DIARY FOR SEPTEMBER.

4. Sat... County Court of York Term ends.
5. SUN. *15th Sunday after Trinity.*
12. SUN. *16th Sunday after Trinity.*
19. SUN. *17th Sunday after Trinity.*
26. SUN *18th Sunday after Trinity.*
29. Wed. *St. Michael*

The Local Courts' AND MUNICIPAL GAZETTE.

SEPTEMBER, 1869.

A FEW WORDS ON ARBITRATION.

There are two points touching arbitration, one general and the other particular, to which we desire to direct attention. The first is the suggestion of a remedy for the usually interminable length of arbitration proceedings. A case is referred at Nisi Prius or by a judge in Chambers, to some one or three gentlemen of the bar, and from that time forth it is uphill work to get it brought to a conclusion. The convenience of all parties—referee, plaintiff and defendant, plaintiff's and defendant's legal advisers, plaintiff's and defendant's witnesses—has to be consulted, and frequent enlargements result in this endeavour. Then every other piece of business is made to take priority over this: and so the reference drags its slow length along, at an expenditure of time and money, that is anything but soothing to the losing party. Mr. Justice Gwynne, in one of his charges at the Toronto Assizes, referred to the advisability of having official referees, to whom might be referred the assessment of damages in certain cases. So we say (and the matter has also been occupying attention in England). Let there be three or more official arbitrators or referees appointed from gentlemen at the bar, who need not on that account give up their practice, but who shall, when a cause is referred to them, act *pro hac vice* as officers of the court and subject to the rules of the court. These referees can then be made subject to the court's directions for the prosecution of business *de die in diem*, till the reference is disposed of. It may be, however, that the end of expedition and correctness in the despatch of arbitration cases, might be better attained by the appointment of an additional officer for each court, whose business it should be to determine these cases and other references, in the same manner as a master in Chancery.

The other point is with regard to the complex arbitration clauses in the Common School Acts, which have frequently been adverted to by the judges in no very complimentary terms. We have several clauses in the Consolidated Act, which it would require a very skilful lawyer to manipulate, and which almost certainly bring to grief every Local Superintendent and School Trustee, who meddles therewith. The series of cases wherein Kennedy figures as plaintiff, is a standing proof of the folly of these provisions. See *Kennedy* v. *Burness et al* 15 U. C. Q. B., 473; *Kennedy* v. *Hall et al*, 7 U. C. C. P., 218; *Kennedy* v. *Burness et al.* and *Murray* v. *Burness et al.* 7 U. C. C. P. 227.

And again we have a further accumulation of clauses in the Act of 1860 (23 Vic. cap. 49) which have been lately exposed in the courts. Section 9 of that Act is a curious product of legislative skill, and is thus commented on by the Chief Justice of the Common Pleas, in a recent decision: (*Birmingham* v. *Hungerford*, 19 U. C. C. P. 414):—"It is right, however, to notice the wording of section 9 of the Act of 1860, on which defendants claim to have proceeded: 'If the trustees wilfully refuse or neglect, *for one month after publication of award*, to comply with or give effect to an award of arbitrators appointed, as provided by the 84th section of the said U. C. C. S. Act, the trustees so refusing or neglecting shall be held to be personally responsible for the amount of such award, which may be enforced against them individually by warrant of such arbitrators *within one month after publication of their award.*' It would seem to be simply impossible to carry this section into effect. If they refuse for one month after publication they are to be liable, and the award may be enforced against them by warrant *within* one month after publication."

The Chief Justice then proceeds to point out what undoubtedly is the true remedy for this cumbrous mode of procedure:—"This is another of one of those most unfortunate cases which have come before the courts in consequence of errors naturally committed in the exercise of statutable powers to decide claims and issue executions otherwise than by regular legal process. A most arduous and dangerous duty is imposed on arbitrators, by directing them to issue their warrant for the seizure

of property at the risk of being made trespassers for unintentional errors; but it is impossible to leave persons whose goods are forcibly and illegally seized without adequate remedy. The design for the avoidance of litigation and cost is most laudable; but experience demonstrates the almost impossibility of carrying it into successful operation. The substitution of the simple process of the Division Court (irrespective of amount) for the cumbrous and costly machinery of arbitration would remove all difficulty. The cost need only be a few shillings; here the costs mentioned in the award are $25."

What is wanted is a short statute repealing all these sections relating to arbitration, and giving jurisdiction to the Division Courts, with right of appeal to the Queen's Bench or Common Pleas in cases where the claim exceeds, say $50. This is all that is needed to adjust a matter which has frequently proved the occasion of great trouble and loss of money to the officers of our Common School system.

THE CRIMINAL LAWS.

We hope hereafter to speak at further length of the consolidation of the Criminal Laws, which has been so thoroughly done by the labours of the learned gentlemen to whom it was entrusted. We have only space at present to give to our readers two of the Acts as they will appear in the coming volume of Statutes of 32-33 Victoria.

CAP. XXVIII.

An Act respecting Vagrants.

