DIARY FOR AUGUST.

1. Sat. ..*Lammas.*
2. SUN..*8th Sunday after Trinity.*
9. SUN..*9th Sunday after Trinity.*
12. Wed..Last day for service for County Court.
14. Frid..Last day for Co. Clerks to certify County Rates to Municipalities in Counties.
16. SUN..*10th Sunday after Trinity.*
21. Frid..Long Vacation ends.
22. Sat. ..Declare for County Court.
23. SUN..*11th Sunday after Trinity.*
24. Mon..*St. Bartholomew.*
26. Wed..Appeals from Chancery Chambers.
30. SUN..*12th Sunday after Trinity.*
31. Mon..Last day for Notice of Trial for Co. Court. Last day for setting down for rehearing.

The Local Courts'

AND

MUNICIPAL GAZETTE.

AUGUST, 1868.

CAUSE OF ACTION IN DIVISION COURTS, WHERE IT ARISES.

The principles governing cases in which questions arise as to the proper court wherein to institute proceedings in Division Courts, though still presenting many points of difficulty, are gradually becoming settled. To one branch of the subject we desire now to refer.

Sec. 71 of the Division Courts Act enacts that any suit may be entered and tried in the court holden for the division in which the cause of action arose or in which the defendant or any one of several defendants resides or carries on business at the time the action is brought, notwithstanding that the defendant or defendants may at such time reside in a county or division or counties or divisions different from the one in which the cause of action arose.

The words "in which the *cause of action* arose" are, it will be seen, deserving of special attention, as numerous cases turn upon the construction to be placed upon the words here printed in italic; and it is a late decision upon this part of the section which has called our attention to the subject. The words "cause of action" have been held in many cases to mean the *whole cause of action*, or, as Chief Justice Draper, in referring to them, says, "whatever the plaintiff must prove to entitle him to recover . . . . not the contract only, but the contract and the breach."

The facts of the case referred to and lately decided in Chambers (*Carsley* v. *Fisken et al.*), by Mr. Justice Morrison, on an application for a writ of prohibition, were as follows:

The defendants, who resided and carried on business at Toronto, offered by letter written at Toronto, to sell to the plaintiff, who resided and carried on business at Kingston, a quantity of coal oil at a certain price. The plaintiff at Kingston accepted the offer of the defendants by telegraph to them at Toronto, and they thereupon shipped the oil to him at Kingston. Upon its arrival, however, the plaintiff found, as he alleged, that the quantity of oil stated to have been contained in the barrels ran short, and he then sued defendants in the Division Court at Kingston for the shortage.

It was objected at the trial that the action could not be brought at Kingston, on the ground that the cause of action did not arise there within the meaning of the statute, and that it could therefore only properly be brought where the defendants resided, under the further provision of the statute.

An application was made in Chambers for a prohibition which was eventually granted, thus deciding that in such a case as we have referred to, the action must be brought where the defendant resided.

Mr. Justice Morrison, in giving judgment, referred to the decision of the Chief Justice, held that the cause of action within the sec. 71 of the Act, is not the contract only, but the contract and breach, and for which the plaintiff claimed damages. "The sale of the oil in this case took place where the defendants resided, at Toronto, to be delivered to the plaintiff at Kingston, and the breach was, that the full quantity of oil was not delivered to the plaintiff at Kingston, the barrels being short of measure On the authority of the case cited, the cause of action arose partly at Toronto and partly at Kingston, and the plaintiff must therefore sue the defendants in the Division Court of the Division in which they reside, that is at Toronto."

JUDICIAL FORM OF EXPRESSION.

There is much sound sense in the following observations of the late Chief Justice of the Supreme Court of the State of Georgia—delivered by him on refusing an application for a new trial made on behalf of a man who had been convicted of murder:—

"All the evidence shews a vicious and depraved propensity to take human life—for the preservation of which human laws are enacted."

"In this age of recklessness and terrible demoralization of men—if men sow the wind they cannot expect courts and juries to interpose and prevent them from reaping the whirlwind—they must eat of the fruit of their own doings. It has been said heretofore that, few cases of murder in the first degree, such as poisoning and private assassination were committed by our people. But f passion without sufficient provocation is to excuse men from the crime and guilt of murder, then is human life cheap indeed—of no more value than the sparrow's."

"I have lost faith very much in punishment as a means of amending the offender himself. Its reformatory effect is not much, I fear; still its punitive power must be felt; and while the glittering blade wielded by the strong arm of malice is mighty to destroy, still, *the small cord in the hands of the executioner of justice must be felt to be not less fatal and unerring.*" (*!*)

"This is an age of Cains and the voices of murdered Abels come up at every court crying aloud to the ministers of the law for vengeance. Let the stern response going out from the jury box and the bench be, who sheddeth man's blood without legal excuse or justification—*shall be hung by the neck till he is dead.*" (*!!*)

35th Georgia Reports, 169-170.

As a matter of taste—it would be a not agreeable surprise to hear from our Judges, similar forms of expression—however readily we might concur in the sentiments expressed.

SELECTIONS.

CRIMINAL LIABILITY WHERE THERE IS NO CRIMINAL INTENTION.

The legal maxim of *Actus non facit reum, nisi mens sit rea*, though in criminal cases of general, is not of universal application, since there are many violations of the criminal law in which it forms no excuse whatever. To instance only the well known principle so often declared from the judgment-seat when some poor wretch, in extenuation of his conduct, asserts that when he did the act for which he has been prosecuted he was drunk — that drunkenness is no excuse for crime, it will at once be understood that the absence of a criminal intention is not always an excuse for an act which the criminal law forbids. No doubt "it is," as said by Lord Kenyon in *Fowler* v. *Paget*, 7 T. R., 514, "a principle of natural justice and of our law that the intent and the act must both concur to constitute the crime." And as remarked by Erle, C. J., in *Bruckmaster* v. *Reynolds*, 13 C. B., N. S., 68, "a man cannot be said to be guilty of a delict unless to some extent his mind goes with the act." But, as observed Mr. Broom in his Legal Maxims, "the first observation which suggests itself in limitation of the principle hus enunciated is, that whenever the law positively forbids a thing to be done, it becomes thereupon *ipso facto* illegal to do it willfully or in some cases even ignorantly; and consequently the doing it may form the subject-matter of an indictment, information, or other criminal proceedings *simpliciter*, without any addition of the corrupt motive." The observations of Ashurst, J., in *Rex.* v. *Sainsbury*, 4 T. R. 427, puts the doctrine in a very clear point of view. He says: "What the law says shall not be done, it becomes illegal to do and is therefore the subject-matter of an indictment without the addition of any corrupt motives. And though the want of corruption may be the answer to an application for an information which is made to the extraordinary jurisdiction of the court, yet it is no answer to an indictment where the judges are bound by the strict rule of law." Where a statute in order to render a party criminally liable requires the act to be done feloniously, maliciously, fraudulently, corruptly, or with any other expressed motive or intention, such motive or intention is a necessary ingredient in the crime; and no legal offence is committed if such motive or intention be wanting; but where the enactment simply forbids a thing to be done, motive or intention is immaterial so far as concerns the legal criminality of the act forbidden.

A recent illustration of this important principle is to be found in the case of *Rex* v. *The Recorder of Wolverhampton*, 18 L. T. Rep. N. S. 395. That was a case which arose out of a violation of the 20 & 21 Vic., c. 83 (Sale of Obscene Books Prevention Act), the 1st section of which enacts that it shall be lawful for any two justices upon the complaint that the complainant has reason to believe that any obscene books are kept in any house, &c., for the purpose of sale or distribution, complainant also stating that one or more articles of the like character have been sold, distributed, &c., so as to satisfy the justices that the belief of the complainant is well founded, and upon such justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanor and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, &c., to enter and to search for, and seize all such books, &c., as aforesaid found in such house, &c., and to carry the articles so seized before the justices issuing the said warrant, and such justices are then to issue a summons calling upon the occupier of the house, &c., to appear within seven days before any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier shall not appear at the said time, or shall appear, and the jus-

tices shall be satisfied that such articles or any of them are of a character stated in the warrant, and that they have been kept for any of the purposes aforesaid, it shall be lawful for them to order the articles so seized, except such of them as they consider necessary to be preserved as evidence in some future proceedings, to be destroyed at the expiration of the time thereinafter allowed for lodging an appeal.

