THE LOCAL COURTS'

AND

MUNICIPAL GAZETTE.

(NEW SERIES.)

VOLUME VII.

FROM JANUARY TO DECEMBER, 1871.

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DIARY FOR JANUARY.

1. SUN. *1st Sunday after Christmas.*
2. Mon. Municipal Elections. Heir and Devisee Sittings begin. County Court Term begins.
6. Frid. *Epiphany.* Christmas vacation in Chancery ends. County Court Term ends.
8. SUN. *1st Sunday after Epiphany.*
9. Mon. County York Assizes begin. Election of Police Trustees in Police Villages.
11. Wed. Election of School Trustees in Toronto. Master and Register in Chancery to pay over fees to Provincial Treasurer.
12. Thur. Court of Error and Appeal sits.
14. Sat. Last day for Common School Trustees to report to Local Superintendent. Trustees and Chairmen of Municipalities to make returns to Board of Audit.
15. SUN. *2nd Sunday after Epiphany.*
16. Mon. Municipal Councils (except Counties) and Treasurers of Police Villages to hold first meeting.
17. Tues. Heir and Devisee Sitting ends.
21. Sat. Articles, &c., to be left with Sec. Law Society.
22. SUN. *3rd Sunday after Epiphany.*
24. Tues. First Meeting of County Councils.
29. SUN. *4th Sunday after Epiphany.*
30. Mon. School Finance Report to Board of Audit. Last day for Non-Resid. to give list of their lands.
31. Tues. Last day for City and County Clerks to make yearly returns to Provincial Secretary. Last day for Councils to report debts, &c.

The Local Courts' AND MUNICIPAL GAZETTE.

JANUARY, 1871.

COURTS OF THE SISTER PROVINCES.

NOVA SCOTIA.

The closer commercial and political relations now being cultivated between the different Provinces of the Dominion can in no way be better cemented than by diffusing as widely as possible, within the limits of Dominion territory, correct information upon all those topics in which each section feels a common interest and pride with the others.

A few years ago Nova Scotia and New Brunswick were to us in the west places of comparative indifference, and we knew but little of the people, institutions or resources of the Provinces. But the times have changed, and already an interest has been awakened, and a dergee of anxious inquiry created amongst us, concerning our eastern brethren, which we have reason to believe they heartily reciprocate, and which promises to be productive of lasting benefit to the whole Dominion.

Anxious therefore further to increase this interest, and stimulate this spirit of inquiry into still greater activity, as well as to fulfil the duties which come legitimately within our sphere, we give to our readers in this issue a sketch of the Courts of Nova Scotia, their powers, functions, officials, &c., which we hope will, so far as that Province is concerned, accomplish the end we have in view.

We way mention that our information is from an authentic source in Nova Scotia, whence also we hope to be able to obtain occasionally for publication short notes of important decisions, which will afford our professional readers at least a knowledge of the laws and legal procedure of that Provinc that cannot fail to be of interest.

THE SUPREME COURT.

The Supreme Court for the Province of Nova Scotia (having an Equity side over which the Equity Judge presides) exercises the same powers as are exercised by the Courts of Queen's Bench, Common Pleas, Chancery and Exchequer in England. Its original jurisdiction being both legal and equitable, embraces all kinds of actions, causes and suits, criminal and civil, real and personal, except actions for debt under $20, in which case it exercises only appellate jurisdiction. It also has power to avoid patents of land by process of escheat, and possesses concurrent jurisdiction with the Vice Admiralty Court, under an Imperial Statute, for the trial of persons eharged with the commission of crimes and misdemeanours on the high seas. Its practice and procedure are prescribed by the revised statutes of Nova Scotia, based upon and assimilated to the English Common Law Procedure Act. In cases not specially provided for by the statutes its practice and proceedings conform, as nearly as may be, to the practice and proceedings of the Superior Courts of Common Law in force previous to the first year of the reign of William IV., the proceedings and practice of the Court of Queen's Bench in England, however, prevailing where those Courts differ from each other. This court, presided over by any one of the judges, holds two Sessions a year for trials of issues in fact, and of Oyer, Terminer and General Gaol Delivery, in every County of the Province. In Halifax County those Sessions are called Sittings, and elsewhere they are designated Terms.

The Supreme Court also sits twice a year *in banco* at Halifax for hearing arguments of rules for new trials, appeals from the Sessions of the Equity Court, the Courts of Insolvency, Courts of Probate, Courts of Sessions, and from orders and decisions of single judges sitting at Chambers, as well as for the argument of special cases and demurrers. Appeals

lie thence to the Judicial Committee of the Privy Council.

The following are the judges of the Supreme Court, five of whom by a recent act constitute a quorum:

Chief Justice Sir William Young, K.C.B.; Hon. James W. Johnston, Hon. Edmund M. Dodd, Hon. Frederick W. DesBarres, Hon. Lewis M. Wilkins, Hon. John N. Ritchie, Hon. Jonathan McCully. Henry Oldright, Esq., is Reporter to the Court.

THE EQUITY COURT.

This Court, with its single judge presiding, is always open, and discharges the functions of the equity side of the Supreme Court, the Judge in Equity being also a Judge of the Supreme Court. Its jurisdiction, powers, &c., are identical with those of the Court of Chancery in England. Its forms of pleadings are those at Common Law, but modified to suit circumstances. The present Equity Court was organized and established by a recent Provisional Statute. Its sittings are always held at Halifax.

Judge in Equity: Hon. James W. Johnston.

THE PRACTICE COURT,

Or Chambers wherein one of the Judges presides, is held every Tuesday at Halifax during the year, except in vacation. The duties and powers incident to this Court are the same as those exercised by Judges at Chambers in England, but somewhat modified and more extensive. The matters which most engage the attention of this Court are motions to amend pleadings, for leave to plead and demur, to refer causes to arbitration, to set aside pleas, &c., &c. A Judge at Chambers on the first Tuesday of every month, except in vacation, hears and determines in a summary way all suits and appeals for sums under $80, and cases of forcible entry and detainer, &c.

THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

The jurisdiction of this Court embraces all matters relating to prohibited marriages and divorces, and has power to declare any marriage null and void for impotence, adultery, cruelty, or kindred, within the degrees prohibited in the 32 Hen. VIII. Its practice and procedure are similar to that of the like court in England, except that co-respondents are not amenable to its jurisdiction, and juries are not used, the judge having the exclusive right to try the issues in fact as well as to determine the law in all cases. The judge also has power to make rules and regulations to govern the practice. Appeals lie to the Supreme Court *in banco* in all cases, except on mere questions of costs. It has no stated periods of sittings, is always open, and sits as occasion requires. Its sittings are always held at Halifax.

Judge ordinary: Hon. James W. Johnston/ Registrar, James H. Thorne, Esq,

THE COURT OF VICE ADMIRALTY.

The jurisdiction of this Court may be said to extend to all maritime suits and causes. It also has jurisdiction in prize causes, and is the Court where prosecutions for violation of the Fishery laws are conducted; in a word, its jurisdiction, functions, &c., are the same as those of like courts in the other maritime Provinces. It always sits at Halifax.

Judge and Commissary General, Sir William Young, K.C.B. Registrar, Lewis W. DesBarres.

THE COURTS OF PROBATE.

These Courts, of which there is one in every County of the Province, and two where the County happens to be divided, grant Probate and has testamentary jurisdiction over the estates of deceased persons, with power to appoint guardian to minors, children of persons who die intestate. Its practice and procedure are prescribed by the statutes of Nova Scotia, so far as they go, otherwise that of the Ecclesiastial Courts of England prevail and are followed. The laws of Nova Scotia regarding probate, the administration of estates, and the distribution of the estates of persons who die intestate, are based largely upon the English Statute of Distribution, &c., but somewhat assimilated to the laws in that respect prevailing in Massachusetts. Appeals lie from these Courts to the Judge in Equity at Halifax, and thence to the Supreme Court *in banco*.

THE INSOLVENCY COURTS,

Being created by "The Insolvent Act of 1869," have the same powers, jurisdiction, &c., as like Courts in the other Provinces of the Dominion.

THE COURTS OF SESSIONS,

Sits in the County of Halifax quarterly, and in some Counties twice, in others once a year. The Custos of the County preside. This Court is composed of the Custos, together with the Justices of the County, the Grand Jury attending for municipal purposes. It has a limited jurisdiction in criminal matters which of late

pears has fallen largely into disuse. The duties now performed by this Court are confined almost entirely to local and municipal purposes.

MAGISTRATES COURTS.

Having jurisdiction in actions of debt, presided over by one Justice, when the whole dealing or cause of action does not exceed $20, and by two where it is above $20, but does not exceed $80, exist in every County of the Province. Where a trespass has been committed by horses, cattle, &c., and the damages do not exceed $12, a Justice of the Peace may try it, providing no question of title to land arises; and if the cattle alleged to have been trespassing are detained, and the alleged damage is not beyond $12, a Justice may grant a writ of replevin for the same. Two Justices may hear and determine all complaints for common assault and battery, and may try bastardy cases, and may grant orders of affiliation. Prosecutions for illegal sale of intoxicating liquors are also confided to two Justices. The criminal jurisdiction now possessed by Magistrates in Nova Scotia, out of Sessions, has been conferred by Dominion Legislation.