[Assented to 22nd June, 1869.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1.—All idle persons who, not having visible means of maintaining themselves, live without employment,—all persons who, being able to work and thereby or by other means to maintain themselves and families, wilfully refuse or neglect to do so,—all persons openly exposing or exhibiting in any street, road, public place or highway any indecent exhibition, or openly or indecently exposing their persons,—all persons who, without a certificate signed, within six months, by a Priest, Clergyman or Minister of the Gospel, or two Justices of the Peace, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wander about and beg, or who go about from door to door, or place themselves in the streets, highways, passages or public places, to beg or receive alms, all persons loitering in the steets or highways and obstructing passengers by standing across the footpaths or by using insulting language or in any other way, or tearing down or defacing signs, breaking windows, breaking doors or door plates, or the walls of houses, roads or gardens, destroying fences, causing a disturbance in the streets or highways by screaming, swearing or singing, or being drunk, or impeding or incommoding peaceable passengers,—all common prostitutes, or night walkers wandering in the fields, public streets or highways, lanes or places of public meeting or gathering of people, not giving a satisfactory account of themselves,—all keeper of bawdy-houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a satisfactory account of themselves,—all persons who have no peaceable profession or calling to maintain themselves by, but who do for the most part support themselves by gaming or crime or by the avails of prostitution,—shall be deemed vagrants, loose, idle or disorderly persons within the meaning of this Act, and shall, upon conviction before any Stipendiary or Police Magistrate, Mayor or Warden, or any two Justices of the Peace, be deemed guilty of a misdemeanor, and be punished by imprisonment in any gaol or place of confinement other than the Penitentiary, for a term not exceeding two months and with or without hard labor, or by a fine not exceeding fifty dollars, or by both, such fine and imprisonment being in the discretion of the convicting Magistrate or Justices.

2.—Any Stipendiary or Police Magistrate, Mayor or Warden, or any two Justices of the Peace, upon information before them made, that any person hereinbefore described as vagrants, loose, idle and disorderly persons, are or are reasonably suspected to be harbored or concealed in any bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other Justices, all persons found therein so suspected as aforesaid.

CAP. XXXIII.

An Act respecting the prompt and summary administration of Criminal Justice in certain cases.

[Assented to 22nd June, 1869.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1.—In this Act the expression "a competent Magistrate" shall, as respects the Province of Quebec and the Province of Ontario, mean and include any Recorder, Judge of a County Court, being a Justice of the Peace, Commissioner of Police, Judge of the Sessions of the Peace, Police Magistrate, District Magistrate or other functionary or tribunal invested at the time of the passing of this Act with the powers vested in a Recorder by chapter one hundred and five of the Consolidated Statutes of Canada,

intituled "*An Act respecting the prompt and summary administration of Criminal Justice in certain cases,*" and acting within the local limits of his or of its jurisdiction, and any functionary or tribunal invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more Justices of the Peace; and as respects the Province of Nova Scotia or the Province of New Brunswick, the said expression shall mean and include a Commissioner of Police and any functionary, tribunal or person invested or to be invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more Justices of the Peace, and the expression "the Magistrate" shall mean a competent Magistrate as above defined;

And the expression "the Common Gaol or other place of confinement," shall, in the case of any offender whose age at the time of his conviction does not, in the opinion of the Magistrate, exceed sixteen years, include any Reformatory Prison provided for the reception of juvenile offenders in the Province in which the conviction referred to takes place, and to which by the law of that Province the offender can be sent.

2.—Where any person is charged before a competent Magistrate with having committed—

1. Simple larceny, larceny from the person, embezzlement, or obtaining money or property by false pretences, or feloniously receiving stolen property, and the value of the whole of the property alleged to have been stolen, embezzled, obtained or received does not, in the judgment of the Magistrate, exceed ten dollars; or,

2. With having attempted to commit larceny from the person or simple larceny; or,

3. With having committed an aggravated assault, by unlawfully and maliciously inflicting upon any other person, either with or without a weapon or instrument, any grievous bodily harm, or by unlawfully and maliciously cutting, stabbing or wounding any other person; or,

4. With having committed an assault upon any female whatever, or upon any male child whose age does not, in the opionion of the Magistrate, exceed fourteen years, such assault being of a nature which cannot, in the opinion of the Magistrate, be sufficiently punished by a summary conviction before him under any other Act, and such assault, if upon a female, not amounting in his opinion to an assault with intent to commit a rape; or

5. With having assaulted, obstructed, molested or hindered any Magistrate, Bailiff, or constable, or officer of customs, or excise or other officer in the lawful performance of his duty, or with intent to prevent the performance thereof; or,

6. With keeping or being an inmate, or habitual frequenter of any disorderly house, house of ill-fame or bawdy-house;—

The Magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way.

3.—Whenever the Magistrate before whom any person is charged as aforesaid proposes to dispose of the case summarily under the provisions of this Act, such Magistrate, after ascertaining the nature and extent of the charge, but before the formal examination of the witnesses for the prosecution, and before calling upon the party charged for any statement which he may wish to make, shall state to such person the substance of the charge against him, and (if the charge is not one that can be tried summarily without the consent of the accused) shall then say to him these words, or words to the like effect: "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a jury at the (*naming the Court at which it could soonest be tried*);" and if the person charged consents to the charge being summarily tried and determined as aforesaid, or if the power of the Magistrate to try it does not depend on the consent of the accused, the Magistrate shall reduce the charge into writing, and read the same to such person, and shall then ask him whether he is guilty or not of such charge.

