DIARY FOR NOVEMBER.

1. Fri.... *All Saints' Day.*
2. Sat.... Last day for Articles, &c., to be left with Secretary of Law Society.
3. SUN.. *23rd Sunday after Trinity.*
10. SUN.. *24th Sunday after Trinity.*
14. Thurs. Examination of Law Students for call with Honors.
15. Fri.... Examin. of Law Students for call to the Bar.
16. Sat.... Examination of Articled Clerks for certificates of fitness.
17. SUN.. *25th Sunday after Trinity.*
18. Mon... Michaelmas Term begins.
21. Thurs.. Inter-examination of Law Students and Articled Clerks.
22. Fri..... Paper Day, Q.B. New Trial Day.
23. Sat.... Paper Day, C.P. New Trial Day, Q.B.
24. SUN.. *26th Sunday after Trinity.*
25. Mon... Paper Day, Q.B. New Trial Day, C.P.
26. Tues .. Paper Day, C.P. New Trial Day, Q.B.
27. Wed... Paper Day. Q.B. New Trial Day, C.P. Last day for setting down and giving notice of re-hearing in Chancery.
28. Thurs.. Paper Day, C.P. Open Day, Q.B.
29. Fri. ... New Trial Day, Q.B. Open Day, C.P.
30. Sat. ... *St. Andrew.* Open Day.

CONTENTS.

The Local Courts'
AND
MUNICIPAL GAZETTE.

NOVEMBER, 1872.

On the opening of the Court of Queen's Bench in Manitoba on a recent occasion, the Chief Justice of Manitoba, the Hon. Alexander Morris, delivered the following excellent charge to the grand jury:—

"GENTLEMEN:—It is my duty, and, I may say, my privilege, now to open the first term of the Court of Queen's Bench for the Province of Manitoba. The occasion is an interesting and important one. In years to come it will be looked back upon as one of the landmarks in the history of the rise and progress not alone of this Province, but of the North-west, to which it is the portal. The establishment of social institutions, the laying the foundation of law and order, are always eras in the history of a new country; and respect for the laws, and due and orderly regard for the requirements of the civil power, are prominent characteristics of the races who are under the British supremacy. Such respect I look for in Manitoba, and in discharging the functions I am called to exercise, it shall be my anxious desire to know neither race, creed nor party, but to administer the laws without fear, favour, or partiality; and, so acting, I am confident that the Court will be supported by the community. Every man who has a stake in the country, has a direct interest in the impartial administration of the law, and all such will rejoice that a Court, fully equipped, will henceforth interpret those Common, Dominion and Provincial Laws, which regulate and control all the relations of social life. There is, beyond question, and I am enabled to speak from an extended observation of various sections of Manitoba, a brilliant future before British North-western America. As an agricultural country, it must take the highest rank. But, to secure that rapid development which its advantages entitle it to, and to attract that great influx of population which its natural resources fit it for, there must be stability in the institutions of the country and there must be confidence that British law and justice will be found in full and entire force. To aid in giving that assurance will be my duty, and I have all confidence that the people of this Province, of all classes, will rejoice that the Court of Queen's Bench is now in full operation. And here, before passing to other subjects, I would

remark incidentally, that I look to the Bar of Manitoba for their aid in the discharge of my duties. The *esprit de corps*, inseparable from over twenty-one years at the Bar, will naturally lead me to respect and uphold the privileges of the Bar, though I will be ready, at all times, while treating the Bar with all courtesy, to uphold the dignity of the Bench; and I therefore look for the most kind relations as likely to prevail between the Bench and the Bar."

After alluding to the recent disturbances there, when certain printing offices were attacked by a mob, and much property destroyed, he continued:—

"If Manitoba is to be prosperous, there must be peace and order, there must be confidence in the administration of the laws, and there must be a fearless execution of these laws against all offenders, be they whom they may. I trust that, henceforth, British subjects in this Province will remember that free men are freest when they yield a ready obedience to the law; and that men of all classes in the land will resolve to work out the destiny of the Province, by the use of the free institutions of the country, without resort to acts of violence, which only bring disgrace on those who commit them, and discredit on the fair fame of the British Empire."

The following effusion is too good to be lost. It must have struck the recipient with profound awe, not to say terror. Whether it had the desired effect we know not, but are informed that this effort of the worthy J. P. was too much for him, for the gentleman who sent us the document quaintly remarks, "You will not be surprised to learn that he has since died." The paper reads as follows, except that we disguise the names:—

"Province of Canada,
"Counties of Huron and Bruce,
"TO WITT: } Thomas W. Smith, of the Township of

McKillop maketh oath before the undersigned one of Her Majesty's Justices of the Peace in and for the said Counties for that Mr. Brown also of McKillop unlawfully holds two ewes the property of said Complant I advise you on receipt of this note to return said sheep to Thomas W. Smith save costs & verry much oblige

"Respectfully yours,

"PETER SMITH J.P. (Seal.)"

We would suggest that Mr. Anderson should be instructed by the Benchers to ask students at next interim examination to define the nature of, and give the technical name to the above document.

The judges of the American Republic are manifestly girding up their loins against municipal and magisterial corruption. Finletter, J. in the Court of Quarter Sessions of Philadelphia, upon a prosecution for taking extortionate fees by a Justice of the Peace, commences his judgment after this fashion: "Complaints of the rapacity of the local magistracy have come down to us continuously from the earliest periods. Its history is written in the statutes which were vainly intended to punish and suppress it. Its portraiture is found in the current literature of the times. 'Shallow' and 'Dogberry' and the justices of Fielding, himself a magistrate, are photographs of living actors of the past and present. The common law abhorred it; and its condemnation is dotted all along the highway of judicial decision in indignant language."

One of the most astounding pieces of judicial statistics which we have recently come across reaches us from the State of Illinois. It appears that the Supreme Court of that State has determined one hundred and thirty-eight appeals from inferior courts, and that the judgments in the eight have been upheld, and those in the one hundred and thirty reversed. Here, surely, is an intolerable amount of sack to a penny-worth of bread. We fancy suitors must be in a happy and contented frame of mind, when they ascertain that the court below has gone against them. Indeed, it seems to us that the judges below had better decide the cases by "skying a copper," because then, as somebody has remarked, "*Heads* might have something to do with the matter;" and, we might add, many a scandalous *tail* be saved.

MISPLACED ZEAL.

A case which is noted in another place shows how common is the belief that arbitrators are at liberty to act as though they were the paid advocates of the litigants that appoint them. It would scarcely seem necessary to quote the words of Mr. Vice-Chancellor Mowat in giving judgment in the case referred to. He says:

"It has over and over again been held, both in England and in this country, that it is illegal for an arbitrator to consider himself as the agent of the party who appoints him, or to hold any private conversation with him or with the witnesses on the subject of the matters in dispute; that an arbitrator is a judge, whose duty it is to be indif-

ferent between the parties; and that any such course as took place here on the part of Mr. ——, however innocent in intention, avoids the award."

It was shown on the other side that the other party was just as bad; but two wrongs do not make a right, and so the excuse was of no avail. On this part of the subject an English judge has remarked:

"This is not a matter of mere private consideration between two adverse parties, but a matter concerning the due administration of justice, in which all persons who may ever chance to be litigant, in courts of justice or before arbitrators, have the strongest interest in maintaining that the principles of justice shall be carefully adhered to in every case."

If the arbitrators in this case had been ignorant men, living in the backwoods, there would have been some excuse for them; but the strange part was, that one was a druggist in a large way of business, and had been for years a city alderman; and the other a broker, a business man for nearer a half than a quarter of a century. The umpire—also an alderman—seemed not to know much more of the judicial nature of his office than the arbitrators. Of course no harm was intended, and perhaps none was done; but that was very properly not considered as an excuse, and the parties had doubtless had to pay a good bill of costs as the result of the zeal of their friends.

RESIGNATION OF VICE-CHANCELLOR MOWAT.

Our readers cannot but be aware that the senior Vice-Chancellor has resigned his seat on the Bench to take the position of Attorney-General for Ontario, in the place of Hon. Adam Crooks, and to become Premier of the Government of Ontario, instead of Hon. Edward Blake.

The "decline and fall" of the Hon. Oliver Mowat is an episode in the nature of history-making, that would form sufficient subject-matter for a Canadian Gibbon to produce a book of no small interest or importance. We do not propose, however, to encroach on the general ground; nor on grounds better adapted for discussion in a political paper, but simply to notice the aspects which the facts present from the stand-points of the judiciary and the profession.

