he should lose no time in altering the police regulations, so as to prevent the recurrence of so scandalous a sacrifice as has taken place; if, on the other hand the constables on duty have exceeded or misconceived their order, the coroner's jury will perhaps know how to deal with them."

Whether this was the result of stupidity or inhumanity, or both combined, we cannot say; but we scarcely like to disgrace human nature by supposing it to be the second of the three. Neither can we tell the number of officials who were necessary to preserve the dignity of the law during the celebration of this human sacrifice, but we have a shrewd notion that under like circumstances in this country, including a supply of these vigilant officers (and we consider ourselves sufficiently law abiding), it would have taken a much larger force to have secured the death of these unfortunate children.

SELECTIONS.

INSURANCE AGAINST ACCIDENTS.

People often wonder how it is that Accident Insurance Companies can afford to insure *so many* persons, and for *so large* a sum each as $3,000 or, $5,000 for *so small* an amount as ten or twenty-five cents per day.

For the benefit of such we may say that the law of accidents on railroads is as fixed and constant as the law of mortality.

The statistics of travel on railroads are carefully prepared and easily understood, and it is really surprising that so few accidents occur. But that they do occur, and will inevitably occur, is as certain as that the sun shines.

From the report made to the Auditor General of Pennsylvania by the various Railroad Companies in this Commonwealth, showing the business of the year 1865, it appears that upon eighteen leading lines of railway, the total number of passengers carried was 16,012,310.

The whole number of persons killed was 365, and injured 561.

From these statistics we deduce the fact that *one* passenger is killed out of every 320,246 passengers carried; one passenger is injured out of every 91,547 passengers carried.

Persons that are insured are presumed to be neither more nor less liable to accident than others, and hence we infer that the number of *insured* passengers killed on railroads will be in the same proportion, viz.: one to every 320,246. From 320,246 passengers paying ten cents for an insurance of $3,000 for one day, the Insurance Company will receive $32,024.60, out of which they must pay for one man killed, or $3,000, leaving a margin profit of over $29,000.

On general accident tickets, or twenty-five cents for a risk of $5,000, the Company would receive $80,061.50 on 320,246 passengers, and have $5,000 to pay for one man killed—margin of profit being $65,000.

This, of course, is exclusive of commissions, paid agents, and expenses of doing business.

In the same way, on a ten cent ticket, the weekly compensation is $15 for a period not exceeding twenty-six weeks—in all, $390. On a general accident ticket the compensation is $25 per week, or $600 as a maximum payment.

If, therefore, as is shown above, one out of every 91,547 is disabled by accident, the Company would receive on these, at ten cents each, $9,154 70, and have to pay $390; and, on a twenty-five cent ticket, would receive $22,886 75, to pay $650.

What can be more clear, therefore, than that any such Insurance Company, properly organized and efficiently conducted, must of necessity be successful; and persons investing ten or twenty-five cents, or more, in this way, to secure a risk upon their lives for $3,000 or $5,000 (although the price paid does not seem commensurate with the amount insured), may be perfectly satisfied that the amount will be promptly met and paid.—*U. S. Insurance Gazette.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Habeas Corpus.—It appeared on an application for a *habeas corpus* that the information laid before a police magistrate and warrant to apprehend were for an assault and beating, but it was disputed whether upon the examination and trial this was *all* the charge made, or whether he was not then charged with an aggravated assault; and whether, when he pleaded guilty, he did so to the former or the latter charge; numerous contradictory affidavits were filed. Four several warrants of commitment were in the gaoler's hands, upon one at least of which the prisoner was detained in custody. They were all for the same offence, one having been from time to time substituted for the other.

Quære, whether, or how far, or for what purpose affidavits can be received against a conviction or warrant of commitment valid on the face of it.

A judge cannot enquire into the conclusions at which the magistrate arrived if he had jurisdiction over the offence charged and issued a proper warrant upon that charge, but may enquire into what that charge was, or whether there was a charge at all.

Con. Stat. Can., cap. 9, probably applies only to common assaults, &c.

A charge of assaulting and beating is not a *charge* of aggravated assault, and a complaint of the former will not sustain a conviction of the latter, though, when the party is before the magistrate, the charge of aggravated assault may be made in writing and followed by a conviction therefor.

Under doubts as to the law, and on the disputed facts, the prisoner was admitted to bail, pending the application for his discharge, which was to be renewed in Term.—*In the matter of Hugh McKinnon. a Prisoner confined in close custody in the Common Gaol of the County of Wentworth.*—2 U. C. L. J. N.S.

Insolvent Act of 1864.—A disagreement having arisen between the majority in number and the majority in value of the creditors of an insolvent, a motion to adjourn, under sec. 11, sub-sec. 2 of the Insolvent Act of 1864, was opposed by the latter; whereupon application was made to the judge of the County Court to dispose of the matter, who ordered that the majority in number might proceed in Chancery, in the assignee's name, against the majority in value.

Semble, that neither party could legally oppose the adjournment, if it was insisted upon by the other, as it would have the effect of empowering the objecting party to prevent the judge from adjudicating between them, as intended by the act; but that such adjournment should have followed as of course, and upon a similar division of opinion, the judge should have decided between the two sets of resolutions, and might then have directed the assignee to proceed in Chancery, or otherwise contest the claim of those creditors whose debt was disputed. But

Held, that the judge had power to make the order in question, and it was not, therefore, advisable to interfere with it.

The assignee has the sole right to select his own professional adviser, and he cannot be made to change him, except upon reasonable ground.—*In the matter of James Thomas Lamb, an Insolvent*, 17 U. C. C. P. 173.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Colony—Independent Legislature—Bishop—Coercive Jurisdiction. — The Colonial Churches, professing the doctrines and discipline of the Church of England, are not merely in communion with the Church of England, but are part thereof, and the bishops of such Colonial Churches have no independent coercive jurisdiction, but can only enforce their orders by means of the civil tribunals of the colonies.

Colonial bishops appointed by letters patent of the Sovereign, though their authority is limited as above, are yet bishops in every sense of the term.

Position of the colonial Church, and *status* of the colonial bishops, considered.

Specific performance of a contract to pay a salary to a "bishop" in the colonies enforced,

though the contributors to the salary may have intended to support a bishop with coercive jurisdiction over his clergy, and subject to coercive jurisdiction of his metropolitan.—*Colenso* v. *Gladstone*, 2 U. C. L. J. N.S. 332.

Bills and Notes—Waiver of Demand and Protest.—A waiver of presentment and demand of payment of a negotiable note would imply and include a waiver of protest and of notice of non-payment, but a waiver of notice only would not be a waiver of demand. A "waiver of protest" would imply a waiver of presentment, demand, and notice. The waiver is a matter between the holder of the note and the indorser to be charged, and the agreement must be made between them.—*Jaccard* v. *Anderson*, 37 Mo. (U. S.)

Usury.—The mere fact that a promissory note, payable in the city of New York, is made and discounted in the country, and a portion or the whole of the proceeds paid to the borrower, in a draft upon the city, at the usual price or charge for city drafts, does not render such note usurious.

Perhaps the note might be held to be usurious if both the place of payment thereof, and the purchase of the draft, were made the condition of the loan. But where nothing of that kind is shown, and for aught that appears in the finding of facts, the borrower desired a draft on the city for his own convenience, if the fact was otherwise it is for the defendant alleging the usury to prove it.—*The Union Bank of Rochester* v. *Gregory*, 46 Barb. (U. S.)