It appeared that one Henry Scott, who was a tradesman, living at Wolverhampton was a member of a body called "The Protestant Electorial Union," the object of which was "to protest against those teachings and practices of the Romish and Puseyite systems which are in England immoral and blasphemous: to maintain the Protestantism of the Bible and the liberty of England, and to promote the return to Parliament of men who will assist them in those objects, and particularly to expose and defeat the deep-laid machinations of the Jesuits and resist grants of money for Romish purposes." In furtherance of the objects of this body, Mr. Scott had made considerable purchases of a pamphlet called "The Confessional Unmasked," which purported to show the supposed depravity of the Romish priesthood, and the iniquity of the confessional; and it did so by extracts from the works of certain Romish theologians who had written on the practice of auricular confession, in which matters of a most obscene and disgusting character were discussed as proper subject for inquiry at the confessional. Mr. Scott had, to promote the objects of his society of bringing down condemnation on the Roman Catholic confessional, sold publicly, at prime cost, a vast number of these pamphlets, when proceedings were taken against him under the section of the 20 & 21 Vic., c. 83, above quoted, and a great quantity of unsold pamphlets were seized at his house, and were in due course ordered by the justices to be destroyed. Having appealed against this decision, the case came on before the Recorder of Wolverhampton, who found "that the appellant did not keep or sell the said pamphlet for the sake of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect; but he sold the pamphlets as a member of the said Protestant Electoral Union to promote the objects of that society, and to expose what he deems to be the errors of the Church of Rome, and particularly the immorality of the confessional." The learned recorder further said that he was of opinion that under the cricumstances the sale and distribution of the pamphlets would not be a misdemeanor, nor be proper to be prosecuted as such, and accordingly that the possession of them by the appellant was not unlawful within the mesning of the statute; and he therefore quashed the order of justices and directed the pamphlets seized to be returned to the appellant, but granted a case for the opinion of the Court of Queen's Bench upon the subject.

It will be observed that the right of the justices to seize the books was dependent upon the fact that they were of such a charactor and description that the publication of them would be a misdemeanor and proper to be prosecuted as such. Upon the case being argued in the court above, the judges differed from the recorder in his opinion upon the subject, holding that the publication of the pamphlets would be a misdemeanor, and proper to be prosecuted as such. In giving his judgment, Cockburn, C. J., says: "He (the recorder) reversed their decision upon the ground that, although this work was an obscene publication, and although its tendency upon the public mind was that suggested upon the part of the information, yet that the immediate intention of the appellant was not so as to affect the public mind, but to expose the practices and errors of the confessional system of the Roman Catholic Church. Now, we must take it upon this finding of the learned recorder that such was the motive of this publication—that its intention was honestly and *bonâ fide* to expose the errors and practices of the Roman Catholic Church in the matter of confession. Upon that ground the learned recorder thought that an indictment could not have been sustained inasmuch as to the maintainance of an indictment it would have been necessary that the *intention* should be alleged, namely that of corrupting the publ.c mind by the obscene matter in question. In that respect I differ from him. I think that, if there be an infraction of the law, and an intention to break the law, the criminal character of such publication is not affected or qualified by there being some ulterior object which is the immediate and primary object of the parties in view, of a different and honest character.... I take it, therefore, that, apart from the ulterior object which the publisher of this work had in view, that the work itself is in every sense of the word an obscene publication, and that consequently, as the law of England does not allow of any obscene publication, such publication is indictable. We have it, therefore, that the publication itself is a breach of the law. But then it is said, 'Yes, but his purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion, especially in the mat. ter of the confessional.' Be it so; but then the question presents itself in this simple form-May you commit an offence against the law, in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is emphatically, 'No.'..... I take it that where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from the act, and that as soon as you have an illegal act thus established *quoad* the intention and *quoad* the act itself, it does not lie in the mouth of a man who does it to say, 'Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.' The law does not allow that. You must abide by the law, and if you accomplish your object you must do it in a legal manner or let it alone; you

must not do it in a manner which is illegal." Other learned judges expressed similar views,

It will be observed that the right of the justices to seize and destroy publications as mentioned in the case, depended solely upon whether or not they were of such a character and description that the publication of them would be a misdemeanor and proper to be prosecuted as such. It was necessary therefore for the judges to decide whether or not this publication, admitted to be obscene and calculated to prejudice good morals, would support an indictment, the publisher not disposing of the pamphlets for the sake of gain, nor in fact to prejudice good morals, but to promote a lawful object. The language of the Chief Justice, in holding that it would support an indictment was not more emphatic than it was sound. The maxim of "You shall not do evil that good may come" is (as was said by the Bench) applicable in law as well as in morals. Indeed if the converse of such a doctrine were permitted, the man who gives another a dose of poison to terminate bodily suffering and put a a speedy end to a painful, fatal malady, would stand excused of crime, and it would be an available plea in the mouth of a man who blew out the brains of another who was struggling in the jaws of death, that he did it, as he commonly done to the lower animals, to release him from a state of suffering which could not but speedily terminate in death. The case we have made the principal subject of these remarks cannot but be looked upon henceforth as a leading authority.—*Law Times.*

MARRIED WOMEN.

The Bill "to amend the law with respect to the property of married women," prepared and brought in by Mr. Shaw Lefevre, Mr. Russell Gurney, and Mr. J. S. Mill, contains only fourteen clauses, and bears evidence of having been carefully prepared. We think that upon the whole it is an advance, though unquestionably by a somewhat long stride, in the direction in which legislation and the practice of the Court of Chancery have been tending for years past, although the framer of the preamble seems disposed to deny any merits whatever to the existing law. The preamble states that the "law of property and contract, with respect to married women, is unjust in principle, and presses with peculiar severity upon the poorer classes of the community." The latter part of the preamble is unfortunately true, as an application to the Court of Equity by a married woman of the poorer classes is a serious step, yet the only one by which she can obtain assistance from those equitable doctrines which have displeased the common law as regards husband and wife. On the former part of it we do not in this place express any opinion. It is then enacted (section 1), that a married woman shall be capable of holding, alienating and devising property and of contracting as a *feme sole*, and (section 2) that property of women married after the Act, which is to come into operation on the 1st January, 1869, whether belonging to them before marriage or accquired by them after marriage, shall be held by them free from the debts of their husbands, and from their control or disposition, as if unmarried.

It is clear that the best advice that it is in our power to give to a woman about to be married must be, "Wait until the 1st of January, 1869." That the wife's property should be exempted from the husband's debts is highly desirable, but how are you to exempt it from his control? We fear that it is beyond the power, even of Parliament, to do that. Suppose the case of a husband and wife under the new law, being of that class where of all others a settlement of the wife's property is most desirable, the class of traders. Under the law, as it is to be, the wife retains her property; before long, without doubt, she will be asked to put it into the business, possibly to become a partner in it, to which we can see no legal objection under the new state of things. Would not ninety-nine women out of a hundred, in such a case, put their fortunes into their husband's hands to do what he liked with? and is not that the very evil which settlements were meant to avert? It is however, still open to a woman on marriage to make a settlement.

Section 3 extends to women already married the right to hold, as if unmarried, property acquired by them after the Act, subject to any settlement which they may have made of it, and to any vested rights of their husbands in it.

Section 4: the earnings of a married woman to be her personal estate; is a valuable provision, extending to all married women the protection which, under the 20 & 21 Vic., c. 85, deserted wives only were enabled to obtain. This provision will undoubtedly be a great boon to the lower classes of society.

Section 5: a husband shall not be liable for his wife's debts incurred before marriage, or for any wrong committed by her.

Section 6 repeals in part the existing law of distribution, giving the husband the same distributive share in the personalty of his intestate wife as she would take, on his dying intestate, in his personalty.

Section 7 reserves the tenancy by the curtesy.

Section 8 provides for a state of things that will, no doubt, often occur. Questions between husband and wife as to chattels are to be decided in a summary way, either by the Court of Chancery or by a County Court, as the case may be, the right being reserved to the petitioner of applying to the county courts, whatever the amount at stake may be. It is probably by an oversight that no provision has been made as to the amount that may be adjudicated upon in the Superior Court and County Court respectively. As the bill stands, the *forum* will be entirely in the option of the petitioner, irrespectively of the amount at stake.

Section 9, however, prevents one class of these questions from being raised, by providing that a husband shall not be liable to account for his wife's income and personalty received by him with her sanction; although we can conceive a good many nice questions being raised as to what amounts to such sanction on her part.

Section 10 contains a saving of existing settlements, and power to make future settlements, and does away with the doctrine of restraint on anticipation as a bar to the claims of the creditors of the wife, where such restraint is contained in any future settlement.

Section 11 extends the principle of the Infants Settlement Act, 18 & 19 Vic., c. 43, enabling a girl (even if under seventeen apparently) to make binding settlements with the consent of her parents or guardian, and of her intended husband, and saves the husband's covenant for settlement of wife's after-acquired property made before the Act comes into operation.

We have thus endeavoured to give a short sketch of the principal features of this Act, which, however it may be amended, must, if it passes, modify to a great extent, if not revolutionise, the position of married women in England as regards property.—*Solicitors Journal.*

CONFESSION.

A controversy is raging, whether, if the ministers of religion in a gaol receive a confession from a convict, they are bound to communicate it to the public. We cannot understand the affirmative argument. Where lies the moral obligation to divulge any secret, much less a secret revealed in the confidence that it will never pass beyond the ear that receives it? No public interest whatever is to be served by it. A confession has no other advantage than that it relieves certain restless minds from an uncomfortable feeling of doubt. A confession does not strengthen the verdict, nor does unconfession weaken it. It is desirable that a criminal should confess, not for the benefit of the public, but for his own sake, because it is the first step to repentance; but for this purpose the confession is the same, whether made to one or many. As being a question wholly between the criminal and his God, we have no hesitation in asserting that all confessions made to ministers of religion in the performance of their duties should be privileged, like those made to an attorney. It is for the temporal advantage of the criminal, that he is allowed to make a clean breast of it to his solicitor, and it is for his spiritual and eternal advantage that he should do the like to his minister, and it would be humane, right, and politic to encourage him to save his soul by the assurance that he will not thereby destroy his body.—*Law Times.*

AUCTIONEERS AND THEIR CATALOGUES.