Whatever view the outside world may take of the matter, it will not prevent strong expressions of opinion from astonished lawyers and more guarded utterances from surprised judges, at the untoward event which at once has lost to the Court a learned brother, and found for the profession a co-labourer in the common ranks. A rude shock has been given to the stability of the judicial position, which the judge himself ought to have been the last to have occasioned. It is not the fact simply that a judge has for good cause, or for no assigned cause, retired, directly and promptly, from the bench, as that he might have done, and as has been done before with dignity and honour, both maintained and perpetuated; the trouble is that a descent like this is not a retirement, nor even an abandonment; but has the appearance of a fall, by reason of an improper pressure that should not have been tolerated by the custodian of an office so sacred and so important. The decline is what gives impetus and force to the fall. The lever that gave to the bench the descending inclination is one of the objectionable features in the movement, and the facts point too pointedly to an inclination in the direction of the fall not to believe in its existence. We do not say that a judge is bound to continue on the Bench at the sacrifice of his health, or of an increased income, (though this has been done time and oft by judges jealous of the traditions of their order); but there is a glaring impropriety in this step, and in the precedent negotiations, which cannot but strike the most superficial observer; though, strange enough, it seems to have escaped the attention of the late learned Vice-Chancellor himself. For his own sake, we regret that it did so.

Individuals may or may not believe that a judge who leaves the bench for politics, at the request of the leader of a party with which he was formerly allied, has all along been an ardent politician. This, however, in itself, is no real grievance, so long as it does not interfere with, or in any way affect the judicial mind, as, for example, in the case of the Lord Chancellor in England; and, as far as Mr. Mowat is concerned, there has never been the slightest evidence of a tendency to fear, favor or affection. But whilst we are prepared to assert, and do assert this, as well of him as of all our judges, it is nevertheless a fact that the great mass of the people will certainly begin to attribute improper motives to judgments, which to the profession may be most unassailable, and will look upon judges as politicians in disguise, when a judge leaves the Bench

directly and avowedly to go into politics, without any interval even to "give colour" to the change. What will be the confidence of the public in the trial of election petitions by judges, if the very judge who one day tries the case and unseats a sitting member, is the next day found leading a government to which the respondent was violently opposed. Better repeal that which was till now a most wise and proper enactment, and let the right to the seat be fought out by partisan committee men.

This view of the matter, if entertained generally, would introduce into the forum a bone of contention in addition to the "pound of flesh" usually in dispute by litigating Shylocks. Counsel would not only be bound to prepare himself for, and apply himself to the conviction of the mind judicial, but also to the mind political of the court. Those judges whose zeal for politics blinded their judicial discernment, would give greater attention to the political charlatan than to the counsel learned in the law. Desperate efforts would be made by suitors of a recognized political stripe to get their cases before the judge tinged with the hue of their party. In such cases political proclivities would lead to the selection of counsel adapted to the ear of the supposed partisan judge. In this way the worst features of political corruption would be transplanted from the lobby to the corridor; from the halls of legislation to the halls of justice. One of the objectionable characteristics of the American judicial system, as distinguished from the English, has in this instance been given the weight of a name heretofore regarded as eminently honorable and upright, both from a personal and judicial point of view. This every lover of his country will lament.

Respect for the law is intimately associated with respect for the law-giver or law-administrator. If law is administered by undignified persons, or by those suspected of partisan feelings, the popular mind at least will be prone to regard the law itself as unworthy and partial, and it will fall into general contempt. Loss of respect for the Bench at once weakens the whole framework of society, and woe betide any country whose judges have been subjected to even the breath of suspicion.

This frailty or weakness, if is to be feared, may be thought by the intensely interested public to be general or epidemical. It is deeply to be regretted—very much to be deplored, that the foundations of judicial power have been weakened by the weakness of a weak brother. The remaining pillars of justice will have to be strengthened by some legislative or administrative application, that will prevent political barnacles from wasting away their firmness and stability.

The profession has been wont to admire the Bench as a place of permanent honor and practical usefulness. It will now be subject to the reproach of fickleness and temporizing utility. Many will look upon it as an elevated vantage-ground from which to scan the contending elements of faction, and from which the occupants are prepared to step down into the arena of conflict, when the prospects of extended patronage, or the gratification of a taste vitiated by the expectation of enlarged emoluments are in view.

The profound respect and traditional deference paid to the Court by the Profession would be perceptibly diminished in proportion to the probability that the judge might one day be "your lordship," and the next, "my learned friend;" one day an authority whose oracular dicta would be sustained by the whole civil and military forces of the Empire, and the next day a speaker whose utterances and arguments would be tattered and torn into shreds of illogical incoherencies by his opponents.

The profession, as such, has a special duty to perform between the Bench and the people, than which there is nothing more important for the due and impartial administration of the law. This duty is to maintain and promote before the public a becoming respect for the Court. This educates the popular mind as much or more than anything else. Where this is wanting, regard for the authority of the Court is wanting; and when once that is gone, the strongest element in obedience is destroyed, and insubordination and anarchy are necessary consequences.

We cannot but most seriously regret the resignation of Mr. Mowat, and his immediate acceptance of the position of a political party leader, and the undoubted necessity of accepting the position of practising at the Bar with those whom he formerly presided over as a judge.

We trust this experiment will not be repeated; that the present daring contempt of judicial traditions and judicious rules will not be accepted, or acted upon, as a precedent hereafter. We hope that the public opinion educed, and the professional

reprobation almost universally manifested at the act, will for the future prevent political intrigues from culminating in judicial declensions. We know of no precedent to fit this case, though possibly one might be found in the United States, but Heaven forbid that we should seek for one there; any analogy from miscalled precedents in England is against such a step. These may perhaps be considered in a future number.

LAW REFORM.*

It is almost impossible to take up any journal, whether lay or legal, without finding somewhere in it a reference to the topic which we have placed at the head of this article. The alterations which have taken place in English law within the last few years have been neither few nor small, yet they seem to be but shadows of coming changes of far wider scope and consequence. Unquestionably, there is in the legal circles of the mother country a strong tendency towards the codification of the laws; we think it needs no great wisdom to predict that this will be a result, the accomplishment of which is no more than a question of time. Probably before this consummation is reached, there will be many intermediate changes and modifications of the existing system, such, for instance, as are foreshadowed in Sir John Coleridge's address at the Social Science Congress. By these the various branches of the law in the matter of evidence, of commercial law, of real property law, and the like, will be systematized by way of codification. By process of complete codification the principles of law will be more or less changed: matters doubtful will be reduced to certainty; harsh rules will be mollified by direct enactment; consistency and logical development will supersede the disjointed and anomalous conglomeration of case-made law.

But in the immediate future, perhaps, there is no more pressing question than that of uniformity of curial procedure, and, coupled with this, the re-adjustment of the jurisdiction of the courts, so that any person who has a valid cause of action, whether legal or equitable, or both, may obtain an adjudication of his case upon the merits, without being driven from one court to another, on technical objections to the jurisdiction.

In this Province there has been a gradual assimilation of the practice in the courts of law and equity. This is especially noticeable in the mode of trying causes by the Court of Chancery under the circuit system, where the evidence is given *viva voce* in open court, the case argued at once and disposed of by the judge, just as in Nisi Prius cases, where a jury is not asked for. So in the establishment of local offices to facilitate the transaction of equity work, the Court of Chancery in Ontario has departed widely from English precedent, though it has acted in conformity with the common law mode of distributing business. As regards the jurisdiction of the courts: when one looks at the Common Law Procedure Act, and observes in how many points the systems of law and equity touch, and when one looks at the reports, and observes in how many cases litigants have been prejudiced because courts of law and equity have not had co-ordinate jurisdiction,—one cannot but wish that some scheme were devised whereby the vexatious lines of demarcation might disappear and (in the language of a well-known pleader, who now adorns the bench of one of the common law courts) "the course of justice flow unobstructed."

The conditions for the successful consummation of such a plan are more favourable in Ontario than in England. Besides the present similarity of procedure, to which we have adverted, which does not obtain in the English courts, we have not the numerous, well-disciplined, and devoted Chancery and Common Law Bar, which in England is powerful enough to delay the adoption of changes, beneficial to the public, though conceived to be detrimental to the privileged few.

There are two modes whereby the injustice to suitors which we have indicated may be remedied. The first is to leave things as they now are in respect to jurisdiction and procedure, and to confer upon the superior courts, by statute, the power to transfer causes from one court to the other, so that a common law cause of action which has strayed into Chan-

* We have much pleasure in inserting this article, from the pen of a valued occasional contributor. He expresses his views clearly and well; but whilst we admit this, we cannot say that he has convinced us that the practice in Chancery should prevail, in case of a fusion, over that at Law. We are not yet prepared to believe that the Common Law Procedure Act is inferior to the ever changing orders of the Court of Chancery, as a basis of procedure. And without going into a further discussion at present, it is an item for consideration that the practice under the C. L. P. Act is more familiar with the profession at large than the other, and could, as is believed by many good judges, more easily be adapted to the future requirements of the country, than the practice of equity; but we will not spoil a good cause by a brief notice of only a few of the arguments which may be adduced in favor of the opinion which seems to us the soundest.—EDS. C. L. J

cery may be relegated to its proper forum, and so that an equity which could not be worked out at law by reason of the insufficient machinery of the court, may be passed over to a competent tribunal. This scheme, properly worked out, could, without doubt, be made an adequate provisional remedy, but it would be manifestly only a half-way stage to effectual relief. The ultimate goal of all such amendments can only be that to which the Attorney-General of England adverts in these words, "the fusion of our two systems of law and equity, a thing, in my opinion, which is absolutely certain one day to be done."