Deed—Effect of its Destruction.—When a deed has been delivered, so as to divest the grantor of the title and vest it in the grantee, the subsequent destruction of it by the parties will not change the title back to the grantor, and reinvest him with it.—*Fonda* v. *Sage et al.*, 46 Barb. (U. S.)

Insurance—Cause of Loss.—A policy of insurance upon a building is an insurance upon the building as such, and not upon the materials of which it is composed. If from any defect of construction or overloading, the building fall into ruins, and subsequently the materials take fire, the insurer is not liable for the loss.—*Nave et al.* v. *Home Mutual Insurance Co.*, 37 Mo. (U. S.)

Railroad Companies—Power to exclude improper Persons from the Cars.—The conductor of a street railway car may exclude or expel therefrom a person who, by reason of intoxication or otherwise, is in such a condition as to render it reasonably certain that by act or speech he will become offensive or annoying to other passengers therein, although he has not committed any act of offence or annoyance.—*Vinton* v. *Middlesex Railroad Co.*, 11 Allen. (U. S.)

Telegraph Company—Contracts Limiting Liability.—Telegraph companies, whether regarded as common carriers or bailees, may specially limit their liabilities, subject to the qualification that they will not be protected from the consequences of gross carelessness. A telegraph company may reasonably require that, for the purpose of avoiding errors, the message shall be repeated, or that the company shall not be liable for any error in the transmission of the message.—*Wann* v. *Western Union Telegraph Co.*, 37 Mo. (U. S.)

Tender.—To make a tender of payment of money valid, as a general rule, the money must be actually produced and proffered unless the creditor expressly or impliedly waive its production. The creditor may not only waive the production of the money, but the actual possession of it in hand by the debtor. Nor is the debtor bound to count out the money if he has it and offers it, when the creditor refuses to receive it. A tender puts a stop to accruing damages or interest for delay in payment, and gives the defendant costs when sued for the debt.—*Berthold* v. *Reyburn at al.*, 37 Mo. (U. S.)

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

In the Matter of the Award between John Cameron and Thomas Kerr.

Fence viewers—Award.

This court has no authority to set aside an award of fence viewers made under Consol. Stat. U. C. ch. 57.

[Q. B., T. T., 30 Vic., 1866.]

Robert A. Harrison applied for a rule, calling upon John Cameron to shew cause why the award of John Menzies, John Ward, and Peter Fisher, fence-viewers in the township of Bathurst, in the matter of dispute between him and Thomas Kerr, should not be set aside with costs, because—

1. The fence-viewers had no power to make the award so as to bind Kerr, or his rights or interests.
2. The award does not direct Cameron to contribute to the expense of making the drains already upon the land of Kerr before giving to Cameron a right to use the same.
3. That the award permits Cameron to put a pipe into Kerr's land, which will have the effect of destroying the under draining of Kerr's land and render it unfit for cultivation.

4. That the fence-viewers had no right to permit Cameron to do what the award sanctions, and declare that he should not be considered a trespasser.

5. That Menzies, one of the fence-viewers, was, by reason of his interest in the subject matter of the award, disqualified.

The award was produced under the hands of the three fence-viewers, dated 22nd May, 1866. It recited that they had been called upon to examine and determine upon a certain ditch or water-course running across the east half of No. 18 and west half of No. 19, in the sixth concession of Bathurst, owned respectively by John Cameron and Thomas Kerr, and that they had examined the ditch in the presence of the parties; and awarded, that Cameron should be allowed to put a three-inch pipe into the open drain sunk by Kerr, and that Cameron should be allowed to open the drain on Kerr's premises, without doing any unnecessary damage, and that he should not be deemed guilty of trespass for so doing. It stated that the fence-viewers in making the award had had due regard to the interest each of the parties had in the opening of the drain, and further awarded that Kerr should pay three dollars "in costs of attendance."

An affidavit of Kerr's was filed to sustain the objections taken in the rule, and to shew the unfairness of the award.

Cur. Ad. Vult

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

Before we consider whether on the merits set out we should grant a rule, we must decide whether we have any jurisdiction.

Under the Consol. Stat. U. C. ch. 57, sec. 8, three fence-viewers of any municipality, or a majority of them, may decide all disputes (among other things) respecting the opening, making or paying for ditches and water-courses under the act.

Sec. 11 gives them authority to divide or apportion the ditch or water-course among the several parties, "having due regard to the interests of each in the opening thereof, and shall fully determine the matter in dispute;" and by

Sec. 9, "Every determination or award of fence-viewers shall be in writing, * * * and such determination or award shall be binding on the parties thereto."

Sec. 13 provides for a new award when by reason of a material change of circumstances in respect to the improvement and occupation of adjacent lots, an award previously made ceases, in the opinion of either of the parties, to be equitable between them.

Sec. 16 points out what proceedings shall be taken to ascertain the amount payable by any person who under the authority of the act makes, opens, or keeps open any ditch or water-cours which another person should have done, and to enforce payment. It is to be done by three fence-viewers; and sub-sec. 9 says such determination shall be final, and it is to be reported to the justice who required the fence-viewers to settle such questions; and that justice (sub-sec. 10) is to return the determination so reported to him to the clerk of the Division Court having jurisdiction over that part of the municipality; and (sub-sec. 11) after forty days from the determination the clerk of the Division Court shall issue execution against the goods of the defendant, in the same manner as if the party in whose favor the determination was made had recovered judgment in the Division Court for the sum awarded by the fence-viewers, and costs.

The whole frame of this act convinces us that the legislature intended to provide for the summary and final determination of the matters comprised within its scope, and erected a jurisdiction whose award and determination made within and pursuant to the provisions thereof was intended to be conclusive. We do not consider that the use of the term "award" introduces the law in respect to arbitrations as applicable to the proceedings of the fence-viewers. There award is, as the act generally expresses it, their determination on the subject matter, and has its effect as a determination by the words of the act, making it binding on the parties (sec 9), or by being declared final (sec. 16, sub-sec. 9); and there is only one provision which interferes with the finality of any award or determination, which is to be found in sec. 13.

It is unnecessary to enquire how far the finality of the determination is subject to impeachment or denial, either in proceedings to enforce it, or where it is set up as a justification for acts which otherwise would be an interference with the rights of another. This application is for the summary interference of the court. The act itself gives us no jurisdiction. There is no submission which can be made a rule of court, nor any agreement out of court which would give us jurisdiction under the statute of William III., and the motion is made on the assumption that this court has, without any such previous proceeding, authority over the subject matter. We are of opinion that we have no such authority, and that the rule should be refused.

Rule refused.

Neill v. McMillan.

Action against J. P.—Notice of action—Proof of quashing conviction.

Where a magistrate acts clearly in excess of or without jurisdiction, he is nevertheless entitled to notice of action, unless the *bona fides* of his conduct be disproved, but the plaintiff may require that question to be left to the jury, and if they find that he did not honestly believe he was acting as a magistrate he has no claim to notice.

A notice describing the plaintiff's place of abode as "of the township of Garafraxa, in the county of Wellington, laborer," without giving the lot or concession, *Held*, sufficient.

To prove the quashing of a conviction on appeal to the Quarter Sessions, it is sufficient to prove an order of that court directing that the conviction shall be quashed, the conviction itself being in evidence, and the connection between it and the order shewn. It is not necessary to make up a formal record, for the Statute Consol. Stat. U. C. ch. 114, enables the Court of Q. S. to dispose of the conviction by order.

[Q. B., T. T., 1866.]

The declaration contained three counts.

1. For assault and false imprisonment

2. That defendant being a J. P., falsely and maliciously, and without reasonable and probable cause, issued a warrant, by virtue of which he caused the plaintiff to be arrested and imprisoned.