A decision, with which auctioneers would do well to make themselves acquainted, has been delivered by Mr. Serjeant Wheeler in the Ormskirk County Court. Mr. Platt an auctioneer of Southport, sued Mr. Bently, of Wigan, for the sum of 13*l.* 10*s.*, the price at which a cask of claret had been 'knocked down' to the defendant's wife at a sale conducted by the plaintiff. It was stated in the catalogue of the sale that 'a hogshead of wine containing 50 dozens' would be put up for auction. The auctioneer said that he would not guarantee quantities, though it could not be shown that this statement was made in the presence of Mrs. Bently; but who is to determine the truth of that extraordinary piece of evidence? unless it was answered by that which followed. Immediately after Mrs. Bently had made an additional bid of 10*s.*, a Dr. Lang offered a higher price for the wine, if the plaintiff would guarantee that there were only 30 dozens in the cask, but this the latter refused to do, and Mrs. Bently was declared the purchaser. Mr. Platt also swore that she did not repudiate the bargain on the day of the sale. However, Mr. Serjeant Wheeler, in giving his judgment, said there was no doubt that the statement in the printed catalogue was *prima facie* the basis of the contract between the parties. That contract admitted of variation, but the variation must be clear and distinct, and so made as to be within the knowledge of the parties at the time the lot was sold. Auctioneers should be exceedingly particular in their printed catalogues, and although it would be hard to hold them to the letter of them, it would be still harder to the public if there were not some degree of faith to be attached to them. It was quite clear an auctioneer must be held responsible for his catalogue, and if he sought to fix a purchaser upon terms different from the catalogue, the evidence must be clear that the difference was brought home to the mind of the purchaser when he made his bid. As it was not proved that that had been done in this case, the verdict must be for the defendant, with costs.—*Law Times.*

SALE OF LIQUORS ON SUNDAY.

The select committee to whom the sale of Liquors on Sunday Bill was referred, have taken evidence upon the subject, and have agreed to the following special report:—

"Your committee are agreed that in certain parts of the country, and especially in some of the large towns in the north of England, a considerable feeling exists in favour of further restriction upon the sale of intoxicating liquors on Sundays; that such feeling has been fostered and stimulated by the organisation of temperance societies and by constant efforts on the part of the advocates of further restriction; that the existence of such feeling has been proved to your committee by the evi-

dence of witnesses conversant with the state of opinion in those communities, and claiming specially to represent the working classes by the reports of various public meetings held upon the subject, and by the returns of many canvasses made in large towns with the view of ascertaining the sentiments of the inhabitants upon this question.

Your committee would, however, observe that great caution must be exercised in affixing a value to the results of any such canvass. Although no imputations of dishonesty rest upon the canvassers, it has been proved to your committee that in many instances the canvass has been of a partial nature, and does not adequately convey the real sense of the community whose opinions it professes to represent. Moreover, it is evident that a canvass conducted by persons whose object it is to obtain a particular expression of opinion is not one of a character to command such implicit confidence as one conducted by more impartial persons. Therefore, whilst so far admitting the value of such canvasses as to accept them as corroborative evidence of the existence of a feeling in favour of further restrictive legislation among a considerable portion of the community, your committee are of opinion that no proof has been afforded of such a general demand as should induce Parliament to disregard those other considerations which lead to a different conclusion.

It has been proved to your committee that a very large number of persons make use of public houses on Sunday against whom no complaint whatever is alleged, and to whom further restictions to the extent contemplated by the Bill would be productive of serious inconvenience, and whilst this inconvenience would occasion great discontent among such persons, it by no means follows that a commensurate benefit would result with regard to the class against whom such restrictions would be especially directed. Those who drink to excess form a very small per centage of the whole number of persons who make use of public-houses upon a Sunday, and it is probable that many of these persons, if deprived of their present facilities for obtaining liquor, would have recourse to drinking in private houses and to various methods of evading the law. For however beneficial may be the results of restriction within certain limits, its enforcement to such an extent as to cause any violent interference with the habits of the people has a tendency to create a discontent which is sure to be followed by evasion, the law is brought into direpute, and effects are not unfrequently produced the very reverse and opposite of those intended by the Legislature.

It is, moreover, clear to your committee that there would be great difficulty in enforcing the restrictions proposed in the Bill. Not only would the duties of the police be materially increased but the duties so imposed would be at once harassing to them and annoying to the public. To the vexed question of 'who is a *bonâ fide* traveller?' the Bill would add the question 'what is a *bonâ fide* meal?' and this is only a sample of the difficulties under which the publican would be obliged to carry on his business.

Your committee further observe, that the proposed restrictions do not afford any hope of the settlement upon a permanent basis. Most of the advocates of the measure openly avow that they would accept it only as an instalment, and many of them declare their desire to put a stop to the whole retail trade in excisable liquors. In that trade a very large amount of capital is embarked: and so long as the licensed victuallers and keepers of beershops stand in the position of men carrying on a recognised and legitimate trade and one moreover subjected to heavy and special taxation, it would be unjust that their operations should be embarrassed, and their property depreciated in value by constant attempts to impose upon them restrictions which do not appear to be demanded by any urgent public necessity. Your committee however belive it to be a question worthy of consideration, whether it would be advantageous to those licensed victuallers and keepers of beershops who may be desirous of closing their houses on Sunday, that licenses should be granted at a reduced rate for the sale of liquors on week days only; but that it is one upon which they have not felt themselves empowered, by their order of reference, to take such evidence as would guide them to a conclusive opinion.

The beneficial working of the Public-houses Scotland Acts 1854–62, which has been declared by a Royal Commission, and of which evidence has been given before your committee, does not in their opinion establish any proof that a law similar or approaching it in strictness would be either acceptable or expedient in England. For even those witnesses who spoke to the success of the Scotch law admitted that there was so remarkable a difference between the habits of the English and those of the Scotch people in their use of public-houses, that your committee are of opinion that no trustworthy inference could be drawn from the fact of that success.

Although it cannot be denied that drunkenness, to a considerable extent, both on Sundays and other days, is to be found in this country, yet the admission appears to be general that the present law is working well, and that under its operation a great diminution of drunkenness has taken place. From this fact it has been argued that further restrictions would lead to further diminution; but, having regard to the experience of the past, and to the agitation consequent upon the passing of a less stringent measure than the present in 1854, which measure was repealed in the following year, your committee are inclined to believe that the safe limit of restrictive legislation has been reached, and that further measures in the same direction would be unwise and injudicious. The praiseworthy exertions of the advocates of temperance must not be

undervalued. These have, no doubt, materially contributed to the diminution of drunkenness, and simultaneously with these exertions, and the salutary influence exercised by the ministers of religion, the opening, in several of our large towns, of parks and other places wherein fresh air and innocent recreation may be obtained by the working classes upon Sunday, has drawn many of them from public house associations, and induced them to spend their only leisure day in a manner more advantageous to themselves and to their families. Other causes have likewise contributed to this desirable result.

The concurrent testimony of all the witnesses proves that for many years past there has been a steady, decided, and progressive improvement in the morals, habits, tastes, and manners of the people. The advance of education, the wider diffusion of knowledge, and the moral influences which have been brought to bear upon them, have doubtless all combined to produce this satisfactory result. Regarding, then, this general improvement, and at the same time bearing in mind that the habits of the upper and middle classes of society are far more temperate at the present day than was the case in the early part of the century, your committee are of opinion that it is not too much to hope that as the working classes also advance in self-improvement, and are actuated by that self-respect which is engendered by improved education, the vice of drunkenness will gradually disappear without the necessity of further coercive measures on the part of the Legislature. In this view your committee cannot recommend the passing of the Bill referred to their consideration, and would rather trust to the progressive improvement discernible under the present law, and to the further development of those moral influences to which they have already referred. —*Law Times.*

OF THE LIABILITIES OF DIRECTORS OF PUBLIC COMPANIES.

We remarked some weeks ago * upon a case which seemed to us to be an illustration of the well-known doctrine, that the directors of public companies stand, for most purposes, in the same relation to the ordinary shareholders as trustees do to their *cestuis que trust*, and in that character have an equitable right to have recouped to them moneys which they have *bona fide* taken up and expended for the purposes of the company. The case of *Turquand* v. *Marshall*, 16 W. R. 719, is an illustration of the same doctrine on a less agreeable side; the conclusion we draw from it being this, that directors are liable to account as trustees for acts done by them in their capacity of directors, which in the opinion of the Court, amount to breaches of trust.