Now, in setting about any scheme of fusion there are a few principles to be borne in mind by law reformers in Canada. It is impossible to satisfy every person, or class of persons, affected by the changes. New, and perhaps unpleasant work will be thrown on the bench and on the bar. Solicitors and attorneys will be unable to agree which class is to swallow up the other. This will be, however, a matter of small concern to the great body to be benefitted,—the people—in whose eyes, according to Jekyll's joke, there is as much difference between attorney and solicitor as there is between crocodile and alligator. Yet all classes will agree that one chief end to be sought is the *maximum* of general good with the *minimum* of change. This will necessitate a choice of one of the two, or between the two systems of procedure which obtain at present in common law and Chancery practice. Now, the simpler and more direct mode of procedure is the most suitable for modern times. For this reason, other things being equal, the writer would prefer, where the two modes of procedure are so inconsistent that they cannot be amalgamated, that the practice as settled by the general orders and decisions of the Court of Chancery, should prevail over the practice at law, which has been mainly imported from England, and the great triumph of which was to simplify considerably time-honoured complexities of the ancient practice. The equity judges have been astute to frame orders from time to time adapted to the wants of the country and the requirements of suitors. The consolidated orders as they stand embody the results of the experience and sagacity of many eminent judges, who were obliged from the position of the Court of Chancery to adapt its procedure to the special circumstances of this Province.

If the three superior courts were consolidated, with a common jurisdiction, and their official machinery enlarged, there would be work enough for them all to do. It is idle and ignorant talk that some of our daily newspapers indulge in, when they recommend the abolition of Chancery. Two sentences of Sir John Coleridge's admirable address put the matter in its true light. He says: "It must be remembered always that the things themselves, law and equity, and the rights and liabilities arising out of them are inherently distinct. The distinction is in the nature of things, and has not been created nor can be abolished by act of Parliament." Nor do we think that the changes need be so excessive or so alarming as some persons imagine. There can always be power given to the judges to *classify* and *apportion* the work which is brought before them, so that judges of equity training may be assigned to equity business, and judges of common law training and aptitude to common law and criminal causes. At all events, there is an ample field open for our legislators and law-officers. Any man or set of men who achieves success in this direction shall well merit the benediction of Coke,—"Blessed be the amending hand!"

LEGISLATION IN NOVA SCOTIA.

Our attention has been drawn to two measures which it is proposed to bring before the Legislature in Nova Scotia, at its next session. One is an Act for establishing County Courts, and the other an Act to confer criminal jurisdiction on the County Courts. Their purport will be best seen from the synopsis given below, some of the clauses being copied in full:

AN ACT FOR ESTABLISHING COUNTY COURTS.

Be it enacted as follows:

1. There shall be established in each of the Counties of this Province, except the County of Halifax, a Court of Law and of Record, to be called the County Court of (the name of the county). The sittings shall be held at the Court House, &c.

2. [Names of Districts—Judges to hold office during good behaviour, &c.]

3. [Provision in case of inability of Judge to hold Court.]

4. No Judge of any such Court shall practice, carry on or conduct any business in the profession or practice of the law, while being such Judge, on pain of forfeiture of his office.

5. [Judge's oath of office.]

6. The practice, forms and modes of proceeding shall be according to the practice of the Supreme Court of this Province; and the Judges of such County Courts shall at all times be governed by the decisions of the Supreme Court.

7. The table of fees shall be the same as in such Supreme Court, for the like services.

8. The Courts shall not have cognizance of any action:—

1st. Where the title to land is brought in question,—or

2nd. In which the validity of any devise, bequest, or limitation is disputed, excep as hereinafter provided, or

3rd. For criminal conversation or seduction, or

4th. For breach of promise of marriage.

5th. Of any action against a Justice of the Peace, for anything done by him in the execution of his office.

9. Subject to the exceptions in the last preceding section, the County Courts shall have jurisdiction, and hold plea in all actions *ex contractu*, when the debt or damages claimed do not exceed the sum of two hundred dollars, and in all actions of tort, when the damages claimed do not exceed one hundred dollars, and in actions on bail bonds given to a Sheriff in any case in a County Court, whatever may be the penalty or amount sought to be recovered.

10. [Pleadings setting up title to land to be verified by affidavit.]

11. [Courts to hold four Terms in a year, and Judge may adjourn to a future day.]

12. [When and where Courts to be held.]

13. If the Judge shall be satisfied, by either party in a cause in his Court, that such cause can be more conveniently or fairly tried in some other County Court, he shall order that the venue be changed, and that the cause be sent for hearing to such other County Court; and the Clerk of the Court shall forthwith transmit by post, to the Clerk of the Court to which the cause is sent, all papers and proceedings in the cause on file in his office, and a certified copy of the order for changing the venue; and such cause shall be dealt with in such Court, as if originally brought therein.

14. [Direction of process to and execution by Sheriffs.]

15. The Evidence Act, and the law relating to the deposition before trial shall apply to the County Courts as far as applicable.

16. [Duties of Clerks, &c.]

17. No defendant shall remove any action commenced in the County Court, into the Supreme Court, by *Habeas Corpus*, or *Certiorari*; and, if any action be brought in the Supreme Court, that could have been brought in a County Court, or any action be brought in a County Court, that ought to have been brought in the Supreme Court, the plaintiff shall not be allowed any costs, unless the presiding Judge shall certify there was good cause for bringing the action in the Supreme Court or County Court, as the case may be. In case such cause shall be transferred to the Supreme Court or County Court, as the case may be, all further proceedings held therein shall be carried on as if such cause had been originally brought in the Supreme Court or County Court, as the case may be.

18. [General powers of Court and Judge defined, similar to those of our County Courts.]

19. [Appeal given to the Supreme Court.]

20. The County Courts shall have and exercise jurisdiction in all cases under the act for overholding, and under the absent or absconding debtor act, as the same is now exercised by the Supreme Court.

21. No privilege shall be allowed to any person to exempt him from the jurisdiction of the several County Courts; but members of the Legislature shall not be arrested or imprisoned by civil process issued out of any such Courts.

22. Judgment from the County Courts shall bind the lands of the defendants from the time of registry, as in the Supreme Court. Writs of execution shall be in the same form, and of like effect, as those out of Supreme Court.

23. [Writs and process to other Counties.]

24. [Juries same as Supreme Court.]

25. The Judge of any County Court may try and determine causes brought to issue before him without the intervention of a jury, if both parties agree thereto.

26. Appeals from the Magistrates' Courts shall be to County Courts, and shall be tried and determined by the Judge thereof, either summarily or by a jury; and there shall be no appeal from the decision of such judge or jury.

27. [As to pending suits.]

28. The summary jurisdiction of the Supreme Court, except in the County of Halifax, is abolished. Acts inconsistent herewith repealed.

29. The Judge of each County Court shall be *ex officio*, a Justice of the Peace, in and for the district for which he is appointed; but shall not issue any civil process.

30. Only Attorneys of the Supreme Court may practice in the County Courts.

31. [Seal and books to be provided.]

32. [Fees to Clerk, &c.]

AN ACT ENTITLED AN ACT TO CONFER CRIMINAL JURISDICTION ON THE COUNTY COURTS.

1. The several County Courts in the Province, shall have exclusive jurisdiction of all misdemea-

nors committed within the body of the respective Counties, and original concurrent criminal jurisdiction within the respective Counties with the Supreme Court, of all crimes and offences, which are not capital, committed within their respective Counties, which crimes and offences shall be triable by whichever Court, the Supreme or County, shall first hold Court in the County, next after the committal of the party charged with such crime and offence, and the judges shall have full power and authority to hear, enquire into, try, determine, deal with and punish all such crimes, offences and misdemeanors aforesaid, in manner prescribed by law, provided always that the Attorney-General of the Province may, at any time and in any stage of the proceedings, relating to all crimes and offences, except misdemeanors proceeded under in any County Court, take charge of, and control such proceedings, as fully as if cognizance were being had in the Supreme Court of such crimes and offences, and may at any time, previous to the commencement of any trial, in any County Court for any crime and offence, cognizable in such Court, except misdemeanors, issue his fiat, and transmit the same to the Clerk of the County Court, where such crime or offence would be triable, which shall have the effect of determining the jurisdiction of said County Court as far as regards such crime and offence, and giving to the Supreme Court of the said County exclusive jurisdiction over such crime or offence. All acts, and part of acts, touching and concerning the criminal laws and the administration of criminal justice in the Province, or relating to jurors, witnesses, evidence or proceedings of any kind now in force, and applicable to the Supreme Court, when exercising criminal jurisdiction, shall be in force and apply to the several County Courts, except as herein modified or altered; and the County Courts shall be clothed with and exercise all the like powers, rights and privileges, in all cases cognizable by them as now appertain to, or are exercised by the Supreme Court, as Courts of criminal jurisdiction; provided that no grand jury shall be summoned to attend any County Court, except upon the order of the Judge of such court directed to the Sheriff for that purpose, who upon receiving such order shall immediately summon seven grand jurors to attend such court, who shall be sworn and charged and due presentment make of any matter submitted to them by the Judge of such court.