3. That defendant being a J. P.; having caused the plaintiff to be brought in custody before him, as mentioned in the last count, did as such justice falsely and maliciously, and without reasonable or probable cause, convict the plaintiff of a charge

then and there preferred against him, after the plaintiff had been legally acquitted of the same by a bench of magistrates then and there having jurisdiction in the premises, and afterwards falsely and maliciously, and without reasonable or probable cause, did as such justice issue his warrant, and caused the plaintiff to be arrested and imprisoned in the common gaol for twenty days.

Plea—Not guilty, by statute. Consol. Stat. U.C. ch. 126, secs. 1, 9, 10 & 11.

The case was tried at Guelph, in March, 1866, before *Richards*. C. J.

The notice of action was produced, and service of it was admitted. It was headed "To John Alexander McMillan, of the village of Fergus, in the county of Wellington, one of Her Majesty's justices of the peace in and for the said county of Wellington," and was signed "James Fletcher Cross, of Prince of Wales' Block, St. Andrew's Street in the village of Fergus, in the county of Wellington, attorney for the said James Neill, of the township of Garafraxa, in the county of Wellington, laborer."

Evidence was given that one James G Allan had, on the 19th of June, 1865, made a complaint before defendant against the plaintiff, for having, while under hire to him as a servant for a term, ending on the 1st of January, 1867, on the 17th June left his employment and refused to return. On this the defendant issued a warrant to apprehend the plaintiff and bring him before defendant or some one or more of the justices of the peace for the said county. On this warrant the plaintiff was arrested on the following morning, and was brought before the defendant and three other justices of the peace, namely, Messrs. Cattanach, Cull, and Munger. Allan and a person named Smith gave evidence, the substance of which was written down by defendant. His written statements were produced. After hearing the evidence the justices consulted together, and the defendant further wrote as follows; "Ordered that the case be dismissed with costs; and on the vote being taken there were for the dismissal of the case

"James Cattanach, J P., moves,
"George Munger, J. P., seconds,
"Henry Cull, J P., voting for,
"John A. McMillan, J. J., dissenting."

The three former justices were called as witnesses, and all agreed that this was a true statement of what occurred. They also stated in effect that after this was so entered the defendant said he thought they had come to a wrong decision, and that if a similar case were brought under his consideration, and there were twenty magistrates sitting, he would take the matter in his own hands, and act upon his own opinion independent of their judgment. One or two of the justices, said to him. "If it is your intention to do so in future, you can do so at present," and defendant asked if they would give him their consent in writing to dispose of the case as he thought fit. They refused, one of them saying they had already disposed of it The room had been cleared of all persons but the justices when they began to consult, and while this discussion was going on defendant was still waiting. The other persons were then called in, and defendant read over the decision which had been come to by the three, and then read further, as follows: "But after the matter had been further talked over, James Cattanach, J. P., and Henry Cull, J. P., gave their consent to allow John A. McMillan, the presiding magistrate in the case, liberty to decide in accordance with his own judgment in the matter *Allan in re Neill;* and it is thereby ordered that the defendant pay a fine of one dollar and the costs, amounting to six dollars, forthwith, or in default to be imprisoned in the common gaol at Guelph for the space of twenty days, and that he, the said James Neill, is still a servant of the complainant James Allan."

"(Signed) JOHN A. MCMILLAN, J. P."

The others on hearing this objected, saying that was not their decison: that the decision was that the case was dismissed. Defendant replied, "Too late," that the court was dismissed; and he picked up the minute book and the statutes, and left the room.

The constable said he had the plaintiff in charge on the first warrant until he got a second, dated the 20th of June, on which he arrested the plaintiff and took him to gaol. This second warrant was issued by defendant under his hand and seal. Defendant told the constable as he left the room after reading the decision that he gave the plaintiff three hours to pay the money, and the constable was to keep him in charge.

It was proved that Garafraxa is one of the largest townships from east to west of any in Canada, being about twenty miles long and contains several villages.

It further appeared that on the 22nd of June the defendant was served with notice that the plaintiff appealed against this conviction, and an order under the seal of the Court of Quarter Sessions, and signed by the clerk of the peace, was produced. It was as follows:

"In the Court of General Quarter Sessions of the Peace for the County of Wellington. On the twelfth day of September, in the year A.D., 1865.

"James Gibbie Allan against James Neill. On the case being called, and notice of appeal proved and heard, it was ordered by the court that the conviction of James Neill be quashed, with costs.

"[Seal] (Signed) THOMAS SAUNDERS,
"*Clerk of the Peace.*

"Office of the Clerk of the Peace, Guelph, March 19, 1866.

The clerk of the peace also produced the minute book of entry of proceedings at the Court of Quarter Sessions on the 12th of September, 1865. The following is a copy:

"In the Court of Quarter Sessions for the county of Wellington, At a general Court of Quarter Sessions of the Peace for the county of Wellington, held at Guelph on Tuesday the 12th day of September, in the year of our Lord one thousand eight hundred and sixty-five, pursuant to statute.

"Present, Archibald McDonald, Esq., County Court Judge, chairman, James Hough, David Allan, John Beattie, James Loughrem, Esquires, justices of the peace for the county of Wellington.

"The following appeal was entered: James Gibbie Allan against James Neill, Master and Servants Act. James Neill appellant.

"The service of notice of appeal was admitted. The order of court was, that the conviction of James Neill be quashed with costs.

"THOMAS SAUNDERS, *Clerk of the Peace.*"

Mr. Saunders stated there was no jury empanelled. There was no trial on the merits.

The defendants counsel took several objections, which were afterwards renewed in this court

For the defence, Allan, the employer of the plaintiff, was called, and gave evidence, to sustain the conviction as actually made by the defendant, showing that Neill was under an agreement to serve him, and left against the will of Allan. He further said, that what made him force plaintiff was that plaintiff said Allan owed him $23, and Allan said he did not owe him; and that's what made Allan take plaintiff up Allan swore he believed it was defendant's doing the warrant was issued in the first instance.

The learned judge told the jury that if they were satisfied that the defendant issued the warrant of commitment in good faith, intending to act as a magistrate, they should find in his favor on the first and second counts. If not satisfied that he was acting in good faith, to find for the plaintiff on the first count and for defendant on the second, and in that view the learned judge inclined to think they might also find for the plaintiff on the third count. As to this count, he told the jury that if the defendant issued the warrant of commitment after the other magistrates in his presence had declared that they had dismissed the complaint with costs, then he issued it without reasonable or probable cause, and they should find for the plaintiff if they thought the defendant acted maliciously. If on the third count they thought the plaintiff entitled to a verdict, they should say whether Neill committed the offence charged against him, and if so they might, according to the statute, limit the verdict to three cents.

The defendants counsel excepted to the charge.

The jury found for the plaintiff, damages $100, and said they did not think the defendant honestly believed he was acting as a magistrate at the time. The plaintiff elected to take the verdict on the first count, and the verdict was so entered for him, and for the defendant on the second and third counts.

In Easter Term *M. C. Cameron*, Q. C., obtained a rule *nisi* for a nonsuit, or for a new trial, the verdict being contrary to law and evidence, and for misdirection, and the reception of improper evidence; the misdirection being in leaving it to the jury to say whether the defendant believed whether he was acting as a justice of the peace, when the evidence shewed, and the learned judge should have ruled, that he was so acting, and the plaintiff having failed to prove malice a nonsuit or verdict for the defendant should have been directed; and in ruling that the notice of action was sufficient, and that there was legal evidence of the quashing of the conviction under which the plaintiff was imprisoned; and in telling the jury that the plaintiff having been acquitted by three magistrates, the defendant had no right to convict the plaintiff, although no record of such acquittal was made; and in not telling the jury that no legal evidence of the acquittal against the record of conviction was given, and that the conviction was legal; and the reception of improper evidence being in admitting evidence of the minute book of the Quarter Sessions to shew the quashing of the conviction, without any formal record of the judgment or decision having been made up, and no legal or formal record of such proceedings being produced.