Turquand v. *Marshall* arose out of the liquidation of the Herefordshire Banking Company. The bank was established in 1836, under a deed of settlement. The concern never prospered, but fell from bad to worse, and was finally ordered to be wound-up in 1863, under the provisions of the Companies Act, 1862. We refer the reader for a fuller account of the bank, and the circumstances under which the catastrophe occurred, to the report of the case in the *Weekly Reporter*. Suffice it here to say, that the concern ought to have gone into liquidation so long ago as 1846, in compliance with a provision to that effect in the deed of settlement, more than one-fourth of the paid-up capital having been lost. The suit was instituted by the official liquidator, suing on behalf of the company; and the object was to recover from the surviving directors, and the personal representatives of deceased directors, damage for losses occasioned to the general body of shareholders by the business having been carried on after, it ought to have been discontinued; by bad debts being allowed to remain outstanding, and accounts to be overdrawn; by the publication of false balance-sheets, and the payment of dividends out of capital.

An objection to the frame of the suit, that the company and not the official liquidator, suing on behalf of the shareholders, should be the plaintiff in the suit for the recovery of corporate assets, depended on the somewhat metaphysical doctrine that the abstract term called a company has a being and an interest apart from the persons who go to make up the company. This objection, however, was disposed of by Lord Romilly, who held in effect that, by the winding-up order the company *quâ* company ceases to exist, except for the purposes of winding-up, and has no longer any interest apart from that of all the persons who compose it, and that the suit, therefore, was correctly instituted in the name of the official liquidator after the winding-up order. The object was common to all the shareholders alike. In a suit so constituted the Court could only take cognizance of breaches of trust affecting the whole body equally. Many misfeasances charged against the directors, the "cooking" of accounts, the payment of dividends out of capital, for instance, unquestionably injured particular shareholders, but could not be said to be uniformly prejudicial to the body. To have been paid a dividend out of capital, for instance, might prejudice a continuing shareholder, but would actually benefit a retiring one, who would get a better price for his shares in consequence of the dividend. There was, therefore, no remedy for these wrongs in a suit constituted like the present. It would be open to any shareholder complaining of a particular wrong to take other proceedings against the directors, in which he would have to prove special damage; but in a suit for universal relief, no individual wrongs could be redressed. We come, however, to a branch of the case against the directors, in which the Master of the Rolls was of opinion, that an inquiry might show that the share-

* 12 Sol. Jour. 605.

holders universally had sustained some loss by the misfeasances of the directors, and an inquiry was directed accordingly. In this case, therefore, the surviving directors and the personal representative of deceased directors were held liable to make good the losses occasioned by their neglect on their part. The inquiry, it is to be observed, went to ascertain what losses had been so incurred since 1846, for a lapse of time is no bar in cases of breach of trust.

With reference to another of the charges in respect of which an inquiry was also directed, we cannot do better than quote the words of the judgment:—"Mr. Higgins was elected a director in 1849. He ceased to be a director in July, 1858. During the nine years that he was a director, in open violation to the clause I have just read, the directors advanced to him, or allowed him to overdraw his account to an extent amounting to an unsecured balance of £8,000, and he died in 1860 insolvent, owing to the company £8,134 2s. 11d. In my opinion this was a clear breach of trust, and one which the persons who were the directors during those nine years are bound to make good if alive, and which the estates of those who have died are liable to replace. I cannot look upon the acts of the directors as different in this respect from the acts of ordinary trustees. They undertake for a valuable consideration—a paid salary—to perform a duty for certain persons, and for this purpose they undertake to hold and employ the money of those persons who trusted them; one of the promises they make is, that they will not lend the money to any one of themselves without taking such precautions as would in practice have made loss impossible. They do nothing of the sort; they take no precaution, no security, and throw away the money of those who trusted them, by giving it to one of their own body. Are they not then to make it good? I think they are."

The case will, no doubt, remind our readers of *The Charitable Corporation* v. *Sir Robert Sutton*, 2 Atk. 400. This was a suit by the Charitable Corporation, which was a *mont de piété*, a chartered pawnbroking establishment, against the directors or committeemen as they were called, and others—fifty in number—to have satisfaction for breaches of trust, fraud, and mismanagement of the concern. It was a similar case to this, but grosser, as the directors in the present case seem to have been guilty of little more than *crassa negligentia*. We observe the following *dicta* of Lord Hardwicke, with respect to the duties of a "committeeman," which may come home to some directors of the present day, when to be a director has become a trade or pursuit, irrespective of the qualifications of the director, or any special knowledge of the business which he is to conduct.

Gross non-attendance may make him guilty of the breaches of trust committed by others. Saying that he had no benefit, but that his place was merely honorary, is no excuse for want of diligence.

Where there is supine negligence in a committee, by which a complicated loss has occurred, all are guilty.

It was contented on behalf of the directors of the bank that, as directors, they were agents, and not trustees. They are no doubt agents to those who employ them in the trust to superintend the corporations affairs, but the fact is that a director is at once an agent and trustee. He is the agent or delegate of the shareholders, to manage their affairs; he is also a trustee, with regard to the funds entrusted to him, and the confidence reposed in him by the general body. It is a hardship, no doubt, that, as directors act by a board, and the proceedings of a *quorum* are binding, a director may find himself unawares involved in all the consequences of trust by the misconduct of a majority of his colleagues. It is always open to one who disapproves of the policy of the rest to protest against it, and to warn his colleagues against the danger of the course they are pursuing, and, in extreme cases to warn the shareholders. By doing so, he would probably exempt himself from the liability incurred by the rest; but few positions can be harder than the position of a director of a company in embarrased circumstances who disapproves of the course which his colleagues are pursuing, and believes it to be unwarranted by their fiduciary position, yet knows that if he warns the shareholders, or discloses the state of things, he may avoid personal liability, but must ruin the company.

The following are our own conclusions from this case which we venture to submit to the reader.

After the winding-up order is made a suit may be properly instituted in the name of the official liquidator to recover from the directors the amount of losses incurred by reason of misfeasances on their part which have injured all the shareholders alike. The directors, however, cannot be made liable in such a suit for distinct acts which have injured particular shareholders, although individual shareholders who have been damnified thereby would be entitled to sue the directors who have done or sanctioned those acts.

With regard to obtaining such relief the position of directors is similar to that of trustees, and the rule *actio personalis moritur cum personâ* is inapplicable, so that no time is a bar to the remedy, which extends alike to surviving directors and the estates of deceased directors. If this were otherwise; if in fact these cases between directors and the company whose affairs they administer, or between directors and individual shareholders, were to be dealt with on the footing of questions between principal and agent, the remedy would be, comparatively speaking, imperfect, and in the case before us obsolete: the wrongs for which the remedy was sought having been committed more than twenty years before the bill was filed, so that action on the case would not lie.

nor action on covenant for not stopping the business in 1846, when more than one-fourth of the capital had been lost. The rule *actio personalis moritur cum personâ* does not apply in cases of breach of trust is still more strongly shown by a Scotch case, *Davidson* v. *Tulloch*, 3 Macq. 783, in which the transaction took place in 1834, and the action was commenced in 1860, when the original parties to the transaction were all dead. And where a fraud had been committed by partners in a bank upon a person, the fact of his having brought an action against the surviving partner does not preclude him from proceeding in equity against the personal representative of the deceased partner (*Rawlins* v. *Wickham*, 7 W. R. 145). Agents even will under certain circumstances be considered as trustees for their principal, and where this is so, lapse of time is no bar to the suit in respect to frauds upon the principal committed by them (*Walsham* v. *Stainton* 12 W. R. 64).

Rawlins v. *Wickham*, as well as the present case, are authorities for the principle, that in the case of directors or partners non-attendance and neglect of duty are no excuse; and directors who have not attended the board meetings, and neglected their duty, are equally liable with the rest to the consequences of their misconduct.

We have already referred to the distinction between the company and the aggregate of the members who compose it. It may seem a trifling one, but the importance of it will be seen by referring to the case of *The Society of Practical Knowledge* v. *Abbott*, 2 Beav. 559. The bill in that case was filed by the corporation of that name against the four promoters, or projectors, as they were at that day more properly termed, who had appropriate certain shares in the concern, without paying the full consideration for them, at the time when the four projectors where the only members of the company. The bill impeached this transaction, and sought to make them account to the corporation for the full value of the shares so appropriated by them, the equity of the corporation to this relief, which was granted, proceeding entirely upon the footing of the corporation being a distinct thing from the aggregate of the members composing it.

It only remains for us to refer to the compromise entered into between the official liquidator and one of the directors of his liabilities as a contributory. This comprise had reference only to his liability as a contributory, and had no reference to his liability as a director to the shareholders of the company. The compromise was in fact in terms restricted to his liability as a contributor; but even if it had extended to his acts as a director, the Court would have directed an inquiry, notwithstandiug the compromise, on the subsequent discovery of fraudulent actions, unknown at the time of the compromise. In *Stainton* v. *The Carron Company*, 12 W. R. 1120, and the House of Lords, held, after a compromise in a suit had been entered into, with the sanction of the Court, between the representatives of an agent of a company and the company, in respect of accounts between them, that on the subsequent discovery of a fraud committed by the agent, the company ceased to be bound by the compromise. —*Solicitors' Journal.*

A BAILIFF AND A JURY.