2. All warrants of committal issued by, and all examinations and recognizances taken by any justice of the peace, or relating to parties committed for trial for any offence or crimes which are not capital, shall be by him immediately after transmitted to the Clerk of the County Courts of the County within which such crimes and offences have been committed—if such court shall sit in said county—previous to the Supreme Court; and all warrants of commitment issued by, and all examinations and recognizances taken by any justice of the peace, or relating to persons committed for trial at any County Court, for misdemeanors, shall immediately thereafter be transmitted to the Clerk of such County Court.

3. The several Judges of the County Court may admit to bail any person charged with any offence (except capital offences) in the same manner and to the same extent as may be now done by a Judge of the Supreme Court.

4. In any and every case of summary or other conviction, before any justice or justices of the peace for any county, or the Stipendiary Magistrate for the city of Halifax, an appeal from such justice, or justices or Stipendiary Magistrate may be made to any Judge of the County Courts—which appeal the said justice or justices or Stipendiary Magistrate shall grant, on the party so committed giving bonds, with sureties, in such sum as the justice or justices or Stipendiary Magistrate shall deem proper, to appear and prosecute said appeal at the next sittings of the County Court in the county, and the Judge thereof shall try the matter, *de novo*, summarily, and the justice or justices or Stipendiary Magistrate shall bind over, by recognizance, the witnesses to appear and give evidence at such court.

5. No petit jury shall be summoned, or hereafter attend at any General Session of the Peace for the county of Halifax.

6. [Special provisions as to County of Halifax.]

7. The Judge of the County Court may, upon good cause shewn, from time to time, postpone the trial of any criminal matter to any future sittings of the court, and in such case shall bind over the offender, by recognizance, (and if at his instance with sureties) in such sum as he thinks proper, to appear and take his trial at such future court; and he shall also bind over, by recognizance, the witnesses to appear and give evidence at such court.

8. [The County Judge may order the examination *de bene esse* of all witnesses sick or infirm or about to leave the Province before the Clerk of the Court.]

9. The jury for the trial of criminal offences in the County Court shall be seven, all of whom must agree upon the verdict.

10. The senior Queen's Counsel resident in the county, and if no Queen's Counsel reside in the county, the senior or Queen's Counsel present at the opening of the County Court, and in their absence the senior practising attorney shall be appointed by the Judge to conduct all criminal

prosecutions during the term; who shall take all proceedings for the trial of all offences in the county, and over which the County Court shall have jurisdiction: prepare indictments and prosecute; and take proceedings for compelling attendance of witnesses, &c.

11. The Clerk of the County Court shall perform all the duties connected with offences cognizable by the County Courts heretofore performed by the Clerk of the Crown, including the necessary proceedings to carry out any sentence imposed by the County Court; the binding over all witnesses in any cause, &c.

12. It shall be lawful for the presiding Judge at any County Court to tax and allow to the Queen's Counsel or attorney, for his services, reasonable costs and fees, as the Judge shall deem adequate, for the services actually performed on such prosecution; but the costs taken shall not exceed for any one prosecution the sum of six dollars for each criminal appeal, and twenty dollars for all writings, papers and counsel fees on each criminal trial; and to tax and allow to the Clerk of the County Court, for his services in each criminal appeal, a sum not exceeding two dollars, and on each criminal trial a sum not exceeding four dollars.

The above Bills seem to be well drawn, and that concerning criminal jurisdiction contains suggestions which it might not be amiss for us to profit by on some future occasion. The idea of giving a limited criminal jurisdiction to County Courts seems to us a good one, our plan being in some respects a clumsy one. The first section is an improvement on our law, which leaves many points of jurisdiction open as questions of construction The clause before us is brief, comprehensive, and complete, as regards the higher crimes: we doubt, however, the propriety of giving to these courts exclusive jurisdiction in all cases of misdemeanor. We would, moreover, suggest a careful review of the bill to see if any of its provisions are not beyond the jurisdiction of a Local Legislature. The second to the eleventh sections, excepting perhaps the fifth, seem to be unconstitutional and beyond the power of the Local Legislature. They relate either to criminal procedure or criminal law, both which classes of subjects are by the British North America Act expressly reserved for Dominion Legislation. The principle of the bill to establish the County Courts as Criminal Courts is good, and whatever provision is necessary to accomplish this may be passed by the Local Legislature; but the alternation of a substantive provision of law relating to criminal matters is clearly beyond the power of the Provincial Parliament.

It would appear that it is proposed to retain the Quarter Sessions in one county. The system should be uniform throughout the Province, unless, indeed, there are local reasons to the contrary of which we know nothing, and cannot see the force. Sections 7 and 8 refer to procedure only, and should be embodied, we think, in a general code of rules, which must also contain various other regulations to prevent uncertainty, and provide for uniformity in all the courts.

Clause 9 would make a change, the merits of which have often been discussed, and more especially with reference to civil causes. Possibly a general provision to this effect, applicable to the whole Dominion, would be desirable, and, at present, we feel rather inclined to favour such a change, but every effort should be made to assimilate our laws, and induce uniformity in all the Provinces of the Dominion.

As to the County Courts Act, some of the clauses seem too general, and those that do go into details are not sufficiently exhaustive, but it would be impossible within our limits to discuss them more at length; doubtless many of these provisions will be added to, and others made, when the bill comes before a committee of the House, and many of them will occur to the framer of the bill before that time. A careful perusal of some of our recent statutes might be found useful in this connection. The ninth clause of this Act is a more definite provision than in our County or Division Court Acts. We strongly recommend our friends not to encumber their lands with the provision for registering judgments (Sec. 22). It will be found much better to make suitable machinery for a speedy seizure and sale of the property by the sheriff under an execution. We had the same process here and had to do away with it.

But it is, perhaps, unfair to criticise further without a more perfect knowedge of what provisions the other statutes of Nova Scotia may make in the premises. We shall, therefore, conclude our brief notice by again complimenting the framer of these proposed acts upon many excellent suggestions, and an evident desire to promote the due administration of justice in his Province.

SELECTIONS.

CONTRIBUTORY NEGLIGENCE IN A COUNTY COURT.

A lady, whose silk dress had suffered injury by the fall thereon of some porter from the bar engine of a public house, while the pump was being worked by the bar-maid, brought an action against the landlord to recover compensation. The case, entitled *Albert* v. *Sands*, was heard before the judge of the Lambeth County Court, and his Honour held that the negligence was proved; but adjourned the question of damages, because a dyer had alleged his ability to restore the silk dress to its original beauty at a trifling cost. At the adjourned hearing the dyer confessed that the porter was too much for him, and thereupon the judge proceeded to assess the damages. The claim was for £5 18s., the cost of the dress; but his Honour thought there ought to be an abatement from this amount, as the lady had some wear out of the dress. So far that Mr. J. Pitt Taylor was in the right. But his Honour then said that as a public house was a dangerous place for a handsome dress, the lady was guilty of some negligence in entering a tavern in such a costume, and for that reason some deduction must be made from the claim. Perhaps we do not quite understand the intent of the learned judge, or his words may have been wrongly reported. Otherwise, here is our old friend the doctrine of "contributory negligence" appearing in a new and most awkward form. For, according to Mr. J. Pitt Taylor, the question of the negligence of the plaintiff is not only material so far as concerns the verdict or judgment in a cause, but must also be considered in regard to the *quantum* of damages to be awarded. The tendency of this novel theory can hardly be conjectured. Clearly, Mr. J. Pitt Taylor thinks that no person in good clothes ought to approach the bar of a public house; a startling opinion for city men, barristers, attorneys, and divers other liege subjects, who must be refreshed in the hurried intervals of buisness, and who now and then may indulge in the elegance of a new pair of pantaloons. But that is not the limit of the doctrine. When next some murderous railway company smashes a statesman, or stockbroker, or a queen's counsel, an appeal will be made to the judge not to award the full measure of damages, on the ground that the plaintiff was himself guilty of some negligence in entering the carriage of the company, that being "a very likely place for a valuable person to get damaged in."—*Law Journal.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

ARBITRATION — IRREGULAR CONDUCT OF ARBITRATORS.