"THE 91st CLAUSE."

Probably no one section of any statute of Canada has been more discussed or oftener in mens' mouths than this. It has been condemned by some certainly, but in the main it has been the safeguard of the "poor creditor" — the bugbear of those who have compassion alone for the "poor debtor" — the terror of the dishonest, and, at the same time, a source of capital to those who, on the strength of it, make much-ado about the oppression of the poor by the rich, and other things equally irrelevant.

Some years ago, an unsuccessful attempt was made to do away with this provision.. It clearly appeared, from the evidence of those competent to form an opinion, that the powers given to the judges operated for the general benefit of the public. During the present session of Parliament, this attempt has been renewed, and has again proved a signal failure. One would have thought that the bill would have been backed up by some sort of evidence or statistics in favor of a change, but there was nothing of the kind, nor did the arguments in favor of it bring out any new points worthy of notice; and we may here remark that, if for no other reason, we are glad the bill has been thrown out, because it was an attempt to change a law without any reasonable ground for belief that a change was generally desired or would be beneficial. This tinkering with our laws has become a mania with some of the new members of the House, as though every change must necessarily be an improvement.

So far as this provision itself is concerned, our opinions have been expressed before now, and we have not as yet seen any sufficient reason to change them; the arguments used in favor of this bill, based only upon generalities and misapprehensions, certainly do not. We believe the present law works well and beneficially to the poor as well as to the rich, and think that its repeal would be an evil instead of the reverse. The very fact of there being such a law has a good effect, and is preventive of fraud; and though it may have, in some few instances, worked a hardship, that is no more a reason for its repeal, than that convicted murderers should go unpunished, because innocent men have suffered.

Before attempts are made to alter the old and well known laws, let it be well ascertained that they require reformation, and then proceed gradually and cautiously. Giving the learned mover of this bill every credit for doing what he conscientiously thought to be right, we cannot give him credit for having made any very diligent enquiry as to the necessity of his bill; in fact his speech on the subject admitted as much; and his own experience is far removed from the practical working of those provisions of the Division Court Acts, popularly known as "The 91st clause."

MULTIPLICATION OF REGISTRY OFFICES.

It is proposed to make several new Registry Offices in Ontario, the reason being, we understand, that the emoluments from some are much greater than it is reasonable for any one public officer to receive.

Persons holding official positions should undoubtedly be paid in proportion to the labour and responsibility involved, and the education and attainments necessary for the proper discharge of the duties of the office, and we gladly testify to the efforts of the Attorney General in this respect to supplement the salaries of the Judges of the Superior Courts. It would be a shame, for instance, that a registrar should

be paid or receive from his office a salary as large as that of one of the judges, and we are told such is the fact in some few instances. But is the only remedy in the premises the division of counties for registration purposes?

The practising attorneys, and they know more about it than all the legislators—eminent Queen's counsel, highly respectable farmers, and whatever else they may be, put together, find that the system of pulling registration divisions into fragments is a bad one. It entails expense, causes great confusion and trouble in searching titles, and is a nuisance to the practioners who do the bulk of the business with these offices. It is sufficient that a Registration District is divided when an alteration is made in the size of a County. Lawyers congregate of course in county towns, and, instead of being able to search titles with promptitude, and with any degree of precision, by a personal reference to the books and original memorials, are compelled to trust to abstracts or agents instead. If the fees received by some registrars are too great, and if a change has to be made, surely some other remedy could be found. One proposes to fund the fees; but whatever is to be done, we hope some other expedient will be found other than multiplying Registry offices, to the great inconvenience of the public and those who do the business of the public in connection with them.

SELECTIONS.

HUMOROUS PHASES OF THE LAW.

THE IMMORALITIES OF WILLS.

Man has a natural longing to perpetuate himself, his likes and his dislikes, his ambitions, his ideas. He dreads to have his name die out, and desires male offspring to keep it alive. If he is a link in a long unbroken chain of family, he shrinks at the reflection that he may be the last link; and hence arises the establishment of an inheritable order of nobility. Above all he clings to material possessions. It is a bitter thought to most men, that others shall pluck the fruit of the trees which they have planted, and thrive under the roofs which they have reared, and follow the North star in ships which they have built; and so one bestows his name on a forest or a graft of apples, another erects a block of houses and calls it after himself, and the third nails his name to the broad stern of a steamship. The desire exists in all; it is only a difference in measure. Napoleon desired to found a dynasty: Smith leaves his India-rubber business to his sons, and directs that the firm shall be Smith's Sons. In others the desire has more of philanthropy, but not much less of vanity; one founds a library and another endows a college, but both insist that their name shall be attached to the gift. Few persons can do even as simple a thing as give a book, without writing their name as donor on the fly-leaf.

Experience has taught man that sooner or later he must give up his possessions, but he clings to the power of controlling what he leaves behind him. He wants to have his way, and make others feel his power, even after he is dust. Like a trustee of long standing, he grows to consider the fund as his own. Instead of viewing his interest in the property which God has permitted him to accumulate, as usufractuary merely, he not only regards it as his own, but endeavors to impress the stamp of his ownership upon it after death. So, while his bones are slowly mouldering, and cattle crop the grass that springs from his dust, he still has a bone of contention among his descendants or beneficiaries, in the shape of an estate burdened with conditions, or loaded with intricate trusts. None but the lawyers call him blessed.

It has been a grave moral and legal question whether a man has a right to effect the disposition of his property by will. Political economists have differed on this subject. Shall I not do what I will with my own? asks one. But another replies, you have no more right to direct the course of your property after your death than to dictate the policy of government. You are done with earthly societies, and all you had falls back into the common fund. Society listens to man's pleadings for posthumous power only in a measured degree. His right to make a will is everywhere attended by limitations, differing according to the form of the government or temperament of the people. In some countries the rule "first come first served" is adopted, and primogeniture obtains. In others the testator may give to whom he chooses, but not as long as he chooses—for not longer than two lives, for instance—on the theory that to control his estate for twice as long as he possessed it is a sufficient reward for getting it. In others, he is restricted in the objects of benefactions; for example, if he leave a wife or child he cannot give more than a certain proportion to religious or charitable uses. In all communities he is prohibited from depriving his wife of dower in his estate.

At first thought one would suppose that the law would care but little concerning the disposition of a man's body after death. The law sometimes hands the bony parts of malefactors over to the surgeons for the instruction of students and the warning of the evilly disposed. But if a man proposes to do this for himself by will, the law makes a great fuss, and even suggests that the idea argues insanity. It is related of Ziska, that, as his end drew near, he commanded that drums should be made of his skin, in order that, though dead, he might speak terror to his enemies; he would

have made a complete drum corpse of himself. In the case of *Morgan* v. *Boys*, the testator devised his property to a stranger, wholly disinheriting the heir or next of kin, and directed that his executors should "cause some parts of his bowels to be converted into fiddle-strings, that others should be sublimed into smelling salts, and that the remainder of his body should be vetrified into lenses, for optical purposes." In a letter attached to his will the testator said: "The world may think this to be done in a spirit of singularity or whim, but I have a mortal aversion to funeral pomp, and I wish my body to be converted into purposes useful to mankind." The testator was shown to have conducted his affairs with great shrewdness and ability, and, so far from being imbecile, he had always been regarded by his associates through life as a person of indisputable capacity. Sir Herbert Jenner Fust regarded the proof as not sufficient to establish insanity, it amounting to nothing more than eccentricity, in his judgment. Judge Redfield, from whose work on wills I quote this case, remarks on it: "This must be regarded as a most charitable view of the testator's mental capacity, and one which an American jury would not be readily induced to adopt. *We do not insist* that the mere absurdity and irreverence of the mode of bestowing his own body, as a sacrifice, to the interests of science and art, in so bald and lawful a mode, *was to be regarded as plenary evidence of mental aberration.* But we have no hesitation in saying that *a jury would be likely always to regard it in this light*, in the case of an unnatural or unofficious testament. *And we are not prepared to say it should not be so.*" (What! that a jury should find against evidence?) "The common sense instincts of a jury are very likely to lead them right in cases of this character. The man who has no more respect for himself or for Christian burial, than this will indicates, has no just claim to the regard or respect of others." With great deference for the learned writer, I must differ from him. How can the law refuse to execute a testator's will, so far as it is not unlawful or abhorrent to morals or contrary to public policy, unless the testator be proved to have been of unsound mind? Suppose, in addition to proof of his clear intellect, the objects of his bounty were unobjectionable or praiseworthy; suppose he should bequeath his estate to the American Bible Society, for instance; shall we defeat his will because he also gives his bones to the New York Medical College? Refuse to execute that portion of his will, perhaps, as against good morals and public policy, but don't pluck up the wheat with the tares. The disposition of this testator's remains was undoubtedly repugnant to men's finer feelings, but I must confess I see nothing improper in a great scientific man, like Agassiz, for example, bequeathing his skeleton to a university which he has done much to adorn. If he should die at sea it would be a much more sensible use of his bones than to give them to the fishes, although the latter might well consider such an event of poetic justice on one who has reduced so many of their tribe to skeletons.