In this term *Robert A. Harrison* shewed cause, citing *Wedge* v. *Berkeley* 6 A. & E. 663; *Osborn* v. *Gough*, 3 B. & P. 551; *James* v. *Saunders*, 10 Bing. 429; *McCance* v. *Bateman*, 12 C. P. 469 *Moran* v. *Palmer*, 13 C. P. 528; *Helliwell* v. *Taylor*, 16 U. C. Q. B. 279; *Connors* v. *Darling*, 23 U. C. Q. B. 541; *Rex* v. *Hains*, Comb. 337; Tay. Ev. 2nd ed., secs. 1390, 1391, 1408, Tidd. Prac. 28.

M. C. Cameron, Q. C., shewed cause, citing *Rex* v. *Ward*, 6 C. & P. 366; *Rex* v. *Smith*, 8 B. & C. 341; *Rex* v. *Bellamy*, Ry. & Moo. 172; *Prestidge* v. *Woodman*, 1 B. & C. 12; *Hazeldine* v. *Grove*, 3 Q. B. 997; *Kirby* v. *Simpson*, 10 Ex. 358; *Weller* v. *Toke*, 9 East, 364.

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

The first question that arises regards the notice, whether under the facts appearing the defendant was entitled to it, and if so was the notice served defective.

When the act of a justice of the peace is either clearly in excess of jurisdiction or an act not within his jurisdiction, he will nevertheless be entitled to notice, unless it be established to the satisfaction of a jury that he did not *bonâ fide* intend to act, or did not believe he was acting, within his jurisdiction. He may act professedly as a justice, using the forms of proceeding in that character, and yet do that which he is fully conscious he has neither power or authority to do, but which under the influence of sinister motives he is resolved to do.

Still, at the trial of an action brought for such an act he may set up a claim to notice and if it has not been proved may ask the judge to nonsuit. We apprehend the judge will not assume that the defendant acted *bonâ fide*, and in a case coming within the letter of the second section of the act for the protection of justices (Consol. Stat. U. C. ch. 126) he would, as a matter of law, rule that the defendant was entitled to notice; but the plaintiff has the right to require that the question of *bonâ fides* should be submitted to the jury, and in *Wedge* v. *Berkeley*, 6 A. & E. 663, Lord Denman, C J., said that if the jury found against the defendant on that point, he should say notice would be unnecessary. In this case that question has been submitted to the jury, and they have answered it adversely to the defendant.

In *Hazeldine* v. *Grove*, 3 Q B. 997, the plaintiff did not ask to have this question submitted to the jury, and in *Kirby* v. *Simpson*, 10 Ex. 358, the act was held to come within the first section of the statute, and then he is entitled to notice; and in *Prestidge* v. *Woodman*, 1 B. & C. 12, where the justice acted upon a subject matter of complaint over which he had no authority, but which arose out of his jurisdiction, he was also entitled to notice. But it is difficult to see upon what ground of reason or justice a magistrate who does a wrongful act, and who (as this jury have found) did not honestly believe he was acting at the time as a magistrate, can claim the protection which the legislature intended for justices of the peace acting in the execution of their duty. Although there are dicta in some cases, which are not wholly consistent with our conclusion, we have, on full consideration, adopted the opinion expressed by Lord Denman, that

after the finding of the jury this defendant had no claim to notice of action.

But we have also considered the objection to the notice given, namely, that the discription of the place of abode of the plaintiff, as endorsed thereon, is not sufficiently particular. He is described as "of the township of Garafraxa, in the county of Wellington, laborer."

The nearest case to the present which we have seen, is that of *Osborn* v. *Gough* 3 B. & P. 551; where the description of the place of abode was A. B., "of Birmingham," and the court held it sufficient. We fully appreciate the distinction between the compactness of a town and the extended surface of a triangular township, perhaps twenty miles long, and on the side opposite the apex as much as twelve, and within which there are three or more villages, and yet we think it probable that Birmingham contained more houses, and a larger population, among which it would be as difficult to find an individual laborer as in Garafraxa; but this consideration does not in our mind outweigh the observation of Lord Alvanley, that if the place endorsed on the notice be the true place of the (plaintiff's abode, it lies on the defendant to shew that such description has not afforded him the opportunity of taking advantage of the act, *i.e.*, by tendering amends. It is urged that the lot and concession should be added to shew the place of abode, but a mere laborer might, especially in harvest time, be changing from one lot to another, and when it is remembered that the attorney's place of abode or business is minutely given, and that the amends may be made to him, and that under sec. 50 of the Common Law Procedure Act of 1856, further information as to the plaintiff could be enforced from his attorney, there appears no good reason for so rigid a construction of the act as is contended for. We have no wish, and no right, to narrow the protection given by the statute in any particular, but its general provisions are so wide that we are not called upon to extend them by construing the words "place" of abode, we think we are taking the right course in holding that if there be a literal compliance, coupled, as in this case, with that which shews that the defendant could not have been prejudiced as to the opportunity of tendering amends, it is enough.

Then as to the evidence of the quashing of the conviction, ch. 114 of the Consol. Stat. U. C. exacts sec 1, that an appeal shall lie in certain cases of summary convictions before justices to the Court of Quarter Sessions, "and such court shall at such sessions hear and determine the matter of such appeal, and make such order therein, with or without costs to either party, as to the court seems meet." Chapter 75 gives an appeal to the Quarter Sessions in a case such as was before the justices in this case.

It sufficiently appears that the conviction of the plaintiff on which the defendant relies, was returned to the Quarter Sessions. The clerk of the peace produced in evidence at the trial the information, conviction, and notice of appeal with affidavit of service. It was his duty to file the justice's return among the records of his office, and, as I have expressed my opinion in another case, when so filed, the conviction became one of such records.* The order above set out was produced under the seal of the court, as well as the original minute book. There were, as the clerk of the peace swore, no other documents filed in his office relating to this matter. The defendant relied on the conviction as his protection, because it was not proved to be quashed.

The case of *Regina* v. *Yeoveley*, 8 A. & E. 806; appears to us to have a material bearing on this question. There the Court of Quarter Sessions had on appeal quashed an order of removal subject to the opinion of the Queen's Bench, and to prove that an order of removal was discharged on appeal at a previous sessions many years before, the original sessions book containing those proceedings was produced. No other record but that book was kept. The minutes of each session were headed with an entry containing the style and date of the sessions and the names of the justices in the usual form of a caption, and it contained a statement of the subject of the appeal and the order made on hearing it, and at the end of the proceedings of the session it was signed, "By the Court, J. C., Clerk of the Peace." The Court of Queen's Bench held this was proper evidence of that former order of sessions.

The evidence in our case was not so decisive in one particular, namely, that no other record was kept of the proceedings except the minute book, though there was no suggestion or pretence that there was any other; nor was there evidence of any practice in the Court of Quarter Sessions of receiving that book as evidence. And there is also a well settled distinction between proving the record of a different court from that in which the evidence is offered and a record of the same court. A court will look at its own minutes when sitting under the same commission, when another court would require more formal proof, and the plaintiff in this case has to prove the act or order of the Quarter Sessions.