Where at the commencement of a reference, *L.*, the arbitrator for one side, conferred privately with the parties who nominated him on the matters in question, and on the evidence to be offered, and continued this course to the end, it was *held* that the impropriety was not cured by showing that after the reference had made some progress, the other arbitrator acted with similar irregularity on the other side.

The reference was to two arbitrators, with power for the arbitrators to appoint an umpire, who was to make an award if the two arbitrators disagreed; an umpire was accordingly appointed; and, the arbitrators differing, the umpire made an award:

Held, that each party was entitled to the free judgment of the two arbitrators on the matters in difference, as a condition precedent to the umpire's authority coming into force; as well as their free judgment in the appointment of the umpire; and that the irregularity of the arbitrator *L's* course in holding private conference with one of the parties was sufficient to avoid the award of the umpire.

After the two arbitrators had finally differed, the umpire had a private conversation on the subject of the reference with the arbitrator *L.*, in the absence of the other arbitrator and of the parties: *Held*, that, as *L.* had acted as the agent for one side, private conversation with him was as injurious and objectionable as private conversation with the principals would have been.

The Court allowed the party prejudiced to serve a supplementary notice, embodying the objections as to the course of the umpire and arbitrator *L.*, the same having come to light on cross-examination, and there being strong reason for apprehending that the award was not a fair award.—*In re Lawson and Hutchinson*, 19 C. R. 84.

DOWER—MORTGAGE.

Where a wife joins in a mortgage, and, on the death of the husband, there are not sufficient assets for the payment of all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors.—*Baker* v. *Dawbarn*, 19 C. R. 113.

INFANTS—PAST MAINTENANCE.

It is for the discretion of the Court, in view

of all the circumstances, whether to allow for past maintenance out of the corpus of an infant's estate not intended by a testator to be so applied.

A farmer, by his will, gave to his widow his goods and chattels absolutely; also an annuity; and the use of his homestead and other real estate during her widowhood; she married again, and claimed to be paid for the past maintenance of the testator's children from the time of his death, out of the corpus of the estate devised to them at twenty-one and otherwise. The Court, on further directions, refused to allow the claim.—*Edwards* v. *Durgen*, 19 C. R. 101.

LEASE—CONTRACT FOR WORK PARTLY EXECUTED—SPECIFIC PERFORMANCE.

Equity, now-a-days, does not, as a general rule, enforce specifically a contract between a landholder and a builder for the erection of a house or the like; but specific performance of agreements to execute works is enforced in cases where the plaintiff shows, what the Court considers to be, a sufficient ground of equity to entitle him to that relief.

A bill alleged that the plaintiff contracted with the defendants to lease to them certain lands, and to erect thereon for their use a stone building of a specified size according to plans and specifications furnished by the defendants; that accordingly the plaintiff had expended $4,000 on the building, under the superintendence of the defendants, and according to plans furnished by them; that he had done everything for which the defendants had given directions; and that the defendants had accepted the building and taken possession of part of it; but it appeared that the machinery was not completed in all respects:

Held, that the allegations of the bill, if proved, would entitle the plaintiff to relief.—[STRONG, V. C., dissenting.]—*Colton* v. *Rookledge*, 19 C. R. 121.

PARTNERSHIP—INTEREST—COMMISSION.

In the absence of a special custom or an agreement, interest is not usually allowable to a partner on advances of capital made by him to the partnership, or for partnership purposes.

Where parties entered into an agreement that they should purchase goods on joint account, and at the joint risk, and that one of the parties should furnish the funds in the first instance, it was *held* that interest could not be charged on the funds so furnished.

In such a case a firm in Canada was to advance the funds, and the goods were to be consigned for sale to their firm in Liverpool, which went by a different name:

Held, that they could not charge commission on their sales.—*Jardine* v. *Hope*, 19 C. R. 76.

PARTNERSHIP—SEPARATE ESTATE.

The rule in Equity, as well as in Bankruptcy, is, that the separate estate of a partner is to be applied first in discharge of his separate debts; and, in applying this rule, money paid by co-partners on a liability created by the fraud of the partner towards them, is treated as a separate debt, provable and payable *pari passu* with the other separate creditors of such partner, in case of his death, insolvent.

The mere liability so fraudulently created cannot be proved against the separate estate as a debt until the liability is paid, or until something equivalent to payment takes place. Where the fraud was in the use of the partnership name on bills, the other partners becoming insolvent, the holders of the bills proved them against the partnership estate; the assignee, in a suit for administering the separate estate of the guilty partner, claimed to prove the amount against the separate estate; but the Master restricted the proof to the expected dividend from the partnership estate and the separate estate of the surviving partners; and the Court *held* that the assignee was not entitled to prove for a larger sum.—*Baker* v. *Dawbarn*, 19 C. R. 113.

TENDER.

A tender of mortgage money with a statement that the party tendering did not consider that the amount tendered was due, and that the other would thereafter be compelled to repay the excess, was held not to have been invalidated by this statement.

A tender to the holder of a mortgage (who claimed a larger sum) with a condition that the mortgage, on the sum tendered being accepted, should be given up, was held bad, as being a conditional tender.—*Peers* v. *Allen*, 19 C. R. 98.

ADMINISTRATION SUIT—EXAMINATION—COSTS.

If in an administration suit fraud is charged in the pleadings, it may be proper for defendants to examine the plaintiff thereupon in order to disprove the charge, even though they succeed in the objection that a proceeding by bill was not necessary.

In examinations *de bene esse* if the evidence is not used and the witnesses are within reach of subpœna, the costs of the examination should not be allowed. Where the evidence is material and is used, the costs become costs in the cause.—*McMillan* v. *McMillan*, 8 L.J. N.S. 285.

ONTARIO REPORTS.

COMMON PLEAS.

The Queen v. Goodman.

Criminal law—Attempt at arson—Evidence.

On an indictment for attempt to commit arson, the evidence showed that one W., under the direction of the prisoner, after so arranging a blanket, saturated with oil, that if the flame were communicated to it, the building would have caught fire, lighted a match, held it till it was burning well, and then put it down to within an inch or two of the blanket, when the match went out, the flame not having touched the blanket:

Held, that the prisoner was properly convicted, under 32 & 33 Vict., ch. 22, sec. 12, of an attempt to commit arson.

[22 C. P. 338.]

The prisoner was tried at the last Spring Assizes, at Hamilton, before S. Richards, Q. C., under an indictment containing two counts; the first, charging that one Francis Waters, unlawfully, and maliciously, did attempt feloniously, unlawfully and maliciously to set fire to a certain dwelling-house, by then and there saturating a blanket with coal oil, and placing it against said dwelling-house, and sprinkling coal oil upon the doors and sides thereof, and attempting to apply a burning match to said oil, said house being at the time inhabited.

The second count charged that the prisoner, before the commission of the said felony, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command said Waters, the felony in manner and form aforesaid to do and commit, against, &c.

The evidence showed that Waters, after arranging under prisoner's directions the saturated blanket, lighted a match, and held it in his fingers till it was burning well, and then put it down towards the blanket, and got it within an inch or two of the blanket when the match went out, the blaze not touching the blanket, and he throwing away the match, and leaving without making any second attempt.

At the conclusion of this evidence prisoner's counsel objected that the evidence of a felony having been committed by Waters was insufficient; that sec. 12, of ch. 22, of 32 & 33 Vict., required an overt act to complete the offence under that section; that the overt act must be of such a nature as to be capable of setting fire to the building, and that at most Waters' act was only an attempt to commit an overt act.

The learned Queen's Counsel overruled the objection, but reserved the question for the consideration of this Court, and he charged the jury that if they believed Waters poured the oil against the building, and also placed the pieces of blanket saturated with oil on the sills of the doors, and that while at the front door he lighted the match, and while so lighted stooped down to apply it to the oil, intending then to set fire to the oil in the saturated blanket, and thereby to set fire to the house, and was in the act of placing the burning match against the oil, and had reached within an inch or two of it, when the light went out, as he had stated in his evidence—then that these acts constitute a sufficient attempt and overt act within sec. 12, of ch. 22, although the match, while in a flame or burning, never touched the oil or blanket, and although no fire was actually communicated to the oil or blanket.

The Attorney General, for the Crown, contended that the charge was fully sustained by the evidence, and the case brought within the 12th sec. of ch. 22, 32 & 33 Vict. He referred to *Regina* v. *Taylor*, 1 F. & F. 511; *Regina* v. *Esmonde*, 26 U. C. 152: *Regina* v. *Bain*, 9 Cox 98.