When a man comes to me to have his will drawn, and proposes to make his bounty to his wife dependent on her "remaining his widow," I always feel an ardent desire to kick or otherwise evilly entreat that man. I am generally able to convert such a heathen. If I fail, my omission to act on my aforesaid muscular impulse is wholly owing to the restraining power of divine grace. A good thing for such men to remember is the golden rule: "Whatsoever ye would that others should do unto you, do ye even so unto them." Would they like to have their rich wives leave such wills behind them? The welkin would ring with their howls. That men can go out of life leaving such testamentary directions is an evidence of their desire to perpetuate their jealousy, as well as their memory and wealth. Of such it cannot be said,

> "The good men do, lives after them;
> The bad is oft interred with their bones."

Perhaps, quite probably, the very money so grudgingly bestowed came from the wife; indeed, it may have been given her by a former husband; or the wife may have earned it in teaching music or keeping a boarding house, and weekly handed it over to a mean-spirited wretch of a husband, who never did an honest hour's work in his life, but having lived on his wife all his days, is bound that no other man shall ever have the like temptation. I have noticed that such men generally contrive to get their wives to sign off all their dower right in their life-time. So there is no inducement left for the poor creatures to be extravagant. Some communities have had the good sense and magnanimity to declare such devises void, as being in restraint of marriage, but New York has not arrived at that pitch of moral elevation yet. Our state has been the pioneer in all other reforms concerning the rights of married women, and now wives among us enjoy pecuniary privileges in a larger degree than in any other state, I believe, and in a larger degree than their husbands. Why then do we yet retain this heathenish concession to the jealousy of hateful husbands? In a community where the right of a wife to hold separate property is not recognized, there might be some pretext for sanctioning the practice, on the hackneyed argument that a second husband might waste the savings of the first; but where she is constituted equal to her husband in respect to rights of property, this reasoning fails. What right has any man to adjudge that his widow shall not marry again, or inflict a pecuniary penalty on her so doing? All the pious expressions that the language is capable of, cannot cover up the wickedness of such a provision. It is really blasphemous to invoke the name of God in favor of such a testament. God does not bless jealousy, envy, hatred, enforced celibacy. The spirit of such testamen-

tary dispositions is well ridiculed in an old quatrain which I have carried in my memory for some years :

> "In the name of God, amen :
> My feather-bed to my wife, Jen :
> Also my carpenter's saw and hammer ;
> Until she marries ; then, God damn her !"

Only one degree less mean is the habit of wreaking posthumous vengeance on a disobedient child by "cutting him off with a shilling." One may possibly be excused for a hasty act of this sort, but when the deliberate judgment approves it and lets it stand, it argues a screw loose in the testator's moral machinery. While he is writing or reading the good words at the commencement of his will, why does he not recall sundry expressions of scripture : "Let not the sun go down upon my wrath ;" "He that hath no rule over his own spirit, is like a city that is broken down and without walls ;" "Vengeance is mine, I will repay, saith the Lord ?" Undoubtedly cases occur where children prove permanently unworthy of parental benefaction. But I am speaking of the common cases, as, for example, where a daughter marries a man whom her father dislikes. Such a one came to me once to have his will drawn, or rather a man who proposed to cut his son off because he had married a woman whom the father did not approve. The old man was a plain farmer, who, when I asked his reason for this course, replied : "Well, I haint got nothing again the gal partikler, only she's a schoolmarm." "Well, what of that?" "Why, she don't know nothing about housekeeping !" It was evident that it might have been beneficial to the old man if *he* had fallen in with a schoolmarm in his young days. What a world this would be, now, if children were compelled to marry as their parents should dictate! How much it would add to conjugal fidelity and happiness! Look at France, where such marriages are substantially the rule. It would become necessary to erect a divorce court at once, with a large number of judges, to relieve each other. Another frequent excuse for disherison, is moral misconduct of a child, especially of a daughter. Fathers ought to be extremely deliberate in such a decision. If Christ could pardon Magdalen, a father may pardon his erring daughter. Especially when he cannot say that her straying is not the result of inherited passions or of defective moral teaching. "Let him that is without sin among you cast the first stone." How humiliated ought such a father to feel, when perhaps he is in the habit of sinning, under the promptings of his passions, every month of his life ! During the prevalence of negro slavery in this country, I noticed that the men who were the most fearful of the consequences of "amalgamation" and loudest in their denunciations of it, were usually those who held the closest associations with females of African descent. So, I believe, the men who are the most "sensitive" about the honor of their wives and daughters, and most apt to go temporarily crazy, and shoot people, are those who practically have least regard for the honor of other men's wives and daughters.

Even when a man has no claims of family upon him, he can hardly be content with making good gifts in secret ; he must proclaim them. An amusing instance of a man's pride and piety living after him may be found in *Downing* v. *Marshall*, 23 New York, 336. This was an action to obtain a construction of a will. The testator, an excellent and pious man, was a manufacturer of cotton goods, on whose adventures the Lord had smiled, and whose wealth consequently loomed up in large proportions. Being one of the earliest and most extensive manufacturers in the country, and justly proud of his material success, and being also childless and without kin on this side of the ocean, he resolved at once to perpetuate his name and commemorate that liberality toward charitable and religious objects for which he had always been remarkable. So, with the help of an attorney, he concocted and left behind him, as a beneficial fund for half a score of lawyers, one of the most singular wills that it ever entered into the heart of man to conceive. His scheme was, in a word, to have his executors carry on his manufacturing business for the benefit of religious and charitable corporations ! He left his manufacturing establishment to his executors in trust to carry on the same and divide the profits in certain proportions between the American Tract Society, the American Home Missionary Society, the American Bible Society, and the Marshall Infirmary, the latter being a hospital which he had founded. But the architects of this remarkable scheme had heard that it was against our laws to tie up property for more than two lives, and so they provided that the trusts were to continue during the lives of two young men named in the will, and on their death the property was to be sold, and the proceeds were to be divided in the like proportion among the same beneficiaries. The court held the trust void, and that the estate descended to the next of kin, subject to the direction to sell and divide on the falling of the two lives. The court in effect decided that the business of the religious societies was the printing of tracts and Bibles, and not of cotton cloths ; even religious pocket handkerchiefs, calculated for the meridian and intelligence of heathendom, would not answer. The Home Missionary Society, being unincorporated, did not participate in the benefits of the will in any degree. It took eight years and cost $50,000 to establish the legal meaning of the will, which was a very different meaning from what the testator intended. Perhaps the result was designed by Providence as a rebuke, for the scheme which the testator had contrived to minister to his vanity, by carrying on his manufacturing establishment as long as legally possible after his death, was frustrated, while the purely benevolent objects alone were effected. His trust in Providence was approved ; his trust in man was held void under the statute.

(*To be continued.*)

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

PROMISSORY NOTE—PRESENTMENT AND NOTICE. —In an action by endorsee against endorser of a note, an averment of presentment and notice is supported by proof of a subsequent promise to pay, although it appears that there was in fact no proper presentment or notice.

So held, in accordance with *Kilby* v. *Rochussen*, 18 C. B. N. S. 357.—*McCarthy* v. *Phelps and Hellems*, 30, U. C. Q. B. 57.

GOODS SOLD AND DELIVERED—RESCISSION OF CONTRACT.—Defendant bought from plaintiff a quantity of oil at four months' credit. Plaintiff delivered oil, but defendant refused to accept a four months' draft for the price, alleging that it was not according to sample. Plaintiff assented and requested defendant to return oil, which defendant promised, but failed to do within a reasonable time. Before the four months had expired plaintiff sued for goods sold and delivered.

Held, that the original contract had been rescinded, and that plaintiff might sue upon a new contract arising out of the retention of the oil by defendant.—*Thompson* v. *Smith*, 21 U. C. C. P. 1.

ARBITRATOR — APPLICATION TO REVOKE. — The particulars in an action on the common counts were headed "Detailed statement of extra work performed by P. R. (plaintiff) on sections 3 and 4, Bruce Gravel Roads, under contract of 1866:" *Held*, that this did not necessarily restrict the plaintiff to work done under the sealed contract of that year entered into between the parties, but that he might shew that any work mentioned in the particulars was done outside of such contract, and under a wholly separate and independent one

Held, also, that under the declaration the plaintiff clearly could not recover for damages of any kind; and the plaintiff's counsel having admitted this, the court would not revoke the submission on the ground, amongst others, that such a claim was being entertained by the arbitrators.

The reference was expressed to be "subject to such points of law as will properly arise on the pleadings and evidence;" *Held*, that this rendered it imperative on the arbitrators to state for the Court any legal point raised, and to distinguish, if required, the subject for which they awarded in plaintiff's favour, if any legal question was raised applicable thereto.—*Ross* v. *The Corporation of Bruce*, 21 U. C. C. P. 41.

RAILWAY COMPANY—PASSENGER'S LUGGAGE—NEGLIGENCE OF PASSENGER.—A passenger by the G. W. Railway from Cheltenham to Reading took his portmanteau into the carriage with him at Swindon. Having left the train for refreshment, he failed to find his carriage, and continued his journey in another carriage. When the train arrived in London, the portmanteau was found in the carriage in which it had been placed at Cheltenham, but it had been cut open, and the contents were gone.