It might be going to far to hold that the minute book of the Quarter Sessions produced at this trial was sufficient proof *per se* of the quashing this conviction, for it was not proved that no other or more formal record was kept although this entry had an apparently proper caption, and was signed by the clerk of the peace. A different rule would no doubt prevail as to indictments, verdicts, and judgments, in criminal matters at the Quarter Sessions, but this is a particular statutory jurisdiction conferred, and not referred to in the commission of the peace, nor existing at common law. We by no means wish to be understood as holding it to be sufficient, especially if the further proof were added that in practice no other record is kept or made up; but we do not feel compelled to rely upon it, for the statute authorizes the Court of Quarter Sessions to dispose of the appeal "by such order as to the court shall seem meet." There is independent proof of the conviction and of the appeal; the decision on the appeal is all that remains to be proved; and an order to the form of which as an order of court no exception has been taken, which is sealed with its seal and signed by its clerk, is produced, by which it is ordered that the conviction of the plaintiff be quashed with costs. We think this is sufficient.

The cases relied on for the defendant on this point are answered by Lord Denman in the judgment referred to, and *Williams*, J., said, "No instance has been adduced in which it has been

* See *Graham* v. *McArthur*, 25 U. C. Q. B. 484, note *a*.

held necessary to make up a formal record of the judgment of Quarter Sessions on an appeal. It is said that, if such an adjudication might be proved as it was here, a judgment of transportation might be proved in the same manner; but the indictment with a minute endorsed upon it would be no proof of a valid judgment, for reasons which do not apply to this case. And in the case of an indictment for perjury," (referring to *Rex* v. *Ward*, 6 C. & P. 366, which was cited by Mr. Cameron,) "the possibility of the offence having been committed would depend upon the court having had jurisdiction; consequently there must, in that instance, be such a record as would shew jurisdiction. But here the whole question was as to the order made at sessions."

In modern times the legislature have relaxed the strictness of the rules of evidence as to proof of judgments, convictions, &c. A certificate containing the substance and effect only of the indictment and conviction for a previous felony, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same, although the consequence to the offender would be a much severer punishment.—(Consol Stat. C., ch. 99, sec. 73.)

We do not think we should require a greater amount of proof than that of an order of sessions directing that the conviction in question should be quashed, the conviction itself being also in evidence, and the connection between it and the order being shewn, and in fact not disputed.

We think this rule should be discharged.

Rule discharged.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, *Esq., Barrister-at-Law.*)

The Queen v. Scott.

Conviction for insolent behaviour to magistrate — Several convictions — How periods of imprisonment to run — Uncertainty.

A prisoner was convicted three several times the same day for insolent conduct to a magistrate on the bench, and detained in prison under three several warrants, all dated the same day, the periods of imprisonment in the two last commencing from the expiration of the one preceding it, but the first to be computed "from the time of his arrival and delivery [by the bailiff] into your [the gaoler's] custody thenceforward."

Held, that the magistrate had a right to convict and to sentence for continuing periods; but that the periods of imprisonment, depending on the will of the officer, who was to deliver him to the gaoler, were uncertain, and prisoner was therefore entitled to his discharge.

[Chambers, 15th December, 1865.]

A writ of *habeas corpus* was issued to the keeper of the common gaol of the County of Waterloo, commanding him to have before the presiding judge in chambers the body of James Scott, detained, &c.

The gaoler accordingly returned that the prisoner was in custody under three several warrants of commitment, which were annexed to the return, and are as follows:

(1) "To the keeper of the common gaol, &c. Receive into your custody the body of James Scott herewith sent you by me, Alfred Boomer, Esquire, one of Her Majesty's Justices of the Peace in and for the said county, and convicted by me the said Justice with contempt and indecent behaviour, by insulting and obstructing me the said Justice in the due execution of my office as such Justice as aforesaid, and for saying in the presence and hearing of me the said Justice, whilst on the bench, that I the said Justice was a 'rascal and a dirty mean dog,' and using other words, and making efforts to prevent the due administration of justice; and him the said James Scott detain in your custody in the gaol aforesaid for the space of ten days, to be computed from the time of his arrival and delivery into your custody thenceforward, for his contempt aforesaid.

"Given under my hand and seal, at the village of Linwood, in the county aforesaid, the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and sixty-five.

(Signed) "A. Boomer, J P." [L S.]

(2) "To the keeper of the common gaol, &c. Receive into your custody the body of James Scott, herewith sent you by me, Alfred Boomer, Esquire, one of Her Majesty's Justices of the Peace in and for the said county, and convicted by me, the said Justice, with contempt and indecent behaviour, by insulting and obstructing me the said Justice in the due execution of my office as such justice as aforesaid, and for saying, in the presence and hearing of me the said justice, whilst on the bench, and after being duly convicted by me the said justice of a former contempt, that I the said justice was 'a damned lousy scoundrel,' and similar opprobrious epithets, as well as endeavouring to prevent the due administration of justice, and him the said James Scott detain in your custody in the gaol aforesaid for the space of ten days, to be computed from the time of the expiration of a former warrant of commitment for a similar offence, and numbered one (1), thenceforward for such his contempt."

(*Same date.*)

(3) "To the keeper of the common gaol, &c. Receive into your custody the body of James Scott, herewith sent you by me, Alfred Boomer, Esquire, one of Her Majesty's Justices of the Peace in and for the said county, and convicted by me, the said justice, with contempt and indecent behaviour, by insulting and obstructing me the said justice in the due execution of my office as such justice as aforesaid, and for saying in the presence and hearing of me the said justice, whilst on the bench, and after being twice duly convicted by me the said justice of similar contempts, that I the said justice was 'a confounded dog,' and similar opprobrious epithets, as well as endeavouring to prevent the due administration of justice, and him the said Jame Scott detain in your custody in the gaol aforesaid for the space of ten days, to be computed from the time of the expiration of a former warrant of commitment for a similar contempt, and numbered two (2), thenceforward for such his contempt."

(*Same date.*)

The discharge of the prisoner was asked for, on the grounds that the magistrate had no authority to commit the prisoner for the offences charged, or to make the two last periods

of imprisonment commence at the termination of the one preceding it, and that the time for which he was to be imprisoned was uncertain, and that therefore the conviction was bad.

J. Wilson, J.—There is no doubt the magistrate had power to commit for contempt under the circumstances stated in this commitment, and if the same violent conduct was continued he had the right to commit again and again as he did; so too it was lawful for him in his sentences, upon his second and third adjudications, to make the period of imprisonment for each of them begin at the termination of the former imprisonment. —4 Burr. 2577-8; 1 Leach, 586; Chitty Cr. Law, 718. By a well-known rule of law, every judicial act is supposed to happen at the first instant of the day it takes place: it follows that the imprisonment of this man would have been deemed to have commenced at the beginning of the day on which he was adjudged to be imprisoned, and he would have been entitled to his discharge, not at the same hour of the day he was brought to prison, but on the first opening of the prison on the day after his imprisonment expired. — 9 Exch. 628-62. By another rule of law, the period of his imprisonment must be certain, not depending upon the will of the officer.—1 Chitty Cr. Law, 701; 3 Burr. 1962. Here he has been adjudged to be imprisoned ten days on the first judgment for contempt, from the hour at which the constable delivers him to the keeper of the gaol, and each of the two succeeding periods of ten days are to commence from the hour of the day at which the former period of imprisonment expires. Now when the constable could or might have taken him to prison is wholly contingent upon his action as regards the imprisonment on the first conviction, which is thereby made uncertain; and as the other periods of imprisonment depend upon the same contingency, they are also uncertain. The prisoner is, therefore, entitled to his discharge for want of certainty in the periods of imprisonment imposed upon him for these several offences.