Robertson, contra, contended that it was not such an overt act, within the meaning of the Statute, as would render the prisoner liable to be convicted.

Hagarty, C. J., delivered the judgment of the Court.

The fact of Waters going away, or ceasing further action after the match went out (not by any act or will of his), seems to put the matter just as if he had been interrupted, or was seized by a peace officer at the moment.

It seems to me the attempt was complete, as an attempt, at that moment, and no change of mind or intention, on prisoner's part, can alter its character.

I see no objection to the charge. There was no doubt the combustible matter was so arranged that if the flame were communicated to it, the building would have caught fire, and the full crime of arson been complete. It would be a reproach to the law if such acts as were here proved do not constitute an overt act towards the commission of arson.

In *Regina* v. *Cheeseman* (L. & C. 145), Blackburn, J., says: "There is no doubt a difference between the preparation antecedent to an offence, and the actual attempt. But if the actual transaction has commenced which would have ended in the crime, if not interrupted, there is clearly an attempt to commit the crime. Then, applying that principle to this case, it is clear that the transaction which would have ended in the crime of larceny had commenced here."

Regina v. *McPherson* (D. & B. 202). Cockburn, C. J.: "The word, attempt, clearly conveys with it the idea that if the attempt had succeeded, the offence charged would have been committed. * * Attempting to commit a felony is clearly distinguishable from intending to commit it.

Regina v. *Taylor* (1 F. & F. 512). The prisoner was indicted for that he by a certain overt act, (*s.c*) by then and there lighting a certain match, &c., near to a certain stack of corn, &c., unlawfully, maliciously, and feloniously, did attempt to set fire to said stack, &c. Prisoner called at prosecutor's house and applied for work; on refusal he asked for money, and on being again refused threatened to burn up the prosecutor. He was watched and seen to go to the stack, kneel down close to it, and strike a match; but seeing he was watched, he blew it out and went away. The stack was not at all burned. Pollock, C. B., told the jury that "If they thought the prisoner intended to set fire to the stack, and that he would have done so had he not been interrupted, in his opinion this was in law a sufficient attempt to set fire to the stack." After stating that buying a box of matches, with intent to set fire to a house, would not be sufficient, he adds: "The act must be one immediately and directly tending to the execution of the principal crime, and committed under such circumstances that he has the power of carrying his intention into execution." The jury found that they were not satisfied that prisoner intended to set fire to the stack, but they thought he intended to extort

money from prosecutor by his conduct. This was held to amount to not guilty.

I think the law laid down in this case fully supports the present conviction, and that our judgment should be for the Crown.

Judgment for the Crown.

CHANCERY.

CLEMMOW v. CONVERSE.

Insolvent debtor—Preference—Pressure.

A preference which a debtor is induced to give by threats of criminal and other proceedings, is not void under the Indigent Debtors' Act of 1859, or the Insolvent Act of 1864:

But to sustain the preference the pressure must have been real, and not a feigned contrivance between the debtor and creditor to wear the appearance of pressure for the mere purpose of giving effect to the debtor's desire and intention to give a preference.

[16 Chan. Rep. 547.]

Examination of witnesses and hearing at Ottawa.

Mr. *Crooks*, Q. C., and Mr. *Kennedy* for the plaintiff.

Mr. *Blake*, Q.C., for defendant Walker.

SPRAGGE, V. C.—It is clear from the evidence, particularly that of Walker, that it was apparent to Converse and to J. T. Lamb, that the effect of the giving of the ante-dated note, and of the legal proceedings to be taken upon it, would be to close the business of Lamb—to put him in insolvency, unless he, Lamb, could obtain aid from some other quarter. It was the intention of Converse to get execution in as short a time as possible, in order to be before other creditors; and the evidence of Mr. Walker, the solicitor of Converse & Co., would lead to the inference that Lamb facilitated this passively, and was anxious, if he could, to facilitate it actively; but Mr. Lamb's letter to Converse & Co., of 4th July, 1865, scarcely supports this. The peculiar course taken by Walker was his own idea, in order to conceal the proceedings from other creditors; but Converse, though not aware of the mode intended by his attorney to gain priority, was anxious that such steps should be taken as would give his firm priority. His anger at the deception which he alleged, and Lamb admitted, had been practised upon him, as to the advance of $1,000 being obtained by representation as to real security, may have been the reason for the course he took. He at least suspected, if he did not know, that Lamb was in a precarious position, perhaps on the eve of insolvency, and his leading object was to secure the debt of his firm, and that at the expense of other creditors, if necessary.

In order to effect this he brought pressure to bear upon J. T. Lamb, sufficient, under the English cases, to make his act not a voluntary act; unless the proper conclusion is, that although there was pressure, still the giving of the ante-dated note was not really the result of the pressure, but in order to give a fraudulent preference: *Cook* v *Pritchard*, 6 Scott, N. R. 34. The evidence of this is that above adverted to. I think it shows that he gave the note under pressure; and further, that having given it, his desire was that Converse & Co. should thereby obtain a preference. Whether he still apprehended the possibility of criminal proceedings being taken, as threatened by Converse, or from any other reason, he was anxious that they should obtain execution in priority to other creditors. The principle upon which, in England, pressure is held to be material, is this: *prima facie*, a payment by one in so hopeless a state of insolvency that his payment is to be looked upon as made in contemplation of bankruptcy; or a delivery of goods or other effects by a debtor in that position, is a fraudulent preference—the preference is presumed to be made in order to defeat the Bankrupt Laws: and the effect of the payment or other act of the insolvent, being under the pressure of the creditor, is to rebut the presumption that would otherwise arise: *Bills* v. *Smith*, 6 B. & S 321. It must of course appear that the pressure is real, not a feigned contrivance between the creditor and debtor, to wear the appearance of pressure, while the real desire and intention is to give a preference.

The circumstance that in this case the note was ante-dated, and that some of the notes which it was given to cover were not yet due, is some evidence of fraudulent preference; but it is not conclusive: *Strachan* v. *Barton*, 11 Ex 647, and there are other cases to the same point. It would seem too, from the evidence, that it was not a case where preference was given before the expiry of credit, but that the notes still current were renewals of notes given for payment of goods. Converse, too, was in a condition to dictate terms to Lamb, and availed himself of his position to insist upon that which enabled him to take immediate proceedings against his debtor. It appears further that Lamb did not consider his insolvency inevitable: he still clung to the hope of being able to continue his business: he hoped for "outside aid" and asked and obtained from Converse a promise of a further supply of goods, to a small extent, upon security, in order to make up his stock. Under these circumstances, I think it would be held in England that a preference given by a debtor to his creditor, was not a fraudulent preference.

This act of J. T. Lamb, if it be void, must be so under the Indigent Debtors' Act, 22 Vic. ch. 96, or under the Insolvency Act of 1864. It was decided in *Young* v. *Christie*, 7 Grant, 312, that allowing judgment to go by default in an action, and defending another, the effect being to enable the one creditor to recover judgment before the other, is not a preference which is avoided by the former act.

Then as to the Insolvency Act of 1864. Sub-section 3 is the clause that bears upon this case. It avoids "all contracts or conveyances made, *and acts done* by a debtor fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors or any of them, and so made, done, and intended, with the knowledge of the person contracting or acting with the debtor, and which have the effect of impeding, obstructing or delaying the creditors in their remedies, or of injuring them or any of them."

In *Newton* v. *The Ontario Bank*, 13 Grant, 652, I thought that this sub-section does not apply to a preference given by a debtor to one creditor over another. Upon the hearing of that case upon appeal (15 Grant, 283,) my brother

Wilson expressed the opinion that the sub-section applies to dealing not only by an insolvent with strangers, but to his dealings with a creditor. Assuming, for the sake of argument, that my learned brother is right, and that the giving of the ante-dated note, and leaving the action upon it undefended, while pleas were put in to actions by other creditors, are "acts" within sub-section 3, there still remains the question whether it can be carried higher in favor of creditors disappointed by the act of the debtor, than a fraudulent preference under the English Bankruptcy Law; or rather a preference which would be held fraudulent but for the circumstance that it was obtained from the debtor by pressure exercised upon the debtor. If, in England, pressure by the creditor is held to rebut the presumption of fraudulent intent, which would otherwise arise, I do not see how, consistently with English decisions, we can hold that pressure has not the same effect under our Insolvency law.

I think, as I have already intimated, that what was done was the result of pressure. I think that the debtor would have avoided what he did, if he had felt that he could do so; and that he did what was demanded of him in order to escape the consequences threatened by Converse, that his motive was to escape those consequences, not with any fraudulent object of preferring Converse & Co. I think the presumption of fraud is fairly rebutted.