In an action by the passenger against the company for the value of the articles, the jury found that there had been negligence on the plaintiff's part, but not on that of the company.

Held, that the general liability of the company was, under the circumstances, modified by the implied condition that the passengers should use reasonable care, and that as the loss was due to his neglect alone, the verdict was to be entered for the company.—*The Great Western Railway Company* v. *Talley*, C. P., 19 W. R. 154.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

INSOLVENCY—CLAIM AGAINST A FIRM, AND ONE PARTNER SEPARATELY—The appellants, in the matter of C. and Co., insolvents, had a claim upon a note made by C. and Co., payable to C., one of the firm, and by him endorsed to the appellants. They proved against the firm on the 3rd July, 1869, but afterwards withdrew it, and proved on the 11th January, 1870, under sec. 60 of the Act of 1869, specifying and putting a value on the separate liability of C.

Held, affirming decision of the County Judge, that the appellants, under the Act of 1864, could not rank both on the separate estate of C. and on the estate of the firm, but must elect; but that they might prove against the joint estate for their whole claim, without deducting from it the value of C.'s separate liability

Held, also, that the appellants could treat the payee and endorser as having incurred a separate liability by his indorsement, distinct from his joint liability as a maker.

Held, also, that the Act of 1869 could not apply, for the case was pending before it, and the question in dispute as to the right to prove was not a matter of procedure only, exempted

from the exceptions in the repealing clause.—*In re Chaffey and others*, 30 U. C. Q. B. 64.

SALE FOR TAXES—LANDS IN CITIES—C. S. U. C. C. H. 55.—Under Consol. Stat. U. C., ch. 55, the chamberlain and high balliff in cities had power only to sell the lands of *non-residents* for arrears of taxes.

A sale in 1865, of land belonging and assessed to a resident was therefore held invalid.—*McKay* v. *Bamberger et al*, 30 U. C. Q. B. 95.

ONTARIO REPORTS.

CHANCERY.

(*Reported by* ALEX. GRANT, ESQ., *Barrister-at-Law, Reporter to the Court.*)

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF EAST ZORRA v. DOUGLAS.

Principal and surety—Discharge of surety—Appropriation of payments—Suit for account against municipal treasurer and his sureties.

A surety cannot get rid of his liability on the ground of having become surety in ignorance of material facts, unless he can show that information was fraudulently withheld from him.

Mere negligence by the obligee in looking after the principal, in calling him to account, or in requiring him to pay over money, is no defence against either antecedent or subsequent liability of the surety.

A township council tacitly permitted the treasurer of the township to mix the township money with his own.

Held, that this conduct was wrong, but did not discharge the treasurer's sureties.

A township treasurer had in his hands a large balance belonging to the township when he gave to the corporation new sureties: *Held*, that subsequent payments by the treasurer were applicable first to the discharge of that balance.

A bill for an account was held to lie at the suit of a municipal corporation against their treasurer and his sureties.

At the time of the transactions in question in this cause, the defendant, James Kintrea, was, and for many years had been, the plaintiffs' treasurer. On the 7th May, 1868, he as principal, and the other defendants, Douglas and Dunlop, as sureties, executed a bond to the plaintiffs, by the name of "The Municipal Council of the Township of East Zorra" (see *Corporation of Bruce* v. *Cramahe*, 22 U.C.Q B. 321), in the penal sum of $3,500, with a condition thereunder written, that if Kintrea should "duly receive, keep and pay over all moneys coming into his hands, and safely keep and surrender all papers, receipts, vouchers, books, papers and documents to him committed, and do give an account therefor, according to the true intent and meaning of any statute of this Province, or any by-law or resolution of said corporation," the obligation was to be void. The prayer of the bill was for (amongst other things) the rectification of the bond with respect to the plaintiffs' name, and an account. The principal defence was, that the bond was not valid, by reason of Kintrea's having, before the execution of the bond, been unfaithful and dishonest as treasurer; of his having theretofore appropriated to his own use township money, and being then unable to repay the same; and of these facts having been known to the plaintiffs, and fraudulently concealed by them from the sureties. The answer also set up that, if the facts were not then known to the plaintiffs, the plaintiffs had information which should have led them to a knowledge of the facts, and that such knowledge must be imputed.

The principal facts in proof which bore on this defence, were these: Kintrea, before the execution of the bond, had received considerable sums beyond the sums which he had paid out for the township. According to the printed accounts, the balance against him on the 20th December, 1867, was $1,556 98; and the balance on the 7th May, 1868 (the date of the bond), was not much less. This balance was not on deposit at any bank to the credit of the corporation, nor did it exist specifically any where. In fact, the treasurer, during the many years that he held office, did not appear to have ever kept a bank account for the township money, or to have ever kept the township money separate from his own money, or from the other money passing through his hands. He was county treasurer as well as treasurer for this township, and he held also the offices of deputy clerk of the Crown and clerk of the Surrogate Court. He had never, so far as appeared, been asked to keep the township money distinct, or made any representation that he was doing so. When asked once by one of the auditors about the balance in his hands, he said that that was not the auditors' business. The auditor mentioned this answer to the reeve and deputy reeve, and it appeared to have been acquiesced in. The auditors did not seem to have ever regarded it as their duty to ascertain that the balance was specifically in existence any where, and, with the one exception, they never made any inquiry about it. The council made no inquiry either; and successive councils appeared either to have assumed that they had no right to make such inquiry, or to have thought the point doubtful. Kintrea had always met all payments which he was directed to make for the township, and had never been in any default which any of the council heard of; and they had great confidence in his integrity and honesty.

It was the practice of this township to appoint annually the treasurer, as well as the other township officers. In the by-law appointing officers for 1867, it was directed that the treasurer and collector should furnish two good and sufficient sureties, to the satisfaction of the council, in double the amount of money passing through their hands as such treasurer and collector. (It was said that the only bond from the treasurer which the corporation held at this time was ten years old; that the defendant Douglas was one of the sureties therein; that he had afterwards obtained his discharge in insolvency; and that the other surety had put his property out of his hands.) It did not appear what, if anything, was done under the by-law of 1867. Kintrea was appointed treasurer again in 1868; and in February, 1868, a by-law was passed reciting that it was "necessary to fix and determine the amount in which the treasurer of the township shall be bound to the corporation of the said township for the faithful performance of his duties as treasurer," and naming $3,500 as the amount. It appeared that a person (Mr. Grey, of Woodstock) about this time told a member of the township council that he believed Kintrea was "going down hill," but, so far as was shown,

giving no particulars, and stating no reasons for his belief. The councillor mentioned the matter at a meeting of the council, and got a resolution passed appointing a committee to inquire as to the solvency of the treasurer's sureties. If Mr. Grey's opinion excited the suspicion of this councillor, it did not seem to have destroyed the confidence of the other members of the council; nor did the confidence which both the council and the sureties had placed in the treasurer's integrity appear to have been destroyed even when, in February or March, 1869, he acknowledged his inability to pay the balance due from him as treasurer. Either at the instance or with the approval of the sureties, the council abstained from removing him from his office, until he absconded in the month of May following.

The case came on for examination of witnesses and hearing at the sittings of the court at Woodstock, in the spring of 1870.

The facts above stated were those which the court considered to be deducible from the evidence.

Mr. *Crooks*, Q. C., and Mr. *John Hoskin*, for the plaintiffs.

Mr. *Blake*, Q. C., and Mr. *Richardson*, for the defendants Douglas and Dunlop.

The bill was *pro confesso* against defendant Kintrea.

MOWAT, V. C. [after stating the facts as above set forth.]—With reference to the points urged by the learned counsel for the defendants, I may say that I am satisfied that when the defendants became sureties the council believed Kintrea to be honest, and to have been faithful to what was mutually considered his duty as treasurer; that it was from no apprehension as to what might be discovered that they had at any time refrained from inquiry as to the specific existence, in money or on deposit, of the balance of the treasurer's receipts; that, at or before the execution of the bond in question, the members of the council, with possibly one exception, did not suspect that the treasurer was insolvent, or that the debt or fund was in danger; that the council had no fraudulent motive in calling for new sureties, and did not fraudulently withhold from the sureties any information which the members had. So far, therefore, as the defence of the sureties is founded on the fraud of the council, I think that the defence is not sustained by the evidence.

The answer does not rest the defence on fraud only; but without proof of fraud it is clear that the defence cannot be sustained. There was a dictum of Lord Truro's, in *Owen* v. *Homans* (3 McN. & G. 378), followed in *Cashin* v. *Perth* (7 Gr. 340), the effect of which was, that the rule which prevails in insurance cases was applicable as between a creditor and an intending surety: that as all material circumstances known to the insured must be communicated on his application to insure, a creditor was under an obligation to be equally full in his communications to an intending surety; and that neglect of this obligation, though without fraud, vitiates the surety's contract. But this opinion was corrected by *The North British Insurance Company* v. *Lloyd* (10 Exch. 523), where all the previous cases were reviewed; and the doctrine was distinctly laid down, that a surety cannot get rid of his obligation on the ground of want of information, unless he can show that the information was fraudulently withheld. The same view has been maintained in all the late cases.