At the Worcestershire Summer Assizes, before Mr. Justice Byles, W. Riley, miner, was indicted for maliciously wounding Alfred Potter. Mr. H. C. James and Mr. Godson appeared for the prosecution, and Mr. Harrington for the defendant. At the conclusion of the case for the prosecution, Mr Harrington was about to address the jury on behalf of the prisoner, when his Lordship intimated that the Court would adjourn for 20 minutes, and directed that the jury should be given in charge of a bailiff, who would take them to a room in the building where they would be refreshed. Mr. Bennett, the sheriff's officer, was then called upon, and after being sworn in the usual way to prevent the jury from dispersing and to keep them from being communicated with, he directed the gentlemen to come down from the box and to follow him, which they accordingly did. On the Court re-assembling, his Lordship took his seat and inquired the reason that the jurymen were not in their places, as the time expired. As no one appeared to be able to answer the question after it had been repeated several times, the Judge directed that some one should go in search of the bailiff who had them in charge. Whilst the messenger was away one of the gentleman composing the jury quietly walked into the box by himself, and after complacently wiping his perspiring forehead and depositing his hat upon the floor, took his seat, much to the astonishment of the Judge and Court, who for a moment failed to realise the position in which they were placed.

His Lordship then said to him: Have you been with the other jurymen?

The juryman: No, sir.

His Lordship: Where have you been then?

The juryman: To the Saracen's Head, sir.

His Lordship: This is a most improper thing, sir. You should not have separated, and you have rendered yourself liable to a serious penalty.

His Lordship also said that it appeared to him that there was not enough attendance to keep order in the Court, and again inquired the whereabouts of the bailiff and the other jurymen.

Bennett now appeared upon the scene, when

His Lordship, addressing him, said: Were you not sworn, sir, to keep the jury together?

Bennett: Yes, my Lord, and I thought I had got 'em all, but when I got upstairs into the room I found that there was only 10.

The Judge: It was your duty to keep them together, and you should have done so. How is it you did not do so?

Bennett, I tried to, my Lord, but two of 'em got away before I was aware of it, and I could not find the other two.

The Judge: It is a very serious matter, and I don't know what the result will be. You should have got the assistance of the police. You will see presently what will be the consequences of this. You were sworn, and should not have lost sight of one of them.

Bennett: But, my Lord, they ran away.

The Judge: Is there any policeman to help you.

Bennett: No, my Lord.

The other jurymen then took their seats, when

Mr. Harrington arose to address them for the defence, but

His Lordship pointed out that in a case of felony the law would not permit a jury to separate until a verdict was returned. The only question that now remained for them to consider was as to whether the jury would return a verdict against the prisoner for felony or misdemeanour. If the learned counsel should raise an objection, and if a verdict for felony was returned, the conviction no doubt would be quashed, but he proposed to meet the difficulty by reserving the point.

Mr. Godson here applied, on behalf of the prosecution, that the jury should be discharged and a fresh one empanelled.

His Lordship said that he should certainly not accede to the request, but let the case go to the jury.

The Judge then summed up, and in so doing observed that in a case of that description the bailiff had been sworn to keep them together, and without that was done a charge of felony became invalid, therefore a very serious matter might arise through their separating. Some of them had dispersed and left the others, perhaps in ignorance of the law. He should not, however, undertake to stop the case but should take their verdict upon the evidence, and if they should return a verdict adverse to the prisoner, it would be for another tribunal to decide upon the validity of it. He then directed their attention to the law bearing upon the case, as to whether it was one of misdemeanour or felony, which they must mainly judge of from the state of mind the prisoner was in at the time, and also by his acts.

The jury then considered their verdict, but after some minutes, one of them jumped up and, beseechingly addressing the Court, said that the foreman had refused to stand up for them.

The foreman, indignantly: I deny it, sir.

The Judge: Have you agreed upon your verdict?

The foreman: No, my Lord.

The Judge: Then you will not separate until you have.

The foreman and the dissentient juryman, in fact the whole of them, appeared to be having a warm altercation, which was quite audible to the whole Court, when his Lordship directed that they should be locked up.

They were then gven in charge, and Bennett, in taking possession of them, and looking as an injured man only can look, said, "Now, gentlemen, this way; I'll take care you don't "slope" this time."

After two hour's absence, they returned into Court with a verdict of 'Guilty' on the misdemeanour count.

The Judge: You have just returned in time to prevent yourselves being incarcerated for the night.

His Lordship directed that the prisoner should stand back, as he did not then intend to sentence him. Then, addressing Mr. Harrington, he observed that in this case, whether the verdict had been one of felony or misdemeanour, he was of opinion that he should not be doing justice to all parties concerned if he did not reserve the point. He should therefore give Mr. Harrington leave to move in a superior Court that the conviction was invalid on the ground that the jury separated after being given into the charge of the bailiff.—*Law Journal.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIPE.

NOTES OF NEW DECISIONS AND LEADING CASES.

NEGLIGENCE—In the absence of evidence to the contrary, trains running over a particular line of railway are to be presumed to be the property of, or at any rate under the control of, the company to whom the line belongs, although other companies have running powers over the part of the line in question.—*Ayles* v. *The South-Eastern Railway Co.*, 37 Law J. Rep. Exch. 104.

FRAUDULENT CONVEYANCE—EVIDENCE—COSTS.—A bill was filed by creditors impeaching a conveyance as fraudulent, but the facts proved failed to establish more than a case of suspicion against the *bona fides* of the transaction; and the same relief having been sought in a bill by other creditors who were also the personal representatives of the debtor and which relief was refused, the Court in dismissing the present bill did so with costs, notwithstanding the reasons for doubting the *bona fides* of the transaction.

The widow of the grantor in a deed impeached as fraudulent against creditors, was entitled to a legacy under the will of her husband:

Held, that, notwithstanding such interest, on her part, she was a competent witness to prove notice as against the purchasers from the grantee in the impeached deed.

Where a deed is set aside as fraudulent against creditors, a purchaser from the grantee in the impeached deed will not be allowed for improvements made by him on the property.—*Scott* v. *Hunter*, 14 U. C. Rep. 376.

WILL—CONSTRUCTION OF.—A general devise of all the testator's real and personal property does not carry after-acquired real estate.—*Whateley* v. *Whateley*.—[Mowat, V. C., dissenting.] 14 U. C. Rep. 450.

MARRIED WOMEN—SEPARATE ESTATE.—A married woman who has separate estate which is vested in Trustees cannot, on that account, be sued for a legal debt contracted before her marriage. In such a case a creditor has no *locus standi* in Equity until he has obtained judgment at Law.

Quære —Whether a married woman has any and what *jus disponendi* in respect of her personal property, under the Married Women's Act (Con. Stat. of U. C., chap. 73)—*Chamberlain* v. *McDonald*, 14 U. C. Rep 447.

LUNACY—To avoid a transaction on the ground of lunacy it is not necessary to shew that the lunacy was connected with or led to the impeached transaction.

But to avoid a sale for value by a lunatic, it may be necessary to establish that the purchaser was aware or had notice of the seller's mental condition

Where, amongst other delusions, a vendor who was insane imagined that he was bewitched; and it was proved, that the purchaser learned this from conversation with the vendor during the negotiation for the purchase, and that the purchase money was only one-half the sum which the seller had previously been offered, and might have obtained from another person, the transaction was set aside.—*McDonald* v. *McDonald*, 14 U. C. Rep. 545.

RIPARIAN PROPRIETORS —A riparian proprietor has the same right to forbid others from backing water on his land, as he has to prevent them from taking possession of any other vacant property he has. and making use of it against his will.

Where it appeared that the defendants had backed water on the plaintiff's mills and overflowed their land, but all the backwater or overflow was not occasioned by the defendants, and it was not clear on the evidence what proportion was attributable to them, or what alterations in their works were necessary to prevent the injury occasioned by the defendants, the Court directed an enquiry by an engineer named by the Court under the general orders.

The works of a riparian proprietor should be sufficient to prevent damage to other riparian proprietors, not in cases of ordinary floods only, but also of the periodical or occasional freshets to which the river is subject; but this rule does not in equity apply to extraordinary freshets which cannot be guarded against, or cannot be so by means consistent with the reasonable use of the stream.—*Dickson* v. *Burnham*, 14 U. C. Rep. 594.

ONTARIO REPORTS.

CHANCERY.

MILLS v. MCKAY.

Pleading—Parties—Tax sale.

The corporation of the local municipality is not a proper party to a bill impeaching a tax sale.

[14 U. C. Chan. Rep. 602.]

This was a suit by a mortgagee to set aside a tax sale of land in the town of Woodstock. The sale was impeached, as well on the ground that the taxes were not unpaid, as for various alleged irregularities and acts of misconduct on the part of the County Treasurer, and of the various officers of the town, who by the Statute have to do with the taxation of land and the sale thereof for unpaid taxes. One of the defendants was the Corporation of the town; and the Corporation demurred on the ground of having been improperly made a party.