It may well be doubted whether it should be in the power of a creditor, by the exercise of pressure upon his debtor, to obtain for himself a preference over other creditors; but while a fraudulent intent is made necessary in order to avoid such preference, anything that is sufficient to rebut what would, *prima facie*, be a fraudulent intent, is necessarily receivable with that view. It is a logical consequence from the state of the law. I regret to have to give effect to it in this case, but in my view of the law I cannot avoid it.

Some question is made as to the *bona fides* of the debt for which the judgment was recovered. I agree that if a note was given advisedly and willingly for a larger sum than was really due, in order to the recovery of judgment for more than the true debt, it would be void under the Statute of Elizabeth; but I do not think that the plaintiff has established such a case.

The plaintiff's bill must be dismissed, and with costs. I may add in justification of the assignee, that it appears to have been a fair case for the institution of a suit for the benefit of the estate. There was insolvency and a preference which, supposing it to be within the act, as my brother Wilson takes it to be, would have been sufficient but for the pressure which is shown by the evidence for the defence.

IN CHANCERY—MASTER'S OFFICE.

RE McMORRIS.

Dower.

A widow who has barred her dower in a mortgage, given by the husband for his own debt, is entitled to have the mortgage paid off by the husband's assets. If she claim dower merely out of the equity of redemption, she has priority over creditors, but if out of the *corpus* of the property, she is postponed to them. On a sale of the lands, as soon as the debts of the husband are paid, she takes precedence over the heir and volunteers, claiming under the husband, and becomes absolutely entitled to her rights as dowress in the balance of the proceeds. *Sheppard* v. *Sheppard*, 14 Grant, 174, noticed.

[May, 1872, *Mr. Boyd.*]

In this case land mortgaged by the testator was ordered to be sold, and by consent of the widow her rights as dowress were to be ascertained in the Master's office. She also claimed dower in lands for the purchase of which her husband had been in treaty with the Crown.

Mr. Holmested for the widow.

Mr. McWilliams for the legatees.

MR. BOYD.—The widow's position in equity seems to be this: having barred her dower in a mortgage in fee given by her husband for his own debt, he covenanting to pay it, she surviving her husband is, in one aspect, in the position of surety for the debt, and can claim that the mortgage should be paid out of the husband's assets, so as to relieve her estate in the land. If she claims dower merely out of the equity of redemption, that would be given her of course in priority to creditors, but if, as here, she claims dower out of the whole *corpus* of the mortgaged land, then she cannot do this to the prejudice of creditors. According to the decisions of this court, general creditors would have the right to marshall the mortgage debt upon the land mortgaged to the prejudice of the widow's dower. But after payment of creditors her rights as dowress accrue absolutely to a life estate in one-third of the lands mortgaged or of the proceeds of the sale thereof. When the mortgage is paid out of the testator's assets, as in this case, by a sale of the lands, it is equivalent to a payment by the testator himself, so far as the dowress is concerned. Had the mortgage been redeemed by the heir out of his own moneys, questions of contribution by the widow would have arisen, which do not arise in the present case. The wife simply bars her dower with a view to secure the debt due by her husband; when that debt is paid by the husband's estate, she is remitted, as against the heir and volunteers claiming under the husband, to her full rights as dowress in the whole estate mortgaged. *Sheppard* v. *Sheppard*, 14 Grant, p. 174, and the passage from Park cited with approval therein are authorities for these positions. I do not regard this case as over-ruled save in so far as it decides that creditors are to be postponed till dower is paid out of the mortgaged estate, see *White* v. *Bastedo*, 15 Gr. 546, and *Thorpe* v. *Richards*, ibid, 403. I do not see upon what principle her claims to dower should be postponed to the legatees in the will named, and indeed by the decree, on further directions, they are only to be paid after the satisfaction of all other claims. As to arrears she can only have these upon contributing one-third of the interest on the mortgage debt since the death to the time of the sale.

Craig v. *Templeton*, 8 Gr. 483, goes to the limit of the law, and that case cannot be extended to meet the present, where the right to a patent was cancelled in the testator's life, and by a mere act of grace was it given to his child afterwards.

McMaster v. Hector.

Computation of subsequent interest.

Former practice in respect to computation of subsequent interest now altered, except in certain cases. Subsequent interest should be computed upon the aggregate of principal, interest and costs, which the puisne incumbrancer has paid for redemption money.

Upon the principal money, subsequent interest should be regulated by the rate fixed in the mortgage security—upon the interest and costs, only statutory interest should be computed.

[June, 1872, *Mr. Boyd.*]

This was a foreclosure suit in which a second mortgagee had redeemed the plaintiff. A question arose as to what subsequent interest should be allowed the party who redeemed.

Mr. Boyd. — By the old practice of the court, a Master's report computing interest on the principal money secured by mortgage, ascertaining what was due and fixing a time for payment, was equivalent to a judgment at law in converting such interest into principal money. If the sum so found due was not paid, subsequent interest would be computed on the whole, interest and principal, *Bacon* v. *Clerk*, 1 P. Wms. 478; *Creuze* v. *Hunter*, 2 Ves. Jr. 159; *Perkyns* v. *Baynton*, 1 B. C. C. 574. The same rule applied where part of the sum found due by the report consisted of *costs*, *Bickham* v. *Cross*, 2 Ves. Sr. 471; *Bruere* v. *Wharton*, 7 Sim. 483. The old rule, however, is now otherwise, and only the principal carries interest, except where a favour is asked by the mortgagor in the way of extending the time for payment, *Whatton* v. *Cradock*, 1 Keen, 267; *Holford* v. *Yates*, 1 K. & J. 677; *Whitfield* v. *Roberts*, 7 Jur. N. S. 1268, and where a later mortgagee or incumbrancer pays off a prior mortgagee under a foreclosure or redemption decree, *Thackwray* v. *Bell*, Fish. on Mortgages, app. 671; Daniell, prac., 4th ed., p. 1125; Seton, 144, 375, 439.

Subsequent interest, therefore, should be computed upon the aggregate of principal, interest, and costs, which the puisne incumbrancer has paid for redemption money. This, in Seton, is said to be "the settled practice of the court," page 375. As to the rate of interest upon the principal money, that should be regulated, I think, by the rate fixed in the mortgage security, which has been redeemed. In the present case that is 8 per cent.: to lessen it would be to give the mortgagor a benefit which he has no right to claim. Subsequent incumbrancers cannot complain that the same rate of interest is maintained till the mortgagor himself redeems. The incumbrancer who redeems is substantially in the position of an assignee of the mortgage. As to the subsequent interest upon interest and costs, that being allowed by the *cursus curiæ* should be not eight per cent. as in the mortgage, but only the statutory rate of six per cent; see *Astley* v. *Powis*, 1 Ves. Sr., 496.

APPOINTMENTS TO OFFICE.

COUNTY JUDGE.

DANIEL MACAROW, of the Town of Picton, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County Court of the County of Prince Edward. (Gazetted July 27th, 1872.)

DEPUTY JUDGE.

JAMES ALEXANDER HENDERSON, of the City of Kingston, of Osgoode Hall, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of the County of Frontenac. (Gazetted June 22nd, 1872.)

SHERIFFS.

JAMES FLINTOFT, Junior, of the Town of Sarnia, Esquire, for the County of Lambton, in the room and stead of James Flintoft, Esquire, resigned. (Gazetted July 6th, 1872.)

GEORGE KEMPT, of the Town of Lindsay, Esquire, for the County of Victoria, in the room and stead of Neil McDougall, Esquire, deceased. (Gazetted July 20th, 1872.)

COUNTY ATTORNEY.

JOHN O'DONOHOE, of Osgoode Hall, Esquire, Barrister-at-Law, to be County Attorney in and for the County of York, in the room and stead of Rupert Mearse Wells, Esquire, resigned. (Gazetted Sept. 14th, 1872.)

DEPUTY CLERK OF THE CROWN AND CLERK OF THE COUNTY COURT.

JOHN YATES ELWOOD, of Osgoode Hall, Esquire, Barrister-at-Law, for the County of Huron. (Gazetted September 14th, 1872.)

INSPECTOR OF DIVISION COURT CLERKS.

JOSEPH DICKEY, of the Village of Uxbridge, Gentleman, Inspector of the Offices that are not situated in County Towns throughout the Province of Ontario. (Gazetted September 28th, 1872.)

NOTARIES PUBLIC FOR ONTARIO.

GEORGE WILLIAM HERBERT BALL, of the Town of Galt, Esquire, Barrister-at-Law.

JAY KETCHEUM, of the Town of Lindsay, Gentleman, Attorney-at-Law. (Gazetted June 1st, 1872.)

HENRY HATTON STRATHY, of the Town of Barrie, Esquire, Barrister-at-Law.

EDWARD BURNS, of the Village of Elora, Esquire, Barrister-at-Law. (Gazetted June 8th, 1872.)