It appears by the treasurer's cash-book that his balance on the 7th May, 1858 (the date of the bond in question), was $1,392 38. This balance was largely increased by his subsequent receipts, so that after making all payments the balance on the 21st December amounted to $3,391 03½, according to the treasurer's account of that date as audited and printed. The treasurer's subsequent payments seem to have exceeded his receipts for the township. The money received after the 7th May, 1868, was, like all the money received previously, allowed to be mixed up by the treasurer with his other money, and was used by him; so that when, in February, 1869, the balance was called for, he was unable to pay it; and it is now clear that he had been insolvent for some time—probably for several years. The bill does not complain of the conduct of the council after the execution of the qend. If the allowing of the treasurer to mix up township money with his own, and to use the whole in commen, as a banker might, does not relieve the sureties from their obligation, like conduct before the bond certainly cannot affect the sureties' liability. Now, in *Black* v. *Ottoman Bank* (8 Jur. N.S. 803), it was held by the Privy Council to be clear, "that the mere passive inactivity of the person to whom the guarantee is given, his neglect tn call the principal debtor to account in reasonable time, and to enforce payment against him, does not discharge the surety; that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence as, in the language of Sir W. P. Wood, V. C., in *Dickson* v. *Lawes*, to imply connivance, and amount to fraud. The surety guarantees the honesty of the person employed, and is not entitled to be relieved of his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty."

In *Dickson* v. *Lawes*, Kay, 306, which is referred to in this extract, Lord Hatherley, then Vice-Chancellor, referred to the argument of a surety that there was a step which the creditor might have taken that would have led him to the discovery of the debtor's fraud, and that the fraud remained undiscovered solely on account of the creditors having neglected to take that precaution; and the learned judge answered the argument by saying: "No authority has yet been producee which goes anything like to the extent that, in such circumstances, the surety would be discharged; and all the analogy to be derived from the cases which have been hitherto decided by the court is the other way. Nothing can exceed the neglect of parties, who, for ten or twelve years, fail to call upon a clerk for an account. They have a high opinion of his honesty, and they trust him; the surety can know nothing of it; all of a sudden they find out a default in his accounts; and they have been allowed to sue the surety; and the surety never has escaped on account of that species of negligence. It is possible te put the doctrine higher than this. that there must be, as Lord Brougham expresses it, such an act of connivance as enables the party to get the fund into his hands, or such an act of gross negligence as to amount to a wilful shutting of the person's eyes to the fraud

which the party is about to commit, in order to discharge the surety. It was put forcibly in the argument, that the frauds in this case were all discovered very quickly after the death of George William Freeman [the principal debtor]. That was because the moment there was a suspicion, the whole matter was unravelled; and by searching and inquiring into the various matters, it was perceived that, if they had been looked into a little more closely, the fraud would have been found out before. That does not prove that the parties have been guilty of such negligence of duty in the obligation in which they were bound towards the surety as to exonerate the surety."

That was the case of sureties for an official assignee in bankruptcy. One of the rules promulgated for the direction of official assignees had expressly provided that no official assignee "should keep under his control, upon any estate, more than £100, or in the aggregate of moneys of bankrupts' estates more than £1000; and that any excess beyond such sum should be paid by him forthwith into the Bank of England:" *Ib*, at p. 205. The bill charged that it was the duty of the commissioners, and of the creditors' assignees, and of the creditors themselves, to see that the official assignee observed this rule and the other rules; that this had not been done; and that, by means of the neglect, the official assignee had kept large sums and applied them to his own use. But his Lordship was of opinion that such neglect, if established, would not relieve the surety. The same view was taken by the House of Lords under like circumstances in *McTaggart* v. *Watson*, 3 C. & F. 525.

I may refer to *Creighton* v. *Rankin* also, 7 C. & F. 355. That was a suit by trustees of district roads under a local act, and was brought in the name of their clerk against their treasurer's sureties. The facts of the case, and the law applicable to them, were summed up by Lord Cottenham as follows, at p 347: "The accounts were regularly examined and audited, and it may be assumed that it was the duty of the trustees not to leave more money in the hands of the treasurer than might be necessary for the current expenses of the road, and that, in fact, more was left in his hands than was necessary for that purpose; but there is no evidence of any alteration in the terms of the contract to which the surety was a party, nothing that could have precluded the trustees from requiring payment of the balance found due. There was, therefore, nothing more than an omission to require payment; and, although this might be a neglect of the duty imposed upon the trustees by the act, it does not, for that reason, operate more strongly in favour of the surety, than a similar neglect of a course of proceeding which the surety might, from the usual course of business, or the routine of trade, or the nature of the transaction, have been led to expect would take place. Such neglect can only be urged in his favour as placing him in a different situation, and exposing him to greater risk than he had intended; and this effect is produced by every omission in keeping the principal punctual to his payments, but such omission cannot be pleaded as an exoneration of the surety."

In consequence of the view which I have thus taken, it is unnecessary to consider the effect of the arrangement made between the plaintiffs and defendants in March, 1869, for continuing Kintrea in office.

It was contended on the part of the sureties, that they were sureties for one year only. But the treasurership was not made an annual office by the statute, 29 & 30 Vic. ch. 51, sec. 161; and the by-law for 1868, appointed Kintrea, and the other officers therein mentioned, for the year 1868, "and until their successors shall be appointed."

It was contended that, at all events, the sureties are only liable for sums received by the treasurer after the execution of the bond; but, as his payments after that date appear to have exceeded the amount then due by him, and are applicable thereto in the first instance, it is unnecessary to consider at present the proper construction of the condition with reference to the balance (if any) which such payments might not satisfy.

The answer raises an objection to the jurisdiction of the court to take the account as against the sureties. I think that the jurisdiction against Kintrea is maintainable on the ground of agency alone; and that, on the principle of avoiding multiplicity of suits, the sureties, being interested in the account, are proper parties to the taking of it. I think that the jurisdiction is maintainable against all the defendants on the ground, also, that the account is not such as can be conveniently and properly investigated before a jury at *Nisi Prius.*

The decree as drawn up declared the bond valid against the sureties, as well as the principal; directed an account to be taken of the amount due to the plaintiffs thereon; ordered the defendants to pay the costs to the hearing; and reserved further directions and subsequent costs.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, ESQ., *Barrister-at-Law.)*

CAISSE v. THARP.
BANK OF MONTREAL, *Garnishees.*

Attachment of debts.

A sum of money was sent by a father to his son, the judgment debtor, as a gift, through a bank. Before any communication by the bank to the judgment debtor, the execution creditor obtained an attaching order and summons to pay over. The order was issued on the 17th of August, thirteen days before the bank agency, where the debtor resided, was advised of the deposit.

Held, that the amount could not be attached.

Semble, that the father might revoke the gift, and therefore it could not be looked upon as a debt.

[Chambers, Sept. 9, 12, 1870.—*Mr. Dalton.*]

The execution creditor in this case obtained an order attaching a sum of money alleged to be standing to the credit of the execution debtor, in the agency of the Bank of Montreal at Cobourg.

The proper name of the execution debtor was Frederick S. G. Tharp, but he was sued as Frederick J. G. Tharp, and the money was said to be payable to one J. G Thorp.

The money had been sent from England by the father to his son, the execution debtor, but there had been no communication between the Bank and the execution debtor on the subject.

O'Brien, for the execution debtor, showed cause:

1. The garnishees are a foreign corporation, and a debt cannot be attached in their hands. *Lundy* v *Dickson*, 6 U. C. L. J. 91.

2. There is no debt in fact. The sum of money, even if intended for this debtor, is a gift from the father, and has never been claimed by the son, nor has there been acquiescence by him. The son could not sue the Bank for the money, and the father could recall it.

Osler for the garnishees.

Dr. McMichael, for the execution creditor, supported the summons, contending that there was a debt, which could be attached.

Mr. DALTON.—I notice only one of the objections made in this case. The judgment creditor is required by the statute to show that "some person is indebted" to the judgment debtor. It is conclusively established that in such an application there must be a *legal* debt from the garnishee.

The facts shown in the case are as follows: The manager of the Bank of Montreal at Cobourg was notified, on the 30th August last, by the manager at Montreal, that the Cobourg agency was credited by the principal Bank at Montreal with $389 33, on account of one J. G. Thorp, deposited in the Union Bank of London, in England.

I think it appears that the person named is the judgment debtor, and I take it, on the affidavits, that the money had been deposited for him as a gift from his father: that on the same 30th day of August, "immediately after" the manager was advised of such credit, he was served with this garnishing order and summons. The order was issued on the 17th August, thirteen days before the Bank at Cobourg was advised of the deposit, and probably before it had been received by the Bank at Montreal. It does not appear when that was. Then surely no debt was shown when the order was issued. But suppose the order not to have been issued till after the receipt by the Cobourg agency, no communication had been made to the judgment debtor by the Bank, nor even an entry to his credit (so far as shown) in their books; and if any point is clear at law, I should say it is clear that the depositor in this case could revoke the authority to the Bank to pay the judgment debtor, at any time, until something had occurred to create a privity between him and the Bank.

As to whether the Bank could be made garnishees in this proceeding, I do not say anything.

The attaching order and summons to pay over must be discharged, with costs to the garnishees.