Roaf, Q. C., for the demurrer.

Barrett, contra.

MOWAT, V. C.—The learned counsel who appeared for the plaintiff referred to *Ford* v. *Boulton*, 9 Gr. 482; as an express authority for making the Corporation a party. My brother *Spragge* there held the local Corporation to be a necessary party, on the ground that a defendant who has a remedy over against another person, has a right to insist on that other person being made a party, so as to avoid the necessity for a second suit. But the learned Vice-Chancellor does not appear to have considered the question, whether there was in fact a remedy over against the Corporation, all parties, it appears, having assumed that the remedy ever existed. It was afterwards expressly held, however, by the Court of Queen's Bench, in *Austin* v. *Corporation of Simcoe*, 22 U.C. Q. B. 73, that a purchaser had no right to recover back his purchase money from the county; and the same view was taken by my brother *Spragge* in the subsequent case of *Black* v. *Harrington*, 12 Grant, 175. If the purchaser has no such right at law, it has not been argued that he had the right in equity. The learned counsel for the plaintiff pointed out, that the case in the Queen's Bench was against the county, not against the local municipality; but the grounds of the judgment apply to both. In the present case it is not alleged by the bill that the money has been paid over to the town.

The learned counsel then contended, that the Corporation was properly made a defendant in order to answer costs, though no other relief could be obtained. But to sustain that position a case of fraud must be charged against the defendant. Here no fraud is charged against the Corporation. The acts compained of are not the acts of the Council of the town; nor is the Council alleged to have been privy to them: they are the wrongful or irregular acts of officers in the

exercise of powers, and discharge of duties, assigned to them by Statute, see *Metcalfe* v. *Hetherington*, 11 Ex. 257; S. C. 5 H. & N. 719.

I think the demurrer must be allowed; but, having reference to the state of the authorities, without costs

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STINSON v. PENNOCK.

Mortgagor—Mortgagee—Fire insurance—Re-building.

Where a mortgage contains no covenant on the part of the mortgagor to insure, but he does insure, and a loss by fire occurs whereby the insurance money becomes payable, the mortgagee is entitled, under the Act (14 George III. ch. 78, sec. 83), to have the insurance money laid out in re-building.

This was a motion by a mortgagee to restrain the defendant, the mortgagor, from receiving money which had become payable under a policy of insurance effected by him on the mortgaged premises.

Roaf, Q. C., in support of the application relied on the Statute 14 George III. ch. 78, secs. 83 & 84,—*Marriage* v. *The Royal Exchange Assurance Co.*, 18 L. J. N. S. Cham. 216; *Exp. Garrie*, 10 Jur. N. S. 1085; *Garden* v. *Ingram* Ib. 478; *Bunyan* on Life Insurance, 151.

Boys, contra.

MOWAT, V. C.—The plaintiff is mortgagee of certain freehold estate, and the mortgagor. The Mortgage contains no covenant to insure. The mortgagor after executing the mortgage took out a policy; and the houses on the property have since been burnt (18th March, 1868). The mortgagee claims that he is entitled to have the insurance money laid out in re-building. The defendant says that he intends to lay it out re-building, but contends that the plaintiff has no right to compel him to do so.

The Statute 14 George III. ch. 78, sec. 83, was relied on upon the part of the plaintiff, and seems to sustain his claim. The object of that section is stated in the preamble to be, "to deter and hinder ill-minded persons from wilfully setting their house or houses or other buildings on fire, with a view of gaining for themselves the insurance money, whereby the lives and fortunes of many families may be lost and endangered;" and the section provides, "that it shall be lawful for the governors and directors of the several insurance offices, and they are thereby authorised and required, upon the request of any person or persons interested in, or entitled to, any house or houses or other buildings, which may thereafter be burnt, demolished or damaged, * * to cause the insurance money to be laid out and expended, so far as the same will go, towards re-building, re-instating, or repairing such house or houses or other buildings, unless the party claiming the insurance money shall, within sixty days, next after his, her, or their claim is adjusted, give a sufficient security to them that the money shall be laid out as aforesaid, or unless it shall be in that time settled and disposed of amongst all the contending parties to the satisfaction of the insurers." The title to this Act would indicate that it refers to certain localities only, and not to the whole kingdom; and most of its provisions are expressly confined to certain limits described in the Act; by Lord *Westbury* held in *Re Barker*, 34 Law J., Bankr., 1.; that the section I have quoted is general, and not local; and if so, it became part of the law of this Province when the body of English law was introduced by legislative enactment.

Then, is a mortgagee a person interested within the meaning of the section? I do not see how I can hold that he is not He is within the words of the enactment, and his case is within the mischief against which Parliament was providing, See *Brooke* v. *Stone*, 34 Law Jour. N. S. Chancery, 251.

The mortgage money is not yet due, but I am clear that that circumstance makes no difference; especially as it appears that without the buildings the property is not worth the mortgage money.

The motion was to restrain the defendant from receiving the money from the Insurance Company. The more proper course would seem to have been a motion to restrain the Company from paying the money except as provided by the Statute, or to have the money paid into Court, *Marriage* v. *The Royal Exchange Assurance Co.*, 18 Law Jour. N. S. Chancery, 216 (Wigram 1849), with a view to its being applied as the Statute directs, if the Company were going otherwise to pay it to the defendant No objection, however, was made to the form of the motion, and the only question discussed was the one on which I have expressed my opinion.

COMMON LAW CHAMBERS.

EX. PARTE GEORGE HENRY MARTIN.

Extradition—Ashburton Treaty—Con. Stat. Can., cap. 89—Stat. 24 Vic. cap. 6—29 & 30 Vic., cap. 45—Regularity of Proceedings—Admissibility of Evidence.

Where a prisoner in custody under the Ashburton Treaty obtained a *habeas corpus* and *certiorari* for his discharge, it was held that the argument as to the regularity or irregularity of the initiatory proceedings, such as information, warrant, &c., was a matter of no consequence; the material question being, whether—being in custody—there was a sufficient case made out to justify the commitment for the crime charged.

It was held that certified copies of depositions sworn in the United States, after proceedings had been initiated in Canada, and after the arrest in Canada, were admissible evidence before the Police Magistrate.

[Chambers, June 29, 1868.]

McMichael obtained a *habeas corpus* directed to the Gaoler of the Gaol in Hamilton, where the prisoner was confined, to have his body before the presiding judge in Chambers, &c., and at the same time he obtained a writ of *certiorari* under 29–30 Vic. cap. 45, addressed to the Police Magistrate of the City of Hamilton, for a return of the informations, examinations and depositions touching the prisoner's commitment.

It appeared by the return to the *habeas corpus*, that the prisoner was in custody under a warrant of commitment issued by the Police Magistrate of Hamilton, upon a charge of robbery committed in the United States, and for the purpose of extradition, and that he was detained until surrendered according to the stipulations of the Ashburton Treaty, &c.

The examinations and depositions returned with the *certiorari* shewed that, early on the morning of the 1st of May, two persons broke into an express car on the Hudson River Railway, on its way to New York,—one Browne, an express messenger of the Merchants' Union Express Company, being in charge of a safe containing a large amount of money and securities. Browne

at the time was asleep. They seized him, handcuffed him, threatened his life, tied his hands and legs together, and himself to a stove in the car, took the keys from his pocket and rifled the safe of its contents, and, as the train approached New York, having gagged him, they leaped from the car, taking with them, with other property, over $100,000 in United States Bonds. Browne swore that although they had dominoes partly secreting their faces, that he had an opportunity of noticing their appearance, so as to be able to describe them, and in his deposition he states their sizes, complexion, color of hair, whiskers, eyes, and voice. The numbers of the bonds and their description being known to the parties who entrusted them to the care of the company, they were described in a printed circular, which was sent to brokers and others, and some of these circulars came into the possession of a Mr. Wilson, a broker in Hamilton. On the 20th of May, the prisoner came to this broker's office, and offered to sell $500 of coupons and five United States five-twenty Bonds. Mr. Wilson, referring to the circular, noticed that the numbers of the bonds corresponded with those of the stolen bonds, and he declined to purchase, telling the prisoner why, and shewing him the circular, and, at prisoner's request, gave him one of the circulars. The prisoner then left the broker's office—his movements were watched, and he was seen to pass through various streets, and eventually go into an uninhabited house, when the person watching missed him. The same evening he was arrested under the warrant produced, which described him as "a man, name unknown." He denied having any of the bonds or coupons, or that he offered any for sale to the broker; none were found on his person—the circular which he received from the broker he had with him. Upon a search at the vacant house he was seen to enter, the Chief of Police found the bonds and coupons secreted between the siding and wall of the couch house. On the following day the Assistant Secretary of the Company arrived in Hamilton, and deposed against the prisoner, by the name of Martin, as being a person answering to the description of one of the robbers. On his examination a good deal of evidence was taken, for the purpose of establishing that bonds bearing the numbers, &c., of those found were delivered to the Express Company, and in their charge in transit on the night of the robbery.