LINDSAY HALL, of the Village of Aurora, Esquire, Barrister-at-Law. (Gazetted June 15th, 1872.)

JOHN CRERAR, of the City of Hamilton, Esquire, Barrister-at-Law.

JOHN FRANCIS CAMPBELL HALDAN, of the Town of Dundas, Gentleman, Attorney-at-Law. (Gazetted June 22nd, 1872.)

HENRY ALFRED WARD, of the Town of Port Hope, Esquire, Barrister-at-Law. (Gazetted June 29th, 1872.)

FRANCIS HENRY CHRYSLER and PHILEMON PENNOCK, junior, of the City of Ottawa, Esquires, Barristers-at-Law. (Gazetted July 6th, 1872.)

JOHN HOSKIN, of the City of Toronto, Esquire, Barrister-at-Law, and GEORGE REDMOND, of the Town of Brockville, Gentleman, Attorney-at-Law. (Gazetted June 20th, 1872.)

GEORGE WASHINGTON BADGEROW, of the City of Toronto; VALENTINE McKENZIE, of the Town of Brantford; JAMES O. LOANE, of the Town of Stratford; and G. LEFROY McCAUL, of the Town of Guelph, Esquires, Barristers-at-Law; and IVAN O'BEIRNE, of the Town of Peterborough, Gentleman, Attorney-at-Law, (Gazetted July 27th, 1872.)

JOHN CRICKMORE, of the City of Toronto, and THOMAS GREIG, of the Village of Carleton Place, Esquires, Barristers-at-Law; and FREDERICK WILLIAM MONRO, of the City of Toronto, Gentleman, Attorney-at-Law. (Gazetted August 3rd, 1872.)

WILLIAM M. MERRITT, of the Town of Guelph, Barrister-at-Law. (Gazetted August 10th, 1872.)

JOHN ARTHUR WELLESLEY HATTON, of the Village of Cayuga, Esquire, Barrister-at-Law. (Gazetted August 17th, 1872.)

ROBERT C. SMYTH, of the Town of Brantford, Esquire, Barrister-at-Law. (Gazetted August 31st, 1872.)

ALFRED PASSMORE POUSSETTE, of the Town of Peterborough, Esquire, Barrister-at-Law; and PETER McGILL BARKER, of the City of Toronto, Gentleman, Attorney-at-Law. (Gazetted Sept. 21st, 1872.)

HENRY BECHER, of the City of London, and JOHN CAMERON, of the Town of Strathroy, Esquires, Barristers-at-Law. McLEOD STEWART, of the City of Ottawa; and JOHN McFAYDEN, of the Village of Mount Forest, Gentlemen, Attorneys-at-Law. (Gazetted Sept. 28th, 1872.)

JOHN MARTIN, of the City of London, Esquire, Barrister-at-Law. (Gazetted October 5th, 1872.)

JOHN BLEVINS, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted October 12th, 1872.)

ASSOCIATE CORONERS.

THOMAS SWAN, Esquire, M. B., for the County of Waterloo.

DAVID BURNET, Esquire, M. B., for the United Counties of Northumberland and Durham.

JOHN DOUGALD McLEAY, Esquire, M. D., for the County of Middlesex. (Gazetted June 1st, 1872.)

FRANCIS LAMB HOWLAND, Esquire, M.D., for the County of Oxford.

NOBLE BENJAMIN HALL DEAN, Esquire, M.D., for the United Counties of Northumberland and Durham.

WILLIAM O'DELL ROBINSON, Esquire, M.D., for the County of Waterloo. (Gazetted June 15th, 1872.)

GEORGE DAVID LOUGHEED, Esquire, M.D., for the County of Lambton.

MARSHALL MARSELLUS PULASKI DEAN, Esquire, M.D., for the County of Peterborough. (Gazetted June 22nd, 1872.)

LOTHROP PAXTON SMITH, Esquire, for the United Counties of Northumberland and Durham. (Gazetted June 29th, 1872.)

ALEXANDER STEPHENS, Esquire, M.D., for the District of Parry Sound. (Gazetted July 6th, 1872.)

PHILIP HOWARD SPOHN, Esquire, M.D., for the County of Simcoe. (Gazetted July 13th, 1872.)

RICHARD KING, Esquire, M.D., for the United Counties of Northumberland and Durham. (Gazetted July 27th, 1872.)

GEORGE NIEMEIER, Esquire, M.D., for the County of Bruce. (Gazetted August 10th, 1872.)

ROBERT HERBERT HUNT, Esquire, M.D., for the County of Grey. (Gazetted August 17th, 1872.)

CHARLES D. TUFFORD, Esq., M.D., for the County of Middlesex. (Gazetted August 31st, 1872.)

JOHN CHURCH CHAMBERLAIN, Esquire, M.D., for the County of Lennox and Addington. (Gazetted Sept. 14th, 1872.)

ALGERNON WOOLVERTON, Esquire, M.D., for the County of Wentworth. (Gazetted September 21st, 1872.)

WILLIAM DeWITT CLINTON LAW, Esquire, M.D., for the County of Simcoe. (Gazetted Sept. 21st, 1872.)

WILLIAM B. FOWLER, Esquire, M.D., for the County of Huron. (Gazetted October 5th, 1872.)

GEORGE MILLER AYLSWORTH, Esquire, M.D., for the County of Huron.

BALDWIN LORENZO BRADLEY, Esquire, M.D., for the County of Oxford. (Gazetted October 12th, 1872.)

THE PRESS AND THE BAR.—Many years ago resolutions were passed by the members of the Oxford and western circuits declaring it to be incompatible with the status of a barrister to report proceedings for the public press. The resolution on the Oxford circuit was aimed at Mr. Cooks Evans, who then represented the *Times*, and on the western circuit at Mr. H. T. Cole (now a Queen's counsel), who then reported for the *Morning Chronicle*. The dictum of the Oxford and western circuits was warmly resented by the press. By way of retaliation the *Times* adopted a plan that was followed by many other journals, and which soon led to the rescinding of the obnoxious resolutions. The leading journal stated that it was of no importance to the general public, however important it might be to the legal gentlemen themselves, to know what particular counsel appeared in any case. Accordingly instructions were given to the *Times* representatives on the Oxford and western circuits to suppress the names of all the barristers who appeared in cases reported in that paper. Hence for some time in the reports of these circuits, the public read that "the counsel for the plaintiff," "the counsel for the defendant," "the counsel for the prosecution," and "the counsel for the prisoner," said or did so and so. This was a serious matter for the bar, and no doubt materially hastened the withdrawal of the objectionable stigma sought to be cast upon the press.—*Gentlemen's Magazine.*

NISI PRIUS.—The origin of the term *nisi prius* was rather curious, and illustrates the startling fictions that our fathers delighted to honor. Formerly, in order to send a cause to trial at the assizes, two writs were directed to the sheriff. By the first writ, called a "venire," the sheriff was commanded to cause a jury to come to Westminster The second writ, called a "distringas," supposed the jurors to have disobeyed the first writ, and commanded the sheriff to distrain their goods, so as to compel them to come to Westminster on a certain day, unless before that day a judge of assize should come to the place where the cause was intended to be tried, as in practice he always did. The words of this writ *nisi prius* gave the name to the ordinary sittings for trying causes. The fiction maintained by these writs was not only useless, but pernicious, for an irregularity in returning them might deprive a plaintiff of the benefit of his verdict. All that was really necessary was, that the sheriff should take care to have in attendance at the assizes a number of jurymen sufficient for the trial of the causes likely to be entered.—*Albany Law Journal.*

THE DECISIONS OF JUSTICES.—The unpaid magistracy is the most abused institution of the country. Very likely some of their decisions are wrong; but it is ridiculous to form an opinion from the newspaper reports, because important incidents of the case are omitted. Writers who propose to abolish the "great unpaid" do not take the trouble to consider the subject. The substitution of paid magistrates would be costly if it were possible, but, however willing the public might be to pay the cost, it would be impossible to find the requisite number of men. Besides, the magistrates are fully qualified to discharge their duties, and, with some exceptions, they do so satisfactorily. The abolition of the unpaid magistracy would be a disastrous social revolution. A writer in the *Times* complains that the decisions of justices cannot be reversed unless the justices themselves reserve any question for the Court of Criminal Appeal. What would be the result of giving an unlimited right of appeal? We apprehend that two Courts of Appeal would be fully and constantly occupied in disposing of such appeals Perhaps in the instance cited by "Stuff-gown," the justices were wrong, but as a rule, when any point is raised, the bench is ready to grant an appeal. Besides, the justices do not sit with closed doors, and their critics in the press are extreme to note the slightest error. We see no danger to the public, and a great convenience, in reserving to the justices the right to refuse an appeal from their decisions.—*Law Journal.*