Order accordingly.

IN RE WATTS AND IN RE EMERY.

Conviction—Sale of liquor contrary to by-law—27 & 28 Vic. cap. 18—32 Vic. cap. 32 (Ont.)—Certiorari—Appeal.

The above persons were convicted of selling intoxicating liquors without license, in a township where the sale of intoxicating liquors and the issue of licenses were prohibited, under the Temperance Act of 1864, 27 & 28 Vic. cap. 18, and a memorandum of the conviction, simply stating it to have been a conviction for selling liquor without a license, was given by the justices to the accused.

An application for writs of certiorari to remove the convictions for the purpose of quashing them was refused; for even if the conviction should have been under the Temperance Act of 1864, and not under 32 Vic. cap. 32 (Ont.), it was amendable.

Quære, whether the conviction could not be supported as it stood.

Semble, that although 27 & 28 Vic. cap. 18, sec. 26, takes away the right of certiorari and appeal, a certiorari may be had when there is an absence of jurisdiction in the convicting justice, or a conviction on its face defective in substance, but not otherwise.

[Chambers, Sept. 12, 1870.—*Gwynne, J.*]

These were applications for writs of certiorari to remove two several convictions, whereby the above named parties were respectively convicted of selling liquors in the township of Ernestown without a license.

The applications were supported by affidavits showing the summonses, which charged that the accused "did within the last twenty days sell or dispose of intoxicating liquors without the license required by law so to do, and contrary to the by-law of the corporation of the township of Ernestown, prohibiting the sale of intoxicating liquor in Ernestown;" and a memorandum dated 30th July, 1870, which was signed by the convicting magistrates, whereby it was said that after hearing the evidence, they adjudged that each of the above parties respectively is guilty of selling intoxicating liquors in the township of Ernestown without a license within the last twenty days.

There were also affidavits showing that by-law No 1, of the year 1870, passed by the Municipal Council of the township of Ernestown, on the 17th January, 1870, whereby the sale of intoxicating liquors, and the issue of licenses for the purpose, is prohibited within the township of Ernestown, under the authority of the Temperance Act of 1864 (27 & 28 Vic cap. 18). The affidavits show this to be a valid and subsisting by-law, and that it was brought under the notice of the magistrates at the hearing of the respective charges.

The ground of the application was that the memorandum of the justices showed the convictions to have been under the statute of Ontario, 32 Vic. cap. 32, whereas it was contended that the conviction should have been under the Act of 1864, 27 & 28 Vic. cap. 18.

McKenzie, Q C., for the convicting justices and the prosecutor, shewed cause.

Holmested supported the application.

GWYNNE, J.—The point made in favor of the applicants is, that a person cannot be convicted of selling intoxicating or spirituous liquors without a license in the township of Ernestown, because, by reason of the by-law, the issuing of such license is prohibited.

In my opinion, there is nothing in these cases to justify the issuing the writ. The statute of Ontario, 32 Vic. c 32, s.1, enacts that "no person shall sell by retail any spirituous, fermented or other manufactured liquors, within the Province

of Ontario, without having first obtained a license authorizing him so to do," as provided by the act. The act provides that these licenses shall be issued upon the certificate of the clerks of the respective municipalities, which were empowered to pass by-laws for granting the certificates, and for declaring the terms and conditions upon which the licenses shall issue.

Now, assuming a complaint to be made for selling spirituous liquors without a license, I am not at all prepared to say that a conviction which finds that the accused is guilty of that offence is bad because he may have adduced evidence which shows not only that he sold the spirituous liquors without a license, but that he could not have obtained a license, because its issue was prohibited by a by-law.

Since the passing of 32 Vic. cap. 32, any sale of intoxicating liquors is in effect illegal as made without license, unless the accused has the protection not only of a license, but also of a by-law of the municipality authorizing the same. Why may not, then, a person be convicted under 32 Vic. cap. 32, for selling without a license, when the accused produces a by-law prohibiting instead of authorizing the issue of a license?

I am not at all prepared to say that there is anything in the point made, even if the magistrates had conclusively prepared and returned their conviction in the terms of their memorandum; but it is said that in fact they have returned a conviction which sets out the by-law and convicts the parties of selling liquor in violation of the by-law.

However, whether this be so in fact or not, I do not enquire; because it is quite apparent that the charge against the accused was of selling liquor without any legal warrant to do so, and in fact in defiance of a law forbidding it. Now, in whatever form the magistrates may have expressed their conviction of that offence, I apprehend, if an appeal be not taken away, that the conviction would be amendable under 29 & 30 Vic. cap. 50, that is, that the charge which was before the magistrate should have to be heard on the merits, "notwithstanding any defect of form or otherwise in the conviction," and, if necessary, upon the party complained against being found guilty, the conviction would be amended, so as to conform with the facts adduced. The matter then, if appeal be not taken away, being capable of being amended on appeal, I do not think that a certiorari should issue. But whether the conviction be under 32 Vic. cap. 32, or 27 & 28 Vic. cap. 18, there is no appeal from this conviction to any court. Now, it would be defeating the object of the statute if, notwithstanding they declare that there shall be no appeal, still a party should be permitted to remove a conviction for the purpose of quashing it in respect of a matter not appearing upon the conviction itself to be a defect rendering it bad, and which, if the appeal had not been taken away, would have been rectified on an appeal.

I do not think that these writs of certiorari should be granted, except in cases where there appears to be an absence of jurisdiction in the convicting justice, or a conviction, upon the face of it, defective in substance.

Here the applicants in substance admit that they have sold the spirituous liquors contrary to law; that is, without having such a license as made the act of sale legal Under these circumstances, I see no way in which they can be prejudiced by the form of the conviction, whatever it may be, even though it be in terms for selling without a license contrary to 32 Vic. cap 32; and I therefore discharge the summonses with costs, to be paid by the respective applicants, Watts and Emery, to the parties called upon to show cause.

Application refused with costs.

ENGLISH REPORTS.

EXCHEQUER CHAMBER.

DENHAM V. SPENCE.

Practice—Action against British subject residing abroad—"Cause of action"—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 18 and 19.

A marriage contract was entered into by the plaintiff and defendant abroad. The plaintiff came to England, and was there followed by the defendant. Immediately on his arrival in England, the defendant wrote to the plaintiff that he did not intend to fulfil the contract, and subsequently refused to marry the plaintiff.

A rule to set aside a suit issued against the defendant under section 18 of the Common Law Procedure Act, 1852, was refused by the court (Kelly, C. B., *dissentiente*).

Contra (per Kelly, C. B.), "Cause of action" means the whole and entire cause of action, both contract and breach.

Semble (per Martin, B.), a marriage contract creating a personal relation between the parties to it, is a continuing contract down to the time of its breach.

Sichell v. *Borch*, 12 W. R. 346; 2 H. & C. 954; *Allhusen* v. *Malgarejo*, 16 W. R. 854, L. R. 3 Q. B. 340; *Jackson* v. *Spittal*, 18 W. R. 1162, L. R. 5 C. P. 542, commented on.

[Ex. 19 W. R. 162.]

Motion for rule to show cause why writ and subsequent proceedings in the above action should not be set aside, on the ground that the cause of action, if any, did not arise within the jurisdiction of the superior courts, under section 18 of the Common Law Procedure Act, 1852. The said section enacts as follows:—

In case any defendant, being a British subject, residing out of the jurisdiction of the said superior courts, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the Schedule A to this Act annexed, marked No 2, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts; and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors; to direct, from time to time, that the plaintiff shall be at liberty to proceed in the action in such manner, and subject to such conditions as to such court or judge may seem fit, having regard to the time allowed for the defendant to

appear being reasonable, and to the other circumstances of the case; provided always that the plaintiff shall, and he is hereby required, to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry, or before one of the masters of the said superior courts, in the manner hereinafter provided, according to the nature of the case, as such court or judges may direct, and the making such proof shall be a condition precedent to his obtaining judgment.

This was an action for breach of promise of marriage. The offer and acceptance of marriage were contained in letters which passed between the plaintiff and defendant at the time that the former was living in Calcutta and the latter at the Cape of Good Hope. The plaintiff came to England, whither she was followed by the defendant. When off Plymouth the defendant wrote a letter to the plaintiff, dated the 8th of April, in which he informed her of his intention not to fulfil his engagement. He subsequently refused to marry the plaintiff. The letter of the 8th of April, was posted in Plymouth, and received, in due course of post, by the plaintiff on the 9th of April.