He is accordingly discharged from custody.

CORRESPONDENCE.

Bailiffs and their Fees.

To the Editors of the Local Courts' Gazette.

Sir,—I beg respectfully to offer you a few observations on the subject of Division Court officers.

As to your remarks on "Bailiffs and their fees," I must say I sympathise much more with you than with your correspondent, "A Subscriber," in the October number; although my impression is, that whatever might be done with regard to clerks being paid by salary, it could not well be got to work with respect to Bailiffs and their remuneration. As to the fees now allowed, the only change I think they are entitled to is an allowance of one dollar for attending on court day; such amount to be proportioned among the defended cases heard; and such proportion taxed as costs in each of such suits—five per cent. on goods actually sold under execution, when amounting to forty dollars or under; and two and a half, as at present, on all sums above this amount; and lastly, I dare say it would only be fair to allow 25 or 50 cents on executions returned *nulla bona;* but not to be allowed on any execution returned for renewal, if money, in part or whole afterwards be made.

Of course I quite agree with you that the matter of remuneration for keep of goods under seizure till day of sale should be made sure, and that beyond a doubt.

Bailiffs do not require to be and generally are not of the same class as clerks; still they are entitled to ample recompense, for their task is not very pleasant. But I think you will agree with me that the clerk, who ought to be and generally is a man of some education, and in fact is supposed to occupy the superior office, should be the better paid of the two. The bailiff is generally a man who owns a farm and is accustomed to manual labour, and, although obliged to keep a horse for the performance of his duties, still, in such a case, both he and his horse can and do work during the greater part of the year on said farm, and he is consequently only obliged to devote a portion of his time to the duties of his office; while the clerk has to work with his head, and be constantly in attendance. And although some may dispute the point, I maintain that the responsibility of the clerk is much greater than that of the bailiff, for he need never have more than a comparatively small amount of money on hand at a time, and, in any case of dispute, can fall back at once on the power of interpleading, if the plaintiff insist on seizure; while the clerk, in places where there is no bank, has to run the risk of keeping from one hundred to five hundred dollars. It may here be said that he has the use of it. I say no; he has no right to touch one cent of it; and so you will see that it is the clerk and not the bailiff who needs an addition to his income. In confirmation of which I may state that during the year 1865, my fees were $510 85; while the fees of my bailiff, a man of experience, and one who is not fond of selling, and still I believe gives as much satisfaction to both plaintiffs and defendants as any one in Canada, were $634 64, from a certain period of 1864 to a certain

period of 1865, embracing the business of twelve months; and I presume that the Division Court of which I am clerk may be taken as a fair sample of an average country court, many being larger and some smaller. It is well to bear in mind that the fees of either clerk or bailiff for the past year will be about a hundred dollars less.

With regard to remuneration of clerks, if still to be paid by fees, I do not think there is on the whole much to complain of; for the fees in each case are nearly as high as they need be, only the executions should be 30, 40, 50, instead of 25, 30, 40, as now; and a small commission ought to be allowed for receiving and paying out money, say one to two per cent. on sums over or under fifty dollars respectively; and an allowance should be made for books, forms, stationery, and use of office, which could very well be done out of fee fund, now that the fees are raised from an average of about 50 cents to that of about 60 cents, by the introduction of stamps. It is very unfair that Division Court clerks should be treated as they are and have been, notwithstanding the opinion of learned judges, given from time to time in their favour. I ask you, Mr. Editor, is it common honesty that I should be called to pay out some 14 dollars when I want a new procedure book; and yet if I resign or die, the government says, that is our property. Neither is it right that clerks should be held responsible for all the money they handle, irrespective of mistakes, fire or robbery, without some allowance. Every justice of the peace, whether he can sign his name or not, is furnished by government with a copy of the statutes, as issued from time to time; while the poor clerks, if they desire to know any thing of the law, must at their own cost provide themselves.

I remain, Sir, yours,

OBSERVER.

[We commend the above very sensible remarks to all whom they may concern. It is very unfair that clerks should be at the expense of these office books. The statutes would, as a general rule, be of more extended usefulness if to be found in the office of Division Court clerks, than in the houses (for but few of them have offices of public or general resort) of most justices of the peace.—EDS. L. C. G.]

Further comments on vexed questions in Division Court practice—Interpleader and judgment summons suits.

TO THE EDITORS OF THE LOCAL COURTS GAZETTE.

GENTLEMEN,—In my letter published in your last issue on vexed questions in the Division Courts, allusion was made to several debateable questions. I had hoped that the opinion of your *Journal* would have been given on them, and as I have alluded to these questions, I will here shortly give my opinion on them.

As to the first, that is to say, what is the true legal meaning of the words, "nearest Division?" I think it should be construed to mean the "nearest" as the crow flies. It is true in some instances that roads not being opened, or lakes and rivers intervening, may sometimes render the distance travelled greater than if the person had been sued in his own county, yet *a uniform rule* is always best. If it were not so endless disputes might arise as to the practicability of going one way or the other. Suppose an unopened road to intervene, one man might say he could travel it on foot or on horseback, whilst another would say he could not travel it in a buggy or carriage. Suppose a river or small lake to intervene, like disputes might arise as to practicable ferries or bridges. The word "nearest" has a well known meaning that cannot be misunderstood. I think there really ought to be no reason why if a judge can entertain a case in "the nearest division," although it arose and the parties live out of his county, he should not have power to issue interpleader summonses, or judgment summonses, a replevin writ, or an attachment, in order fully to settle the case in question. Judge Hughes, of Elgin, thinks it not safe to act in at least some of the last named cases. The rule is that inferior courts can not extend their jurisdiction by *implication.* Jurisdiction must be plainly given. On this point I am not satisfied that the Superior Courts would agree with Judge Hughes, although I think his ruling is the safer one.

As to the computation of time in the Division Courts, in cases of summonses, tender of money, pleading tender or payment, service of set-off and statutory defences. I contend the just and safe rule is to give the full time. When a six days notice is spoken of and the word "at least" is before it, it means *six days* exclusive of the court day as well as the day of service. The whole policy of the Division

Court act is to give full periods of time to suitors. The rule of the common law is the same in most cases. In cases of distress under Stat. 2 Wm. & M., the goods cannot be sold until the debtor has five full days to pay and replevy in, which means five times 24 hours. If a person has a certain period to do a thing in, the full period, such as 20 days or 30 days, or six days, he is entitled to have the time clear of the day of service of notice and of the act to be done, as for instance, in the payment of rent, he has the whole day on which rent falls due in which to pay. By the practice of the Superior Courts in some cases by their rules make the day of service count and the court day is excluded, or *vice versa*, but that is an exception to the general rule. It is easy to see that the one rule is definite the other indefinite. Suppose a set-off served, as it may be, at eleven and fifty-five minutes o'clock, P. M. (at night) of one day. If the day of service counts the party served really has but five minutes of the day on which he is served to examine or prepare for the set-off. Independent of this he has only five days, as the courts usually meet at nine o'clock on the court day. Would it not be better te exclude both the court day and the day of service? I believe this not only the best legal construction but the wiser and better one, upon the principle of full justice and notice to all parties.