4.—If the person charged confesses the charge, the Magistrate shall then proceed to pass such sentence upon him as may by law be passed, (subject to the provisions of this Act), in respect to such offence; but if the person charged says that he is not guilty, the Magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the Magistrate shall inquire of the person charged whether he has any defence to make to such charge, and if he state that he has a defence, the Magistrate shall hear such defence, and shall then proceed to dispose of the case summarily.

5.—In the case of larceny, feloniously receiving stolen property or attempt to commit larceny from the person, or simple larceny, charged under the first or second sub-sections of the second section of this Act, if the Magistrate, after hearing the whole case for the prosecution and for the defence, finds the charge proved, then he shall convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any period not exceeding six months.

6.—If in any case the Magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand, stating the fact of such dismissal.

7.—Every such conviction and certificate respectively may be in the form A and B, in this Act, or to the like effect.

8.—If (when his consent is necessary) the person charged does not consent to have the case heard and determined by the Magistrate, or in any case if it appears to the Magistrate that the offence is one which, owing to a pre-

vious conviction of the person charged, or from any other circumstance, ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, such Magistrate shall deal with the case in all respects as if this Act had not been passed; but a previous conviction shall not prevent the Magistrate from trying the offender summarily, if he thinks fit so to do.

9.—If, upon the hearing of the charge, the Magistrate is of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment, he may dismiss the person charged without proceeding to a conviction.

10—When any person charged before a competent Magistrate with simple larceny, or with having obtained property by false pretences, or with having embezzled, or having feloniously received stolen property, or with committing larceny from the person, or with larceny as a clerk or servant, and the value of the property stolen, obtained, embezzled or received exceeds ten dollars, and the evidence in support of the prosecution is, in the opinion of the Magistrate, sufficient to put the person on his trial for the offence charged, such Magistrate, if the case appear to him to be one which may properly be disposed of in a summary way, and may be adequately punished by virtue of the powers of this Act, shall reduce the charge into writing and shall read it to the said person, and (unless such person is one who can be tried summarily without his consent) shall then put to him the question mentioned in section three, and shall explain to him that he is not obliged to plead or answer before such Magistrate at all, and that if he do not plead or answer before him, he will be committed for trial in the usual course.

11.—If the person so charged consents to be tried by the Magistrate, the Magistrate shall then ask him whether he is guilty or not of the charge, and if such person says that he is guilty, the Magistrate stall thereupon cause a plea to be entered upon the proceedings, and shall convict him of the offence, and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labor, for any term not exceeding twelve months, and every such conviction may be in the form C, or to the like effect.

12.—In every case of summary proceedings under this Act, the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined, by counsel or attorney.

13.—The magistrate before whom any person is charged under this act, may by summons require the attendance of any person as a witness upon the hearing of the case at a time and place to be named in such summons, and such Magistrate may bind by recognizance all persons whom he may consider necessary to be examined touching the matter of such charge, to attend at the time and place to be appointed by him, and then and there to give evidence upon the hearing of such charge; And in case any person so summoned or required or bound as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, then upon proof being first made of such person's having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, the Magistrate before whom such person ought to have attended may issue a warrant to compel his appearance as a witness.

14.—Every summons issued under this Act may be served by delivering a copy of the summons to the party summoned, or by delivering a copy of the summons to some inmate of such party's usual place of abode; and every person so required by any writing under the hand of any competent Magistrate to attend and give evidence as aforesaid, shall be deemed to have been duly summoned.

15.—The jurisdiction of the Magistrate in the case of any person charged within the Police limits of any city in Canada with therein keeping or being an inmate or an habitual frequenter of any disorderly house, house of ill-fame or bawdy-house, shall be absolute, and shall not depend on the consent of the party charged to be tried by such Magistrate, nor shall such party be asked whether he consents to be so tried; nor shall this Act affect the absolute summary jurisdiction given to any Justice or Justices of the Peace in any case by any other Act.

16.—The jurisdiction of the Magistrate shall also be absolute in the case of any person being a seafaring person, and only transiently in Canada, and having no permanent domicile therein, charged, either within the city of Quebec as limited for the purpose of the Police Ordinance, or within the city of Montreal as so limited, or any other seaport, city or town in Canada, where there is a competent Magistrate, with the commission therein of any of the offences mentioned in the second section of this Act, and also in the case of any other person charged with any such offence on the complaint of any such seafaring person whose testimony is essential to the proof of the offence, and such jurisdiction shall not depend on the consent of any such party to be tried by the Magistrate, nor shall such party be asked whether he consents to be so tried.

17.—In any case summarily tried under the third, fourth, fifth or sixth sub-sections of the second section of this Act, if the Magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned with or without hard labor for any period not exceeding six months, or may condemn him to pay a fine not exceeding, with the costs in the case, one hundred dollars, or to both fine and imprisonment, not exceeding the said period and sum; and such fine may be levied by warrant and distress under the hand and seal of the Magistrate, or the party convicted may be condemned (in addition to any other imprisonment on the same conviction) to be committed to the common gaol or

other place of confinement, for a further period not exceeding six months, unless such fine be sooner paid.