Day, in support of the motion.—The question turns on the construction of the words "a cause of action which arose within the jurisdiction or in respect of the breach of a contract made within the jurisdiction" of section 18 of the Common Law Procedure Act of 1852. The contract in this case was certainly made out of the jurisdiction, therefore the defendant is not within the latter part of the sentence, nor is he, I submit, within the meaning of the words "a cause of action which arose within the jurisdiction," for even admitting the breach to have occurred in England, "cause of action" means the whole cause of action, and embraces the contract as well as the breach; and the former was not subsisting at the time that the defendant landed in England, for he had broken it by letter before disembarking. The authorities are divided as to the construction of the words in question. In 1858, this court, *Fife* v. *Round*, 6 W. R. 282, held that the dishonour in England of a promissory note made and delivered to the plaintiff in France, but payable in England, was within the section. But in 1864, this court, in *Sichell* v. *Borch*, 12 W. R. 346, 2 H. & C. 954—where the defendant, a foreigner residing in Norway, there drew a bill of exchange on E., after endorsing it to D.'s order, sent it by post to D. in London, who endorsed it to the plaintiff—held that the cause of action did not arise within the jurisdiction. However, in 1865, in *Chapman* v. *Cottrell*, 13 W. R. 843, 3 H. & C. 865, 34 L. J. Ex. 186—where the defendant, a British subject residing in Florence, signed two promissory notes there as joint and several maker with his brother in London, to whom he sent them by post, and his brother thereupon signed the notes and delivered them to the payees in England—this court held that the "cause of action" had arisen within the jurisdiction; but this case is, it is submitted, distinguishable from that preceding it, as the defendant's contract was not complete until the notes were signed and delivered by his brother, a joint maker in England. In 1868, the Court of Queen's Bench, in *Allhusen* v. *Malgarejo*, 16 W. R. 854, L. R. 3 Q. B. 340, following *Sichell* v. *Borch*, held that "cause of action" must mean the whole cause of action; that is, all the facts which together constitute the plaintiff's right to maintain the action. This case has been chronologically, but not otherwise, followed by the case of *Jackson* v. *Spittal*, 18 W. R. 1162, L. R. 5 C. P. 542, where the Court of Common Pleas has held that "cause of action" is satisfied by the breach of a contract arising within the jurisdiction; but that case is clearly wrong, as it proceeds on the idea of an analogy existing between the present procedure and that of outlawry. Now the foundation of the proceedings in outlawry was that the defendant must be in the jurisdiction, while the procedure introduced by the Common Law Procedure Act, is directed against those who are beyond the jurisdiction. I therefore submit that on this review of the cases, the balance of the authority is in the defendant's favour, and cause of action must mean "whole cause of action."

Petheram against the motion.—This was a continuing contract, and therefore both breach and contract were in England; but if the court is not of that opinion, then I submit that by "cause of action" is meant a substantial part of the cause of action, and that is the breach which it is admitted arose within the jurisdiction: Day's Common Law Procedure Act, 1852, 3rd edit. p. 18.

Cur. adv. vult.

PIGOTT, B.—I regret to say that there is a difference of opinion in this court, and as the other superior courts have also differed in the construction to be put upon the language of the Common Law Procedure Act, 1852, s. 18, of that section I am bound to express my opinion. The words which raise the difficulty are a cause of action which arise within the jurisdiction "or in respect of the breach of a contract made within the jurisdiction." In the case of *Sichell* v. *Borch* I did not then differ from the rest of the court, but contented myself with expressing my doubts as to the correctness of the decision of the court. The Court of Common Pleas, in the case of *Jackson* v. *Spittal*, have had this section under their consideration, and have affirmed those doubts. After full consideration, I adopt the language of the Common Pleas. The Legislature, no doubt, intended to give increased facilities to creditors against debtors who are out of the country, and for this I rely upon the words "or in respect of the breach of a contract made within the jurisdiction" being used in the alternative. The present case arises upon facts which were correctly stated by Mr. Day, and that statement of the facts was accepted as correct by the other side; what we now have to determine is the intention of the Legislature conveyed by the words "cause of action." Mr. Day contends that the meaning of the words is the whole cause of action or all the facts which together constitute the plaintiff's right to maintain the action. It seems to me that that is not the true meaning of the words, or the intention of the Legislature.

The expression "cause of action" means the breach of the contract. It is of course clear that a contract can be broken, but the breach alone would—and I think does—satisfy the language of the Legislature, and that is, I think made clear by the words used in the section.

To exemplify them—Suppose a contract made in China to deliver goods in England and the contract is broken by non-delivery, then I say, according to this section, a cause of action would arise in England. The Act was intended to be a remedial Act, and I don't think we ought to narrow the words which the Legislature has made use of.

MARTIN, B.—I am of the same opinion. I think that this writ was rightly issued. The words of the section are, "It shall be lawful for the court or judge upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction or in respect of the breach of a contract made within the jurisdiction to direct, &c." The facts of the case are very short.

It appears that the defendant wrote an offer of marriage from the Cape of Good Hope to the plaintiff at Calcutta, and she wrote from that place accepting his offer. She came to England; he followed her; but before landing at Plymouth wrote to her that he held himself disengaged from his promise. Now, in my opinion, there is this peculiarity in the contract of marriage that it is a continuing contract, and therefore when the parties were in England, the one being at London and the other at Plymouth, it seems to me that there was a valid contract in England, and then the defendant having broken the engagement it follows that a cause of action arose within the jurisdiction. We were pressed by the judgment of this court in the case of *Sichel* v. *Borch*, but I am not embarrassed by that, for I still adhere to that judgment. The circumstances of this case are easily distinguishable from those in *Sichel* v. *Borch*; there the defendant was a Norwegian, residing in Norway; he may never have been in this country in his life; he both drew and endorsed the bill on which he was sued in Norway. It would have been monstrous on account of the dishonour of the bill here to have held that there was a cause of action within our jurisdiction. I therefore think that *Sichel* v *Borch* was decided rightly, and I would decide both that case and the present, as they have been decided, if I had to decide them again.

KELLY, C.B.—I entirely agree with my brother Pigott, in regretting that there is a difference of opinion in the court on the construction of this section. In my opinion, "the cause of acion" really means the whole and entire cause of action, and not merely such an act as the non-acceptance or non-delivery of goods. I think it almost obvious that that expression must include the making of a contract as well as its breach. My brethren read the words, "cause of action," as if they were equivalent to breach of contract; but it appears to me obvious that that is not the meaning, for the words breach of contract are used immediately afterwards To treat non-payment, non-appearance, or non-delivery of goods as a cause of action is a mistake, for such acts of themselves do not constitute a cause of action; that which makes them so is the contract, and without the contract there can be on cause of action at all. I think therefore in the first place, that as the contract was not made in England, no cause of action did in this case arise within the jurisdiction Now, as to the words of the statute on which this question arises, they are—"it shall be lawful for a court or a judge, upon being satisfied by affidavit that there is a cause of action, which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction," &c. Now, the effect of the construction I put upon the words "cause of action" would be, that if in the case of a contract made abroad, say for the delivery of goods in England, that contract were broken by the non-delivery of goods in England, no cause of action would arise within the jurisdiction; but in the case of a contract made in England, there a cause of action would arise, although the breach of the contract be committed abroad; but if that construction be not right, why, it may be asked, did not the Legislature, if it intended that actions should be brought here for breaches of contracts arising in England, although the contracts were made abroad, use half a dozen more words, and plainly express such intention. It seems to me, therefore, that, quite irrespective of authority, the meaning of this section is clear and obvious. But when we look at the authorities, several of which are in this court, and which terminate with the case of *Sichel* v. *Borch*, I think the balance of authority is in favour of my view of this section. I also look upon the case of *Allhusen* v *Malgarejo*, decided in the Queen's Bench, as rightly decided. There it was expressly said that the cause of action means the whole or entire course of action. There it was expressly said that the cause of action means the whole or entire course of action. My brother Martin has dealt with this case in a way that I cannot accede to. He says that the contract continued until the plaintiff and defendant came into this country; but if that were the case the same might be said of every contract if the parties to it happened to come to England, and where such an event happened there would be no necessity for the Act. Then as to the case of *Jackson* v *Spittal*, recently decided in the Common Pleas, I have looked through that case with great attention, and it seems to me that they have purposely adopted such a construction of the section as would extend the jurisdiction of the superior courts. But I think such a construction would prejudicially affect thousands of persons, and would work positive injustice; and therefore, with every respect for the decision of that court, and agreeing, as I do, that it is generally a sound rule to put such a construction on an Act of Parliament as should have the effect of extending the jurisdiction of the superior courts, I am unable, for the reasons I have given, to agree with that decision. I am therefore of opinion that in the case of a contract made abroad, but broken in England, the "whole cause of action" does not arise within our jurisdiction.

CLEASBY, B. (after saying that although not in court during the whole of the case, he felt himself entitled to give judgment, as he had heard Mr. Day's argument, proceeded)—I agree with the majority of the court that the defendant's application ought to be refused. The expression "cause of action" is very intelligible, though if the words used had been "whole cause of action" that might not, perhaps, have been so clear. Now when does the cause of action arise? It seems to my mind clear that it arises when that is not done at the time at which it ought to

have been done, and when that takes place in this country then it follows that the cause of action arises here, or, in other words, the cause of action arises when something takes place inconsistent with the obligations of the party; now that in contract is the breach, and therefore, I hold that the cause of action can arise nowhere except where the breach occurs. As to the inconvenience which my Lord Chief Baron suggests would arise from our holding that actions can be brought in this country in respect of contracts made abroad, but broken in England, I confess that it does not seem to me that any would arise, for such contracts would be interpreted according to the law of the country where they were made; yet, as the breach has occurred in England, it seems to me only fair and reasonable that the action should be brought in England. As to the case of contract made within but broken without the jurisdiction, if we expand the section it will read "or that there is cause of action in respect of the breach of a contract made within the jurisdiction," and the action, therefore, gives us jurisdiction over contracts made here, but of which the breach has arisen abroad.