As to payment of money to officers, bailiffs of the court, when no execution is in their hands, I think every dictate of sound policy and justice requires the sureties to be held liable. The sureties are the cause of the bailiff being in his office—without them he would have no power; they in a measure guarantee his character. Why, then, should an innocent party paying money to a bailiff in office demanding it, lose the benefit of it, because the officer did not happen to have an execution at the time? The words of the bond "that they are liable to any one (for the misconduct of the bailiff) who is a party to the legal proceedings," would cover such a case. There is, however, much to be said on the other side.

As to the enforcement of a judgment of the Division Courts after six years, my remarks in my former letter must suffice. I have no doubt it can be done.

Interpleader Suits.—There are three points about these suits unsettled.

Bailiffs in various parts of the country consider they have done their duty when they levy, and the goods are claimed, if they simply notify the plaintiff of the fact. They claim that the plaintiff must then interplead and pay all the costs into court—that they are not bound to do either of these things. Now suppose the plaintiff takes no notice of the claim or notice, the bailiff must make some legal return to his execution within thirty days, which must be "money made," or "*nulla bona.*" He cannot legally return "goods claimed by A. B.," or "goods on hand." To avoid this the law gives him (as in the case of sheriffs in the upper courts) power, if the plaintiff will not order them to sell, or the claimant abandon his claim, *to call both parties before the court*, and make the loser pay the costs. I consider this the proper course of the bailiff.

The next two points relate chiefly to costs. Should the clerk charge in the tariff costs in reference to the debt in the execution, or in reference to the value of the goods in question, not to exceed in value $100? I think *in reference to the goods.* There is, however, doubt on this head. Then suppose an execution levied, and the goods claimed by a dozen different parties — a horse by one, a cow by another, a waggon by another, and so on. Is it not the policy of the Division Court Act to simplify the proceedings, and to cheapen them? Why, in such a case shonld there be as many separate suits as there are claimants or goods seized? Why not issue *one original summons*, specifying all the goods and claimants therein (as can be easily done), and serve duplicates on each claimant? I am inclined to think the latter the course most in consonance with the true policy of the act. Such a course does not prevent the judge from making orders as against such claimant in one original suit. The practice of the courts, I believe, is almost universally the other way, however. My rule is, of course, opposed to the interests of the *fee fund*, and to the *fees* of the officers of the court.

The operation of the law of enforcing judgment summonses, or as it is called *the 91st clause*, and the order following, requires a few remarks, which I had intended to make, but your columns would be too much occupied by one contributor.

CHARLES DURAND,
Toronto, Dec. 14, 1866. *Barrister.*

A question under the new Exemption Law.

To the Editors of the Local Courts' Gazette.

Gentlemen,—In the Division Courts, in carrying out the provisions of the new Exemption Act, the question often arises, as to the law in cases of attachment. The law permits an attachment to be taken out in the Division Court in three cases.

1st. Where the defendant has absconded from the Province, eaving goods liable to seizure; when, of course, he is not a resident himself of the Province, although his family may be resident.

2nd. Where he secretes himself to avoid or wilfully avoids service of process on him, when he is still resident in the Province.

3rd. Or where he is about to move his goods from one County to another County in the Province. In the last case he is, of course, a resident of the Province.

The Exemption Law says that every person the head of a family, shall retain certain articles free from seizure by any writ of process issued out of any court in this Province, or words to that effect.

Now the question is--Can exempted goods in any of the above instances in which the law permits attachments to be issued, be taken from a debtor?

The opinion of the learned Editors of your Journal would oblige many enquirers.

Scarboro'.

Dec. 14, 1866.

[See Editorial remarks on p. 177].—Eds. L. C. G.

Sheep Protection Acts of 1865 *and* 1866.

To the Editors of the Local Courts' Gazette.

Sec. 4, of 1st Act—Assessors to make out lists of dog tax, and give the same to collectors for collection.

Sec. 5—Duty and powers of collector, 'the same as with respect to other taxes.

In 1865, the township assessor assessed and made out his lists, and delivered them to collector for collection, on the 15th day of April, the *time limited for return of his roll* per by-law. (P. 659, Con. Stat. U. C.)

On the 1st May, (as extended per County Council,) collector returned his roll to the treasurer (page 671, 12 sec. cap. 19, 27 Vic.), he never having attempted to collect on said lists, in consequence of the time then being so circumscribed that he could not possibly have visited all the taxed parties in the township. By the 1st sec. of the above Act of 1866 the former act is repealed.

Gentlemen, your sentiments in respect of the following queries would confer an obligation on the subscriber, as also the Holland Municipality:

Can the present township collector collect on the lists above made out, or has the clerk authority to extend such taxes on the current year's collector's roll?

Gentlemen, yours respectfully,

Henry Cardwell,

Towns'p Cl'k Holland.

Chatsworth,

Co. Grey, 20th Nov., 1866.

[We doubt the power of the collector to collect on the lists above mentioned, especially in view of the fact, that the Act of 1865 is repealed, and no apparent provision made for completing what was commenced under it before its repeal.—Eds. L. C. G.]

Jurisdiction of Magistrates—Malicious Injury to Property.

To the Editors of the Local Courts' Gazette.

Gentlemen,—Some magistrates, whose opinions are entitled to consideration, maintain that a magistrate has no authority to commit to gaol, for "wilful or malicious injuries to property," that is, under cap. 93, C. S. C., p. 986, sec. 28. I think, sec. 37 clearly lays down the punishment for anything committed under sec. 28, which authorises and gives the right of committal after a distress warrant has been returned unstatisfied. What is your opinion?

Yours,

A Justice of the Peace.

Port Rowan,

December 3, 1866.

[The jurisdiction of the magistrate, under sections 28 and 29, is in certain cases to order the offender to pay such sum of money as may appear to him to be a reasonable compensation for the damage done, not exceeding £20; and further, if the sum be not paid, to commit the delinquent to gaol for any term not exceeding two months. There is no authority to commit to gaol in the first instance; and the object of the statute appears to be to ensure the payment of the "sum forfeited," for the amount can be paid at any time, and there is distinction drawn between a "sum

forfeited" to pay for the damage done and a "penalty."—Eds. L. C. G.]

Division Courts—Stamp on judgment summons.

To the Editors of the Local Courts Gazette.

Gentlemen,—Would you answer the following questions in the next issue of your *Gazette:* Does the law require that judgment summonses in the Division Courts be stamped? and do the judges of the Division Court in Toronto require them to be stamped.

Yours, &c. Student-at-Law.

[We think a stamp is necessary, and it is required in Toronto.—Eds. L. C. G.]

Transcript of judgment from Division Court to County Court.

To the Editors of the Law Journal.

Gentlemen,—I should feel obliged by your opinion on the following points through the columns of your valuable journal. A. sues B. in the 7th Division Court, and obtains a judgment against him for $90. After the expiry of 30 days, usually given for the defendant to pay the amount, the plaintiff orders the clerk to issue execution. The Clerk of the 7th Division Court issues the same, and directs it to the Baillff of the 11th Division Court, who returns the same *nulla bona* to the Clerk of the 7th Division Court. The plaintiff then obtains a transcript, and makes it a judgment of the County Court, and places a writ of *fi. fa.* against the lands of the defendant in the hands of the sheriff. Had the Clerk of the 7th Division Court power to do so, or was the return made by the Bailiff of the 11th Division Court sufficient to make valid the said judgment of the County Court.

Respectfully, M.

Goderich, Nov. 9, 1866.

[A transcript, in our opinion, ought not to to have issued under the circumstances mentioned.

The clerk of a Division Court has no power to issue a writ of execution to the bailiff of another court. The 135th section requires that the clerk, "at the request of the party prosecuting the order" (for payment), "shall issue under the seal of the court a *fieri facias to one of the bailiffs of the court*, who by virtue thereof shall levy," &c.; and the whole tenor of the statute relating to this point is to the like effect.