18.—Whenever the nature of the case requires it, the forms given at the end of this Act shall be altered by omitting the words stating the consent of the party to be tried before the Magistrate, and by adding the requisite words stating the fine imposed (if any) and the imprisonment (if any) to which the party convicted is to be subjected if the fine be not sooner paid.

19.—When any person is charged before any Justice or Justices of the Peace with any offence mentioned in this Act, and in the opinion of such Justice or Justices, the case is proper to be disposed of by a competent Magistrate, as herein provided, the Justice or Justices before whom such person is so charged, may, if he or they see fit, remand such person for further examination before the nearest competent Magistrate, in like manner in all respects as a Justice or Justices are authorized to remand a party accused for trial at any Court, under any general Act respecting the duties of Justices of the Peace out of Sessions, in like cases.

20.—No Justice or Justices of the Peace in any Province shall so remand any person for further examination or trial before any such Magistrate in any other Province.

21.—Any person so remanded for further examination before a competent Magistrate in any city, may be examined and dealt with by any other competent Magistrate in the same city.

22.—If any person suffered to go at large upon entering into such recognizance as the Justice or Justices are authorized under any such Act as last mentioned to take, on the remand of a party accused, conditioned for his appearance before a competent Magistrate under the preceding section of this Act, does not afterwards appear pursuant to such recognizance, then the Magistrate before whom he ought to have appeared, shall certify (under his hand on the back of the recognizance) to the Clerk of the Peace of the District, County or place (as the case may be) the fact of such non-appearance, and such recognizance shall be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie* evidence of such non-appearance.

23.—The Magistrate adjudicating under this Act shall transmit the conviction, or a duplicate of a certificate of dismissal, with the written charge, the deposition of witnesses for the prosecution and for the defence, and the statement of the accused, to the next Court of General or Quarter Sessions of the Peace, or to the Court discharging the functions of a Court of General or Quarter Sessions of the Peace, for the District, County or place, there to be kept by the proper officer among the Records of the Court.

24.—A copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein, in any legal proceedings whatever.

25.—The Magistrate, by whom any person has been convicted under this Act, may order restitution of the property stolen, or taken, or obtained by false pretences, in those cases in which the Court before whom the person convicted would have been tried but for this Act, might by law order restitution.

26.—Every Court, held by a competent Magistrate for the purposes of this Act, shall be an open public Court, and a written or printed notice of the day and hour for holding such Court, shall be posted or affixed by the Clerk of the Court upon the outside of some conspicuous part of the building or place where the same is held.

27.—The provisions of the *Act respecting the duties of Justices of the Peace out of Sessions, in relation to summary convictions and orders*, and the provisions of the *Act respecting the duties of Justices of the Peace out of Sessions in relation to persons charged with indictable offences*, shall not be construed as applying to any proceeding under this Act, except as mentioned in section nineteen.

28.—Every conviction by a competent Magistrate under this Act shall have the same effect as a conviction upon indictment for the same offence would have had, save that no conviction under this Act shall be attended with forfeiture beyond the penalty (if any) imposed in the case.

29.—Every person who obtains a certificate of dismissal or is convicted under this Act, shall be released from all further or other criminal proceedings for the same cause.

30.—No conviction, sentence or proceeding under this Act shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it be therein alleged that the offender has been convicted, and there be a good and valid conviction to sustain the same.

31—Nothing in this Act shall affect the provisions of the *Act respecting the Trial and Punishment of Juvenile Offenders;* and this Act shall not extend to persons punishable under that Act, so far as regards offences for which such persons may be punished thereunder.

32.—Every fine imposed under the authority of this Act shall be paid to the Magistrate, who has imposed the same, or to the Clerk of the Court or Clerk of the Peace, as the case may be, and shall be by him paid over to the County Treasurer for county purposes if it has been imposed in the Province of Ontario, —and if it has been imposed in any new district in the Province of Quebec, constituted by any Act of the Legislature of the late Province of Canada passed in or after the year one thousand eight hundred and fifty-seven, then to the Sheriff of such District as Treasurer of the Building and Jury Fund for such

Distict, to form part of the said Fund,—and if it has been imposed in any other District in the said Province, then to the Prothonotary of such District, to be by him applied under the direction of the Lieutenant Governor in Council, towards the keeping in repair of the Court House in such District, or to be by him added to the moneys and fees collected by him for the erection of a Court House and Gaol in such District, so long as such fees shall be collected to defray the cost of such erection; And in the Province of Nova Scotia to the County Treasurer for county purposes, and in the Province of New Brunswick to the County Treasurer for county purposes.

33.—In the interpretation of this Act the word "property" shall be construed to include everything included under the same word or the expression "valuable security," as used in the *Act respecting Larceny and other similar offences;* and in the case of any "valuable in the manner prescribed in the said Act.

34.—The Act cited in the first section of this Act, chapter one hundred and five of the Consolidated Statutes of Canada, is hereby repealed. except as to cases pending under it at the time of the coming into force of this Act, and as to all sentences pronounced and punishments awarded under it, as regards all which this Act shall be construed as a re-enactment of the said Act, with amendments, and not as a new law.

34.—This Act shall commence and take effect on the first day of January, in the year of our Lord one thousand eight hundred and seventy.

FORM (A)—*See* sec. 7.

Conviction.