Rule refused.

OBITUARY.

[We shall be glad to receive full information under this head, from reliable correspondents, so as to enable us to keep as complete and accurate a record as possible.]

THE HON. JOHN PRINCE, Q.C.

(Extracted from the *Essex Record.*)

The Honorable John Prince, late Judge of the district of Algoma, better known to the public as Col. Prince, was born in Herefordshire, England, on the 12th of March, 1796, and consequently upon his death at his residence at Sault Ste. Marie, Algoma, on the 30th of November, 1870, was in the 75th year of his age.

He was early in life devoted to the profession of the law, and in 1821 was admitted to practice in all the courts of law and equity in England. He followed the practice of his profession in the Counties of Herefordshire, Kent and Gloucestershire, until 1833, when he decided upon emigrating to America. His extraordinary fondness (amounting to a passion) for field sports, is said by those still living who remembered him at that time, to have been the cause of this sudden severance from a lucrative practice and all his home ties; it is said he would occupy all his leisure at this time in reading and dilating upon accounts of the deer and turkey shooting in Kentucky, which he then intended as his destination. Had he carried out his intention, with the knowledge we now have of him, and of the subsequent history of the country he proposed as his future home, a curious speculation might be formed as to the position of himself and family; but the facts were that his course was changed by the influence, we believe, of some accidental companions of voyage, and in August, 1833, he finally settled in Sandwich, two miles from where we write.

In 1835 he went into Parliament, and from this point of his career there were few men whose actions for twenty years after this time were more continually before the people of Ontario and Quebec than those of Col. Prince. From 1836 to 1860, he sat in the Parliaments of Upper Canada and United Canada, and for the latter few years, in the Legislative Council or Upper House of the United Provinces, to which, when made elective, the electors of Essex and Kent, the "Western Division," returned as its representative the man who both counties always "delighted to honour." Colonel Prince was the representative of the Western country; but he was not merely a representative in the House of Parliament, for —whether he were urging to its passage a bill for the admission of aliens to the real estate privileges of British subjects, and thereby bringing American capital into the Province, or whether he were ordering the shooting on the spot of these same Americans when caught in the sin of piratical invasion and brutal murder, and thereby subjecting himself to abuses and misrepresentations, culminating in duels and court martials (and recent events have shewn his course to be the proper treatment of like marauding scoundrels after all), or whether he was arranging an agricultural show or cattle fair in a little Essex town on the plan of his old Herefordshire recollections, or haranguing in the principal city of Canada thousands on the then, to Conservatives, most exciting topic of the day, the payment of "rebellion losses," in all circumstances, on all occasions, he was the representative man.

He was called to the Bar and admitted as an attorney in Michaelmas Term, 1838, at the same time as the present Treasurer of the Society, and was elected a Bencher in the same term twenty years afterwards.

In 1860 he was offered and accepted the situation of District Judge of the District of Algoma, which he never quitted until the year 1870, when he visited Toronto in search of medical assistance which could not be of use, for he died suddenly on the morning of Wednesday, November 30, but quite calmly and free from pain.

As a lawyer he was a remarkable instance of a practical application of the maxim that law is the highest reason, the best of common sense; for, without being a student, he would almost instinctively seize upon the true bearing, and the inevitable result of a certain state of facts, and would astonish consumers of the midnight oil, by shewing that he knew the law without having read the cases.

As a politician he was successful as regards the interest of the country, an utter failure as regards his own. He would urge with the whole power of his intellect some measure he deemed for the good of the country, utterly indifferent to the fact that the ministry he professed to support at the time were its op-

ponents. He never could be made to understand the necessity which seems now-a-days to be so universally admitted, the necessity for party government. He never held office.

As both lawyer and politician his distinguishing characteristic was his eloquence, eloquence which would sometimes rise, especially in his references to the classics (for he was a scholar of old Hereford College, and no mere "crammer" of Latin and Greek), to the height of oratory. And with his eloquence, with the expression of his thoughts in the most fluent and fitting language, was joined almost all the advantages which subserve it, ease of manner, power and pliability of voice, and a most gracious and commanding presence. But the feature of Colonel Prince's character, upon which most of those who knew him well fixed their attention, was always his manliness, his independent assertion of not what always was right, but always what he thought to be so, and his generous and disinterested recantation of such opinions when he thought them to have been wrong.

His warm impulsive nature, fed by and resting upon a superb bodily constitution, led him to error as well as to truth, but in either event men came to know that what he did he did with all his heart, and that that heart was never sullied by anything mean, sordid, or dishonest.

Two biographical sketches of Colonel Prince have been published, one by Mr. F. Taylor, in 1865, another by Mrs. Jamieson, in the earlier portion of the Colonel's Parliamentary career, we think about 1838.

THE LOWEST TENDER.—The advertising columns of the daily journals contain pages of invitations for tenders issued by Government departments, unions, institutions, and companies. The persons upon whom devolves the duty of drawing these notices are accustomed to add a note that the advertisers do not 'bind themselves to accept the lowest or any tender.' It is so rarely that these cautious words are omitted that it is difficult to believe that they are the merest surplusage. They look so exactly alike the offspring of some decided case. Yet a judgment lately delivered by the Court of Common Pleas and printed in the November number of the *Law Journal Reports* show plainly enough that they have their origin in nothing but the wariness of advertisers, and that the effect of the proposition would be precisely the same if they were omitted. In *Spencer* v *Harding*, 39 Law J. Rep. (N.S.) C. P. 339, the defendants issued a circular in which they stated that they had been instructed to offer to the wholesale trade for sale by tender the stock-in-trade of E. & Co., amounting, as per stock book to a definite sum of money, and which would be sold at a discount, in one lot. They also stated in the circular the day and the hour when the tenders would be received and opened at their offices. The plaintiffs made a tender, which they alleged to be the highest and brought an action against the defendants for not accepting. The plaintiffs contended that the case was analogous to those in which a person has been held liable to pay a reward offered by advertisement. But Mr. Justice Willes said that the analogy supposed would exist if the defendants had in their circular undertaken to accept the highest bidder; as it was, there was nothing more than a proclamation that the defendant desired to have offers made them for the stock. We shall be curious to see whether this decision will embolden advertisers to shorten their notices by one line.—*Law Journal.*

LEGAL APHORISMS.—The defendant's counsel, in a breach of promise suit, having argued that the woman had a lucky escape from one who had proved so inconstant, the judge remarked that "what the woman looses is the man as he ought to be." Afterward, when there was a debate as to the advisability of a marriage between a man of forty-nine and a girl of twenty, his lordship remarked that "a man is as old as he feels; a woman as old as she looks."

APPOINTMENTS TO OFFICE.

COUNTY JUDGE.

THE HON. WALTER RAE McCREA, of the Town of Chatham, in the County of Kent, to be Judge of the Provisional Judicial District of Algoma, *vice* Hon. John Prince, deceased. (Gazetted December 24th, 1870.)

COUNTY ATTORNEY.

JOHN BAN McLELLAN, of the Town of Cornwall, Esquire, Barrister-at-Law, to be County Attorney and Clerk of the Peace for the United Counties of Stormont, Dundas and Glengary, *vice* James Bethune, resigned. (Gazetted December 3rd, 1870.)

DEPUTY CLERK OF CROWN.

FRANK E. MARCON, of Sandwich, Gentleman, Attorney-at-Law, to be Deputy Clerk of the Crown and Clerk of the County Court of the County of Essex. (Gazetted 1st October, 1870.)

WILLIAM ALEXANDER CAMPBELL, of the City of Toronto, Esquire, to be Acting Deputy Clerk of the Crown and Clerk of the County Court of the County of Kent, *vice* T. A. Ireland, deceased. (Gazetted 1st October, 1870.)

REGISTRAR.

JOHN COPELAND, of the Township of Cornwall, Esquire, to be Registrar for the County of Stormont, *vice* George Wood, resigned. (Gazetted November 19th, 1870.)

NOTARIES PUBLIC.

GEORGE FREDERICK HARMAN, of the Village of Orangeville, Esquire, Barrister-at-Law; THOS. DIXON, of the Village of Durham, Esq., Barrister-at-Law; ARCH. BELL, of the Town of Chatham, Gentleman, Attorney-at-Law. (Gazetted November 5th, 1870.)

FRANCIS R. BALL, of the Town of Woodstock, and EDWARD MERRILL, of the Town of Picton, Esquires, Barristers-at-Law. (Gazetted November 12th, 1870.)

SIMON HARRISON PAYNE, of Colborne, Gentleman, Attorney-at-Law. (Gazetted November 26th, 1870.)

JOHN HENRY GRASSETT HAGARTY, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted December 3rd, 1870.)

ADAM HENRY MEYERS, jun., of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted Dec. 17th, 1870.)

ROBERT OLIVER, jun., of the Town of Guelph, Esq., Barrister-at-Law. (Gazetted December 24th, 1870.)

ALEXANDER S. WINCH, of the Town of Dundas, Gentleman, Attorney-at-Law. (Gazetted 31st December 1870.)