The 142 section makes it a condition that the execution shall be returned *nulla bona*, and the transcript to be given must set forth *the* bailiff's return; that is, the return of the bailiff of the court from which the transcript issues.

The case before us suggests an amendment of the law, viz.: enabling a *fi. fa.* to be directed to any bailiff in the county.—Eds. L. J.]

REVIEW.

The Municipal Manual for Upper Canada; containing the new Municipal and Assessment Acts, with Notes of all decided cases, and a full Index. By Robert A. Harrison, Esq., D.C.L., Barrister-at-law. Second Edition, 1866. W. C. Chewett & Co.: Toronto.

Parts I. & II. of this valuable work have been issued; and the other parts, we are informed by the publishers, will appear very shortly. That part of the Act which came into force on the first of November last is however embraced in the numbers of the Manual now before us, and this fact alone will render it of great service to that large portion of the community who take a part and an interest in our municipal elections.

It may be premature just now to speak of the book as a whole, with only two instalment before us; but taking the former edition as a type of the present one, we may safely assume that the new Manual will be found as the old one has been, a reliable guide to the proper understanding of the law, and a safe counsellor to those acting under its provisions.

Mr. Harrison's Municipal Manual has indeed for the past eight years been, as it were, a household word amongst all classes, lawyers or laymen, who have been brought into contact with the working of our Municipal system; and, now that the law has been revised and amended by the legislature, the absence of such a work, embracing the changes which have been made, would be much felt by those who had been in the constant habit of referring to it whenever a doubt arose as to the meaning of any provision.

A great portion of the old law which had been found to work satisfactorily, has been re-enacted—a circumstance which gives an additional value to Mr. Harrison's present labors, inasmuch as many doubtful points have been settled by decisions of the courts within the past eight years, and these decisions have been all carefully collected and annotated in the present edition of the work, thus placing under the eye of both lawyers and laymen,

information which the latter could not obtain except through the former, and which the former had to acquire at the cost of much labor and research.

Even our non professional readers are, for the most part, aware that the only safe interpretation of the law is to be found in the decisions of the Courts, and this being the case, the value of an accumulation of these desisions, extending over a series of years, on the clauses of a particular enactment, will be readily understood and appreciated—especially with reference to the law which governs the working of our Municipal Institutions—a law second in importance to none on our statute book, and affecting bodies which are in themselves minor parliaments possessing extensive but limited powers which it is of great importance to the community should be easily ascertained and correctly defined.

We feel that in making any allusion to Mr. Harrison's special fitness and ability to again undertake the task of annotating the Municipal and Assessment Laws, we are treading on rather delicate ground, inasmuch as that gentleman is one of the conductors of this journal, although his editorial duties do not come within this department of our labors, but the writer of this notice can, at least, say that his remarks on the same subject, written nearly eight years since for this journal have, he has reason to believe, been fully justified, namely: "that Mr. Harrison's well-known character as an annotater was, of itself, a guarantee that no labor had been spared in making the Manual a desideratum for every lawyer and member, or officer of a Municipal Council in the Province." The same remarks will certainly apply with even greater force to the present work, and as a corroboration of the writer's opinion on the subject, we may quote from the remarks of a learned County Court Judge of great experience, made on a recent occasion when addressing the grand jury of the County of Simcoe, shortly after the passing of the new Municipal Act, and published in the local papers, from which we quote. Referring to the announcement of a forthcoming new edition of Mr. Harrison's Municipal Manual, the learned judge said that "he (Mr. Harrison) had made the subject his own, and that from the Manual he had himself received most valuable aid in the discharge of his duties. He had reason to know that the work was found to be of the greatest possible assistance to Municipal officers in Upper Canada; that the able and carefully prepared notes it contained must have largely contributed to the safe working of the law; that since the issue of the first edition of the work many cases had been before his own courts upon the several provisions of the statutes, and many cases in England upon analagous enactments, all of which he had no doubt, would be referred to and turned to account in the new work." It is only necessary to glance through the book before us to be satisfied that the opinion of Judge Gowan has been justified.

We shall probably have something more to say on the subject after the other parts of the work are issued.

W. D. A.

APPOINTMENTS TO OFFICE.

JUDGES.

SECKER BROUGH, of Osgoode Hall, Esquire, Q.C., to be Judge of the County Court of the United Counties of Huron and Bruce, in the room of Robt. Cooper, Esq., deceased. (Gazetted 17th November, 1866.)

JACOB FARRAND PRINGLE, of Osgoode Hall, Esquire, Barrister-at-Law, to be Junior Judge of the United Counties of Stormont, Dundas and Glengary. (Gazetted November 17th, 1866.)

JOHN JUCHEREAU KINGSMILL, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County Court in and for the County of Bruce. (Gazetted 24th November, 1866.)

SHERIFF.

WILLIAM SUTTON, Esquire, to be Sheriff in and for the County of Bruce. (Gazetted 24th November, 1866.)

COUNTY ATTORNEYS.

JAS. BETHUNE, of Osgoode Hall, Esq., Barrister-at-Law, to be Clerk of the Peace and County Crown Attorney for the United Counties of Stormont, Dundas and Glengarry, in the room of Jacob F. Pringle. (Gazetted 17th November, 1866.)

DONALD WILSON ROSS, of Osgoode Hall, Esquire, Barrister-at-Law, to be Clerk of the Peace and County Crown Attorney, in and for the County of Bruce. (Gazetted 24th November. 1866.)

COUNTY COURT CLERK.

WILLIAM GUNN, Esquire, to be Clerk of the County Court in and for the County of Bruce. (Gazetted 24th November, 1866.)

REGISTRARS.

The Honorable SIDNEY SMITH, of Peterborough, to be Inpector of Registry Offices in Upper Canada, under the Act 29 Vic. cap. 24 (Gazetted 17th November, 1866.

JAMES DICKSON, Esquire, to be Regisrar of the County of Huron, in the room of John Galt, Esq., deceased. (Gazetted 17th November, 1866.)

THOMAS W. JOHNSON, Esquire, to be Registrar of the County of Lambton, in the room of Henry Glass, Esq., deceased. (Gazetted 17th November, 1866)

NOTARIES PUBLIC.

TIMOTHY BLAIR PARDEE, of Sarnia, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted 24th November, 1866.)

JAMES S. HALLOWELL, of St. Thomas, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted 24th November, 1866.)

CORONERS.

HORATIO CHARLES BURRITT, of Morrisburg, Esquire, M.D., to be an Associate Coroner for the United Counties of Stormont, Dundas and Glengarry. (Gazetted 24t November, 1866.)

DAVID L. WALMSLEY, of Elmira, Esquire, M.D., to be an Associate Coroner for the County of Waterloo. (Gazetted 24th November, 1866.)

THOMAS R. McINNES, of Dresden, Esquire, M.D., to be an Associate Coroner for the Gounty of Kent. (Gazetted 24th Yovember, 1866.)

ADDISON WORTHINGTON, ALEXANDER THOMPSON, WILLIAM S. FRANCIS, DEWITT MARTYN, CHARLES HILL, WALTER THORPE and SOLOMON D SECORD, Esquires, to be Coroners in and for the County of Bruce. (Gazetted 24th November, 1866.)

TO CORRESPONDENTS.

"Observer" — "Charles Durand" — "Scarboro'" — "Henry Cardwell" — "A Justice of the Peace" — "Student-at-Law"—"M."—Under "Correspondence."

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