Province of——— City *or* ——, } *as the case may be of*, to wit: }

Be it remembered that on the——day of—, in the year of our Lord——, at——A. B., being charged before me the undersigned——, of the said (City), (and consenting to my deciding upon the charge summarily), is convicted before me, for that he the said A. B, &c., (*stating the offence, and the time and place when and where committed*), and I adjudge the said A. B., for his said offence, to be imprisoned in the——— (and there kept at hard labor) for the space of——

Given under my hand and seal, the day and year first above mentioned, at——aforesaid.

J. S. [L. S.]

FORM (B)—*See* sec. 7.

Certificate of Dismissal.

Province of——— City *or* ——, } *as the case may be of*, to wit: }

I, the undersigned, ———, of the City *or as the case may be*, of——, certify that on the —— day of —— in the year of our Lord ——, at —— aforesaid, A. B., being charged before me (and consenting to my deciding upon the charge summarily), for that he the said A. B., &c., *stating the offence charged, and the time and place when and where alleged to have been committed*), I did, after having summarily adjudicated thereon, dismiss the said charge.

Given under my hand and seal, this —— day of ——, at —— aforesaid.

J. S. [L. S.]

FORM (C)—*See* sec. 11.

Conviction upon a plea of not guilty.

Province of——— City *or* ——, } *as the case may be of*, to wit, }

Be it remembered that on the——day of—, in the year of our Lord ——, at —— A. B., being charged before me the undersigned——, of the said City, (and consenting to my deciding upon the charge summarily) for that he the said A. B., &c., (*stating the offence, and the time and place when and where committed*), and pleading guilty to such charge, he is thereupon convicted before me of the said charge, and I adjudge him, the said A. B., for his said offence, to be imprisoned in the —— (and there kept at hard labor) for the space of ——

Given under my hand and seal, the day and year first above mentioned, at——aforesaid.

J. S. [L. S.]

SELECTIONS.

WORSE THAN THE INQUISITION.

If electoral lambs and their shepherds are wont to pray, they will henceforth add a clause to the Litany, devoutly asking to be delivered from an election commission. It is a scene of cruel, remorseless, mortal torture. Mr. Tom Taylor has turned a contested election into a charming comedy; but if he proposes to dramatise an election commission he must invoke the tragic muse. Men of note in the country, men of rank in the market place, men who have the best family pews in the middle aisle, are forced to tell the truth, and—oh, horrors! —the whole truth about their electoral experiences. The description of the Palace of Truth by Madame de Genlis is somewhat pathetic. To be compelled to express one's thoughts without reservation is bad enough, but, to be sure, the spectres in the Palace of Truth knew not what they said, and when they uttered a rudeness, fondly imagined they were paying a compliment. It is not so with those who appear as witnesses before an election commission. They know the deep damnation of the evidence extorted from them. They have to stand up, and, before their neighbours, tell the deeds that were done in solemn secrecy. Bankers, employers, professional men, mayors, town councillors, and magistrates, are forced to recite their acts of corruption, and to confess how even the money bequeathed to the poor has been used for electioneering purposes. There is no evading the commissioners. If a witness sends a certificate of sickness the commission express their readiness to visit the sick chamber. If the poor mouse cannot go the mountain, the considerate mountain

will go to the mouse. If a witness manifests the least temper, he is committed for contempt. If he persistently prevaricate, he is to be prosecuted for perjury. If he does not tell the whole truth, however it may blacken himself and neighbors, he will not get a certificate of indemnity, and will be liable to prosecution. It would be amusing, if it were not so painful, to note how the examined witnesses watch the proceedings, and come from day to day to offer explanations. Take the case of Mr. Harold Barkworth, of Beverley, as a specimen of the torture of witnesses. Mr. Barkworth is an alderman and a borough magistrate, and he was prepared to defy the commissioners. We cannot do better than quote the scene between him and Mr. Serjeant O'Brien, the Chief Commissioner, as reported in the *Times* of Wednesday:—

Witness: He had given money to Burrell before, but could not say when.

The Chief Commissioner: You will be compelled to say when, as sure as you stand in that box.

Witness: I must take the consequence, but I cannot answer that question.

The Chief Commissioner: You are sworn to tell the truth, and the whole truth. You must say when you paid that money. It is no use your refusing to answer. When did you pay the money?

Witness: I cannot answer the question.

The Chief Commissioner: You must and you shall. You hold Her Majesty's commission as a justice of the borough, and we are here under sign manual to inquire into this. You are bound whole truth. Did you pay Burrell any money besides this 2*l* or 3*l*?

Witness: I cannot answer.

The Chief Commissioner: Did you pay him any money in 1868?

Witness: No.

The Chief Commissioner: Did you pay him any money in 1867?

Witness: I am sure I cannot say.

The Chief Commissioner: Yes you can, and you shall answer the question before you leave that box. You shall answer it. Did you pay Burrell any money in 1867 in reference to these elections?

Witness: I will take the consequence; I have given you my answer already.

The Chief Commissioner: You have given me no answer. I asked you did you pay Burrell any money in 1869, and you have given me no answer. Now you must answer the question.

Witness: I cannot answer it, and I shan't.

The Chief Commissioner: I will put the question once more. Did you pay Burrell any money in 1867?

Witness then looked down, and began to pull his glove about, declining to answer.