Upon reading the return to the writ of *habeas corpus*, and the examinations, depositions, &c., returned with the *certiorari*, *M. C. Cameron*, Q.C., *Dr. McMichael* with him, moved that the prisoner be discharged.

They contended that the prisoner was entitled to his discharge on various grounds; among others, that the original information and warrant issued by the Police Magistrate, and upon which the prisoner was arrested and charged, was made against "a man, name unknown," and that as the 2nd sec. of 24 Vic. cap 6, only authorised the Police Magistrate to issue his warrant upon complaint charging any person (that is, by name) found within the limits of the Province, &c. the Police Magistrate had no jurisdiction and the proceedings were void. That certain depositions made in the United States after the arrest of the prisoner here, were not receivable in evidence before the Police Magistrate, and without these there was no evidence of a robbery committed. And further, that if these depositions were receivable, still there was no evidence of the identity of the prisoner as one of the robbers, and no evidence to shew that the property seen with the prisoner, or in his possession, was any of the property alleged to have been stolen.

The depositions to which exceptions were taken were depositions made and sworn to on the 30th of May, in New York, and upon which a warrant was issued on the 1st of June, by the Recorder of that city, against the prisoner, for robbery. The prisoner having been arrested on the 21st May, in Hamilton, and being under examination for commitment under the Treaty and our statute, upon the same charge of robbery, and during his examination these depositions were received against him by the Magistrate on the 4th June, under the provisions of the 3rd sec. of 24 Vic., cap. 6, as it was conceded that unless these depositions could be received, the prisoner was entitled to be discharged, as without them there was no evidence of the robbery.

Harrison, Q.C., appeared on behalf of the Express Company, and

James Paterson on behalf of the Minister of Justice and Attorney-General for the Dominion, and opposed the discharge.

They contended that the only question for determination was, whether there was sufficient evidence to justify the committal of the prisoner. They submitted that the depositions taken on the 30th May, were properly received by the Police Magistrate, and after receiving the evidence at length, they argued that there was evidence of identification of the prisoner, and that property alleged to have been stolen was found in his possession shortly after the robbery.

MORRISON, J.—I have carefully read all the testimony, including the depositions taken in the United States, and I am of opinion, assuming that they were all receivable on the hearing before the Police Magistrate, that he was warranted in committing the prisoner for the purpose of his extradition, and that a sufficient case was made out against the prisoner to justify his apprehension and committal for trial, if the crime of which he was accused had been committed in this Province; and the circumstances proved are so suspicious that if the robbery had taken place here the magistrate would not have been justified in discharging the accused. It is not the province of the Police Magistrate to determine the questions of fact, if he finds sufficient evidence to justify a commitment. Whether there is a probability of the prisoner being eventually convicted of the offence, after a trial, is not a question for his or for my consideration.

I shall now consider the legal objections to these proceedings.

As to the first, that the Police Magistrate had no jurisdiction, by reason of the original arrest and warrant being irregular and defective, I see nothing in the objection. Assuming that the initiatory proceedings were irregular and unjustifiable, in my judgment it is a matter of no moment and beside the present enquiry, whether the prisoner originally was arrested upon a void warrant, or without complaint or warrant, or whether, as contended, the warrant was for a charge of robbery of $20,000

and it turned out to be $20,000 in United States Bonds; the material question is, being in custody, whether a sufficient case was made out to justify his commitment for robbery, with a view to his extradition. It is obvious that offenders flying from the United States into this Province in order to elude arrest, would, when discovered here, in many cases, escape in consequence of the impossibility of obtaining the necessary proof at the moment, to authorise a warrant for their apprehension, unless some peace officer, satisfied of the guilt of a party, would assume the responsibility of his detention, until the regular proof was forthcoming. And it would be discreditable to our laws to hold that because in a case of this nature the original arrest was technically irregular (after the case was heard and the prisoner committed) the whole proceedings should be declared to be *coram non judice*, and the prisoner discharged.

Then, as to the objection that the depositions taken in New York, on the 30th May, were not receivable in evidence under the provisions of the 3rd sec. of our act, I had on the argument some doubts as to their admissibility, but upon consideration have come to the conclusion that the objection is untenable. The question resolves itself into this, whether when an offender is arrested in this Province for a crime committed in the United States for the purpose of extradition, can depositions taken in the United States after his arrest here and upon which a warrant issued against him in the United States upon the same charge, be received as evidence against the accused, upon the hearing of the case before the Police Magistrate.

It is admitted that the proceedings against the prisoner, may be originated in this country. It cannot be doubted that before or after his arrest here, a warrant may be issued in the United States founded upon depositions taken there. On the argument no reason or authority was adduced against using depositions taken in the United States during the pendency of the proceedings against the prisoner before the Police Magistrate, except by a very critical reading of the 3rd sec. of our statute, to shew that the framer of that section intended that before its provisions should apply, the depositions should be made, and a warrant issue in the United States, before the arrest of the accused in this country; but in construing and applying that section we must look at the spirit of the provision, not the mere letter, and in the language of our Interpretation Act, Con. Stat. of Canada, we must give it "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the act and of such provision or enactment, according to their true intent, meaning and spirit." What the section evidently intended was, that any depositions made in the United States, before proper authority and upon which a warrant issued for the arrest of the accused, should be received as evidence of his criminality in the hearing before the Police Magistrate. The main object contemplated by the enactment, was to sanction the use of depositions and to avoid the necessity of bringing the deponents here. The referring to or connecting the depositions with the warrant in this section, was, in my opinion, for the purpose of ensuring that they should be such depositions as would be taken before competent authority, and in relation to the particular crime and the offence specified in the foreign warrant, and that the time when the warrant issued was immaterial. The value of the objection is apparent, when we consider that if the Police Magistrate had given effect to the objection, when taken before him by the prisoner's counsel, all that was necessary to be done was to issue a new warrant and begin the proceedings all new, and so get rid of the technicality—and if I were now to discharge the prisoner on this objection, practically I should do so upon the ground that the Police Magistrate did not go through the farce of abandoning the proceedings *pro forma*, saying to the prisoner, I release you for the purpose of re-arresting you, in order to read the depositions taken in New York against you. To discharge the prisoner from custody on such grounds, while it would be contrary to the spirit and intention of the Treaty and the provisions of our statute, would be a scandal and reproach to the administration of the law.

It was contended very strongly and zealously by Dr. McMichael, that the case was one of great hardship against the prisoner: that the true object of his extradition was for some purpose other than his trial for the robbery. I see no ground for apprehending that such is the case and I have not the slightest doubt that the prisoner will be fairly dealt with by the Government of the United States, as well as the courts of law there, and that nothing will be done against the prisoner contrary to the spirit and object of the Treaty—nor am I pressed with any serious doubts as to the propriety of the view taken of the case by the Police Magistrate. The prisoner's conduct from the time he offered the securities for sale, until and after his arrest, without explanation, is quite inconsistent with innocence, and indicates forcibly guilty knowledge. It may turn out, as suggested, that he is only a receiver of the stolen property, but the facts disclosed would be evidence to some extent to go to a jury against the prisoner, for a taking by him. I am therefore of opinion that I should not discharge the prisoner, but that he should be remanded, to be dealt with as His Excellency the Governor-General, may be advised.

Prisoner remanded.

ENGLISH REPORTS.

COMMON PLEAS.

LEETE v. HART.

False imprisonment—Giving person in custody found committing offence—24 & 25 Vict. c. 96, s. 103.

A person found committing an offence against the Larceny Act may be immediately apprehended by any person without a warrant, provided, according to the rule laid down in *Herman* v. *Seneschal*, and adopted in *Roberts* v. *Orchard*, the person so apprehending honestly believes in the existence of facts, which, if they had existed, would have justified him under the Statute.

Held, that this belief must rest on some ground, and that mere suspicion will not be enough.

[16 W. R. 676; April 2, 1868.]

This was an action for false imprisonment. Plea—Not Guilty by Statute, 24 & 25 Vic. c. 96, ss 51, 103, 104, and 113.

At the trial before Byles, J., at the last Guildhall sittings, it appeared that the defendant, who lived in a suburban villa, had been on several

occasions alarmed by attempts made to break into his house during the night. On the night of the 5th of October last, about half-past twelve, he was in a back room on the ground floor, and and on looking out of the window he saw a man at his back door, who, he concluded, was trying to effect an entrance. He at once ran up stairs to his bedroom to fetch a sword and pistol, and alarmed his wife, who had already gone to bed. She ran down out of the front door screaming police, and seeing a man standing at the garden gate in front of the house, gave him in custody to a policeman who came up at the moment. This man was the plaintiff. Shortly afterwards the defendant came down with his sword and pistol, and saw his wife standing with the policeman at the gate. The wife, pointing to the plaintiff, said, 'that is the man," or words to that effect, and the defendant thereupon gave him into custody; but after they had proceeded some fifty yards on the way to the police station the defendant, on the plaintiff's assurance that he was a respectable man and a neighbour of his, expressed his wish to withdraw the charge; they, however, went on to the police station. The plaintiff it appeared lived in the same row of houses as the defendant, and was walking home along the pavement, and was within a stone's throw of his own house, when he heard the defendant's wife screaming police, and stopped at the garden gate to learn what was the matter, and was then given in custody. A centre bit was found next morning at the back of the house. On these facts, no witnesses being called for the defence, the jury found for the plaintiff, with £10 damages.