Mr. Barstow: Now, Mr. Barkworth, I really must beg of you not to compel us to do anything disagreeable. You are asked a very simple question. Did you or did you not pay money to Burrell in 1867? Am I to understand you will not answer that question?

Witness: I have no hesitation in saying that I advanced money in 1867.

Mr. Barstow: In reference to any election?

Witness: Yes.

The Chief Commissioner: How much?

Witness: Between 50*l*. and 60*l*., on the 1st of November, 1867.

The Chief Commissioner: That was in reference to the municipal election?

Witness: Yes.

The Chief Commissioner: I am glad of it, exceedingly glad.

Can anything be more thoroughly dramatic than the looking down and the pulling about of the glove? To an officer of the Society for the Prevention of Cruelty to Animals the sufferings of Mr. Barkworth would have been too horrible to look upon. The Chief Commissioner's hint about something disagreeable put an end to the torment. In an instant Mr. Barkworth's memory was restored to him. Suddenly he recollected he had advanced money in 1867. Nay, he remembered all the incidents. He remembered it was for an election. He remembered the amount. And—marvel of marvels!—he remembered the very day on which he advanced the money.

May we not learn a useful lesson from the miraculous recovery of Mr. Barkworth's memory? Now and then, and indeed frequently, we have to deal with *non mi ricordor* witnesses both in civil and Crown cases; that is, with witnesses who forget everything that they deem inconvenient to remember. Would it not further the ends of justice if judges were to intimate to such persons that they are sworn to tell the whole truth, and that they must do so to avoid something disagreeable, —to wit, a prosecution for perjury? We must congratulate the Election Commissioners upon the eminent success which has attended their plan of squeezing out the whole truth, and we see no reason why it should not be adopted in all judicial inquiries.—*The Law Journal.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

INSOLVENCY—DEMAND OF ASSIGNMENT—27 & 28 VIC. CH. 17, SEC. 3—PLEADING.—Declaration that plaintiff and another carried on business under name of "Magill Bros.," were in good credit, and solvent, and had not ceased to meet their commercial liabilities; that defendants, being creditors for sums not exceeding $500, maliciously intending to injure plaintiff, and destroy his business and credit, falsely, &c., and without reasonable, &c., cause, made a demand in writing on said firm in the form "E" in the schedule to the Insolvent Act of 1864; that within five days thereafter defendants refused to abandon said proceedings, but, as a condition, insisted that plaintiff should retire from said firm, and that certain security for a composition on debts of said firm should be given, or defendants would proceed; that the trade and credit of firm were much injured, and that, in consequence of

defendant's proceedings, plaintiff was put out of said firm, without receiving any share of the assets, &c.:

Held, on demurrer, bad, as shewing that the proceedings on the demand terminated against plaintiff instead of in his favor, and as disclosing a state of facts, in the submission of plaintiff to the demand, instead of controverting its reasonableness, which shewed that defendants had reasonable grounds for taking the proceedings complained of.—*Magill* v. *Samuel et al*, 19 U. C. C. P. 443.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

LANDLORD AND TENANT — IMPROVEMENTS BY TENANT—SUSPENSION OF RENT.—Tenant agreed with landlord to make certain improvements upon the demised premises, tenant "get the first three years' rent for said buildings and improvements, provided they are completed in the first two years."

Held, that the rent was suspended during the two years, and that the landlord would not, therefore, before the expiration of this period, eject for non-payment.—*Irwin* v. *Hunter*, 19 U. C. C. P. 391.

ASSIGNMENT OF RENT—CLAUSE OF DISTRESS—RENT SECK OR RENT CHARGE—DISTRESS IN GRANTEE'S OWN NAME—4 GEO. II. CH. 28.—A landlord, after leasing certain premises, by deed "assigneed, transfered, and set over" to M. two instalments of the rent reserved, and appointed him his attorney to sue for, collect or levy by landlord's warrant, if necessary, in his (the landlord's) name: *Held*, that the instrument contained a grant, and of a rent charged, as an incorporeal hereditament, accompanied with a clause of distress, and *therefore* not of a rent seck, and that B. could distrain for the rent in his own name; but that, whether rent charge or rent seck, he had equally the power of distress under 4 Geo. II. ch. 28 —*Hope* v. *White*, 19 U.C. C.P. 479.

SETTING ASIDE DEEDS.—An old man greatly addicted to drinking executed deeds of all his property, real and personal, to the tavern keeper with whom he boarded, and he accepted in consideration therefor the bond of the latter for his support for life, which was an inadequate consideration. Within five months afterwards the grantee died: and, one of his heirs having filed a bill to set aside the deeds, the court made a decree for the plaintiff with costs. —*Hume* v. *Cook*, 16 U. C. C. R., 84.

WILL — DEVISEE AN ATTESTING WITNESS — POWER OF SALE—CONSTRUCTION OF —Where a devisee witnesses the will the devise to him is void, although there are two other two witnesses, and the will would therefore have been sufficiently attested without him.

Held (the court being left to draw inferences of fact), that upon the evidence set out below it must be inferred that the devisee, whose name was subscribed as a witness, did see the testator sign, although he swore that he thought he did not, and that he subscribed in his presence.

Testator devised the land in question to his wife for life, remainder to his nephew, T., in fee. He then devised specific land to be disposed of by his executors for the payment of his debts, and added "and I also do hereby acknowledge and authorize them to sell, grant and convey in full and proper manner, any, all or such of my real estate as may be necessary to the payment and liquidation of any and all such just debts as may be due by me, and not otherwise provided for;"

Held, that under this clause the executors had power to sell the land in question.

They conveyed to one P., a creditor, who was to pay the widow a certain sum for her dower, and the residue to other creditors:

Held, that the legal estate passed, whether the sale could be impeached in equity or not.

Executors in such a case are not bound to sign the deed in presence of each other, as arbitrators executing on award.—*Little* v. *Aikman et al*, 28 U. C. Q. B., 337.

POWER OF HUSBAND OVER HOMESTEAD, UNITED STATES CASE.—The husband cannot, by his act alone, affect the rights of the wife to the homestead, after the homestead right has once attached by the act of either.

The husband cannot, by his act alone, extend the time for commencing an action under the Statute of Limitations, upon a note and mortgage given in due form, so as to prolong a lien upon the homestead.

The execution of a new note and mortgage, by the husband alone, in place of a prior one given on the homestead before the declaration of homestead was filed, does not continue the old mortgage in life as to the homestead interest, beyond the time when it would otherwise be barred by the Statute of Limitations.

Homestead a Joint Estate.—By the provisions of the Homestead Act, there is a joint estate in the homestead vested in the husband and wife, which can only be divested by the concurrent act of both, in the manner provided by law.

Fraud of Husband.—The rights of the wife in

the homestead cannot be prejudiced by the fraudulent acts of the husband, in which she did not participate.

Homestead a Joint Tenancy.—In the homestead estate most of the unities of a joint tenancy are to be found. The main difference between a homestead tenancy and a joint tenancy at common law is, the want of power in one of the parties In the case of the homestead to sever the tenancy.—*Manvill Barber and Julia A. Barber his wife* v. *Frederick Babel and Sophia Babel his wife*, Pitt. Leg. Journal, Sept. 27, 1869.

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

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

HOLMES v. REEVE.

Certiorari to remove case from Division Court.

Held, 1. The mere fact that a judge of a Division Court has expressed an erroneous opinion in a case before him, is no ground for its removal by *certiorari*.

2. Where a defendant knows all the facts of a case before the day of trial, but, nevetheless, argues the case and obtains an opinion from the judge, the case should not be removed, and the fact that the judge is desirous that the case should be disposed of in the superior court, can make no difference.

[Chambers, March 15, 1869.]

This was an action brought on a promissory note for sixty-eight dollars, made by the defendant, and was placed in suit in the third Division Court of the County of Huron, and the summons was served for the court to be held on 25th January, 1869.

The defendant obtained a summons for a writ of *certiorari* to remove the case from the said Division Court into the Court of Common Pleas, on the ground that difficult questions of law were likely to arise.

One of the affidavits upon which the summons for the *certiorari* was granted was made by Mr. Sinclair, attorney for the defendant, and was as follows: "That the said judge reserved his judgment on said evidence and the points raised, from the twenty-fifth day of January last until the sixth February, instant, and from then until the thirteenth day of February, instant, when I attended before him, and he expressed a desire to have a short time longer for consideration, and he suggested the eighteenth day of February instant, as the day he would be prepared to give his judgment: that on said last mentioned day I attended before the said judge, and Mr. Elwood appeared for the plaintiff, when the judge of said Division Court expressed his opinion adversely to the defendant: that he did so with great hesitation, as he expressed it, on the ground that the decisions bearing on the point appeared contradictory: that I suggested to the said judge the propriety of delaying his delivery of judgment until I had an opportunity of applying for a *certiorari* to remove the case ta one of the superior courts of law, the case being one of great importance to the defendant, and one involving some questions of law, which had not then come up for decision in any of the superior courts of law in the manner raised by the facts of this case: that the said learned judge remarked that he certainly thought it a fit case to be removed by *certiorari*, and would grant time to enable me to apply therefor, and postponed the delivery of judgment until the fourth day of March next, for the purpose of such application."

The plaintiff's attorney, in his affidavit filed on shewing cause, swore, "That on the return of the said summons (in the Division Court) the said John Reeve appeared, and also the said Richard Holmes: that James Shaw Sinclair, of the said town of Goderich, Esquire, appeared as counsel for the said John Reeve, and I, this deponent, appeared as counsel for the said Richard Holmes: that the said cause was duly called on for hearing on that day before Secker Brough, Esq., judge of the County Court of the County of Huron, who is also the judge of the said third Division Court: that after the said case had been thoroughly gone into, and after several witnesses were examined, both on behalf of the said Richard Holmes and the said John Reeve, and after a lengthy legal argument had taken place, and when the said judge had expressed his opinion that his judgment would be for the said Richard Holmes, and just as he was about to endorse his said judgment on the said summons, the said James Shaw Sinclair got up, and asked, and pressed on the said judge, that if he would not then enter his judgment, but would defer the same to some future day, he could produce to him authority to shew that in law he was entitled to his judgment: that the said judge in pursuance of the said request, adjourned the said cause until the sixth day of February: that on that day the said Mr. Sinclair, on behalf of the said John Reeve, and John Y. Elwood, of the said town of Goderich, barrister-at-law, my partner, on behalf of the said Richard Holmes, appeared before the said judge, and further argued the said case: that after hearing the said argument, the said judge informed the said parties that he would be prepared to give his judgment on the thirteenth day of February: that on that day the said Sinclair and Elwood appeared before the said judge to hear his said judgment, but he, not being prepared to give it then, said he would give the same on the eighteenth day of February."