Foard now moved, pursuant to leave reserved, to enter the verdict for the defendant.

The plea is founded on sections 51, 103, 104, & 113, of the Larceny Act, 24 & 25 Vict. c. 69. The 51st section defines the crime of burglary; by the 103rd section "any person found committing any offence punishable either upon indictment or upon summary conviction by virtue of this Act except only the offence of angling in the day time, may be immediately apprehended with a warrant by any person," &c. By the 104th section "any constable or peace officer may take into custody without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this Act," &c.; and the 113th section provides that in an action for anything done in pursuance of the Act, notice shall be given to the defendant, and that he may plead the general issue, and give this Act, and the special matter, in evidence thereunder.

The Act was intended to protect those who have by mistake exceeded their duty; and the defendant here *bonâ fide* believed that an attempt at burglary had been committed: *Roberts* v. *Orchard*, 12 W. R. 253, 2 H. & C. 768; *Read* v. *Coker*, 1 W. R. 413, 13 C. B. 850; *Heath* v. *Brewer*, 15 C. B. N. S. 803; *Hermann* v. *Seneschal*, 11 W. R. 184, 13 C. B. N. S. 392; *Downing* v. *Capel*, 15 W. R. 745, L. R. 2 C. P. 461. He was misled by an existing state of facts, over which he had no control.

Bovill C. J.—I am of opinion that this rule should be refused. *Roberts* v. *Orchard*, did not introduce any new law on the point, but the case must be decided on the law as previously laid down, and especially in *Hermann* v. *Seneschal*. In *Roberts* v. *Orchard*, the question was whether the judge should have asked the jury if the defendant honestly believed that the plaintiff had taken the money, and that in giving him into custody, he was exercising a legal power; and it was decided that it would not be enough to ask them that, but that they should also be asked whether the defendant honestly believed that the plaintiff had been found committing the offence. But as to the rule of law, the Exchequer Chamber adopted what had before been laid down by Williams, J., in *Hermann* v. *Seneschal*, viz., that the defendant has the protection of the statute "if he honestly intended to put the law in motion, and really believed in the existence of the state of facts, which, if they existed, would have justified him in doing as he did." That I take to have been the rule before *Roberts* v. *Orchard*, and it was not interfered with by that case, and must be applied here. Did the defendant then in this case to adopt the words of Williams. J., in *Roberts* v. *Orchard*, "honestly believe in the existence of those facts which, if they had existed, would have afforded a justification under the statute?" It is clear that it is not necessary that an offence should have been committed under the statute by any one, here there was certainly no such offence committed by the plaintiff, and there is nothing to satisfy me that the defendant did believe facts which, if they had existed, would have justified him, or that the plaintiff was found committing any offence under the Act. There was no entry, no robbery, and no attempt; and further an attempt at robbery is not within the statute. The case is not brought either within the 51st or the 58th section; and there is no evidence of any such belief as is required on the part of the defendant, or of any other circumstance to bring the case within the Act.

Byles, J.—I am of the same opinion, and will only add one further on *Roberts* v. *Orchard*. My brother Willes there says, "it is clear to my mind, from the defendant's evidence in answer, that he was acting on mere suspicion." Mere suspicion will not do for belief is a state of mind which rests on some ground, and therefore I doubt whether *Roberts* v. *Orchards*, has much changed what was considered to be the law on the subject before. *Hermann* v. *Seneschal* was a case in which the plaintiff was given into custody on the suspicion of passing bad money; and Erie, C.J., says, "the jury having found that the defendant did really believe that the plaintiff had passed him a counterfeit coin, and did honestly intend to put the law in force against him, and as I am clearly of opinion that the facts were sufficient to justify that conclusion, I do not think that the other part of the finding, viz, that the defendant had no reasonable ground for such his belief, entitles the plaintiff to retain the verdict." *Roberts* v. *Orchard*. therefore reposes on the same ground as that case, for there were no facts there sufficient to justify the belief.

Keating. J —I am of the same opinion. The rule in *Roberts* v. *Orchard*, is not meant to be impinged upon by any judgment of ours. Did the defendant honestly believe in a state of facts which, if true, would justify him? That is the question. If he acted upon what he had been

dreaming, that would not be sufficient. I cannot see what the facts are which he believed in, and which if they had existed would have justified him. There is no evidence that any offence had been committed on that night by anyone; much less that any one had been found committing any offence. How could the defendant honestly believe in facts which, if true, would justify him?

MONTAGU SMITH, J.—I am of the same opinion. In *Read* v. *Coker*, Jervis, C. J., lays it down broadly that "to entitle a defendant to a notice of action it is enough to show that he *bonâ fide* believed he was acting in pursuance of the statute for the protection of his property." Perhaps the rule stated in those general terms may be too wide; but the rule laid down by Williams, J., in *Roberts* v. *Orchard*, is enough for us in disposing of this case, and the defendant has not brought himself within it; and the meaning of the rule is, the defendant must not only believe that he is right in law but that those facts exist, which if they had existed, would justify him; and that was the view of Parke, B., in *Hughes* v. *Buckland*, 15 M. & W. 346, where the plaintiff was apprehended while fishing, for he says, "The defendants, in order to be protected, must have *bonâ fide* and reasonably believed Colonel Pennant to be the owner of the place where the plaintiff was fishing, and that the trespass was committed within the limits of his property;" and so it was held in *Downing* v. *Capel*. Here I am not satisfied that the defendant believed, indeed I think that he did not believe, that his house had been broken into. The defendant himself might have satisfied the jury as to the state of his mind, but he did not choose to undergo the ordeal.

Rule refused.

CORRESPONDENCE.

TO THE EDITORS OF THE CANADA LAW JOURNAL.

Gentlemen,—"Scarboro," in the June number of the *Law Journal*, answers my communication in the the March number of the *Local Courts Gazette*, and detects an apparent contradiction, as to whether I meant that the discharge of an insolvent discharges debts not included in the schedule, and correctly asserts that the cases cited by me prove that such debts are not barred by discharge. At first I thought it best not to advert to the matter again, but, on reflection, think it fair that an error either from omission in engrossing or printing (probably the former) should be corrected.

In quoting *Stephenson* v. *Green*, 11 U.C.Q.B., deciding "that a final order granted under the English acts similar to our then bankrupt and insolvent acts, could *not* be set up as a defence to any debt *not* included in the schedule," the word "not" between the words "could" and "be" was accidentally omitted, which made me appear, in that sentence, to contend that debts not included were discharged. But you can easily see such was not my intention; and "Scarboro" admits that "at the end of my letter one would think I actually agreed with him." In this, he is so far right, for it is there plainly stated "that a creditor whose claim is not in the schedule, would not be barred by discharge."

The reason of referring to the cases was to clear doubts "Scarboro" expressed in the March number of the *Local Courts Gazette*. He there stated, "it should be enacted distinctly (*there is now some doubt on the subject*) that the insolvent shall be discharged only from the debts or liabilities mentioned in his schedule of debts;" and for the further reason that I failed to see the necessity of legislation on that subject, owing to these discussions, and as we now both agree in this respect, perhaps none is required on most, if not all, the other points to which he alludes in his March letter, and, if a fair trial is given the acts, in a short time many doubtful and difficult points may be decided.

Whilst agreeing with "Scarboro" that if assignees resort to the practice to which he alludes, their conduct is reprehensible, as well as illegal, I assert again, that it is due to the neglect of creditors in making an example by proof of such practice, before the judge. If "Scarboro" knew of any such practice, why did he not try the experiment before the court? I think such an assignee would be dismissed.

QUINTS.

The *Pall Mall Gazette* extracts the following remarkable piece of news from a French paper of Wednesday last:—"Interesting specimen of the manners and customs of the English.—A few days since a tailor was tried in London, for the murder of a soldier. The judge in passing sentence, severely reprimanded the prisoner, and concluded his address thus:—'You have not only murdered a fellow-creature with an illegal weapon; you have done more—you have damaged and rendered worthless with that same weapon the overalls of your Queen.' It is well known that in England everything is in a legal sense the property of the Queen." The foundation of this wonderful paragraph is traceable in an old anecdote told of Eskgrove, a Scotch judge, who, in sentencing a tailor who had stabbed a soldier, was said to have aggravated his offence in the following fashion:—"And not only did you murder him, whereby he was bereaved of his life, but did wilfully thrust, pierce, push, project, or impel the lethal weapon through the belly-band of his regimental breeches, *which were his Majesty's*." The concluding *dictum* as to English law is probably the private incubation of the penny-a-liner who hoaxed the French editor.