It also appeared from another affidavit, that on the 18th February, the learned judge said he was then prepared to deliver his judgment, and then proceeded to deliver and did deliver the same; and said that "in his opinion the plaintiff Richard Holmes was entitled to his judgment," and then proceeded to give and did give his grounds for said judgment, and reviewed the authorities cited to him on the said argument: that after the said judge had delivered his said judgment, Mr. Sinclair, on behalf of the said John R eve, applied to and urged upon the said judge not to endorse his judgment on the back of the said summons, but to refrain from doing so until the fourth day of March, instant, as in the meantime he would apply for a writ of *certiorari* to remove the said plaint.

Spencer shewed cause, and contended that the application was made too late, the case having been considered by the judge of the court below, and that judgment was in effect given, though not formally entered: *Black* v. *Wesley*, 8 U. C. L. J. 277; *Gallagher* v. *Bathie*, 2 U. C. L. J. N. S. 73.

John Patterson, contra, contended that the judge had given no judgment, and had expressly postponed his decision to enable the *certiorari* to be applied for; he had merely expressed an opinion. He cited *Paterson* v. *Smith*, 14 C. P. 525.

RICHARDS, C. J.—On principle I do not think this case ought to be removed from the Division Court. If the case was one fit to be tried before the judge of that court, the mere fact that he may have formed and expressed an opinion which was erroneous, is no ground for taking the case into a superior court. The defendant knew all the facts of the case before the day of trial, and if it was considered it ought to have been removed from the Division Court, steps should have been taken for that purpose before it was heard.

It seems to me to be an unseemly proceeding, that the defendant, after having argued the matter before the judge, and obtained his opinion, and having had the case adjourned for the purpose of furnishing new authorities, and, after consideration of these authorities, the judge had expressed an opinion, that the case should then be taken out of his jurisdiction by a *certiorari*. The fact that the judge himself may have been willing or even desirous to have the case disposed of in the superior court can make no difference. After he has taken on himself the burthen of disposing of the case, having heard the evidence and expressed his opinion, I do not think, as a general rule, a *certiorari* ought to issue. The cases of *Black* v. *Wesley*, 8 U. C. L. J. 277, and *Gallagher* v. *Bathie*, 2 U. C. L. J. N. S. 73, seem to me to lay down principles inconsistent with removing this case. The case of *Paterson* v. *Smith*, 14, C. P. 525, does not, I think, lay down any doctrine contrary to that of the other cases referred to, for although there had been an abortive attempt to have a trial, there was no verdict, and the court no doubt looked at that case in the same way as if no jury have been sworn at all.

I think the summons should be discharged on the grounds I have mentioned, but as the learned judge of the County Court delayed the entry of judgment to enable the defendant to make this application, it will be without costs. I arrive at this conclusion as to the costs more readily from the fact that one of the affidavits filed on behalf of the plaintiff states the belief of the deponent that the attorney for the defendant speculated on the chance of getting a decision in his favour, and, it being against him, he now makes this application. I do not see how this statement thus made was calculated to be of any service to the plaintiff; the way in which it is made is not likely to keep up kindly feelings between professional gentlemen practising in the same town. No particular grounds seem to be referred to in the affidavit as justifying the belief expressed, though no doubt the person making the affidavit entertained such belief. If the facts stated in the affidavit justify the inference, it will generally be better to place that inference before the Court as a matter of argument and conclusion to be drawn from facts, rather than as a fact in the affidavit, which the deponent swears he believes.

Summons discharged without costs.

JOHNSTON v. ANGLIN.

Arbitration—Enlarging time for making award.

An arbitrator having failed, owing to the loss of the papers in the cause, in making his award within the time limited, a Judge extended the time under Con. Stat. U. C. cap. 22, sec. 172.

[Chambers, Feb. 22, April 5, 1869.]

In this case a verdict was taken for the plaintiff subject to be increased or reduced or verdict entered for defendant, by the award of an arbitrator, to whom power was given to enlarge the time for making his award. The arbitrator within the extended time endorsed on the order of reference for making the award, heard all the evidence produced on both sides and the addresses of counsel, and took all the papers to make up his award. It further appeared from the affidavit of the arbitrator that before he was enabled to make his award, the papers connected with the said arbitration and filed with him by both parties were mislaid, and he said that it was owing to papers being thus mislaid that he did not make the award or extend the time for that purpose: that the papers having since been found he was then willing to make his award in the premises if the Court would extend the time so as to enable him to make the same.

The last enlargement of the time for making the award was until 1st May, 1867.

In February, 1869, the defendant obtained a summons calling on the plaintiff to shew cause why the time for making the award under the order of reference at *Nisi Prius* should not be enlarged for two years from the first day of May, 1867, the time for making an enlargement of said term having elapsed without such enlargement having been made.

The application was founded on the affidavits of the arbitrator and the defendant's attorney.

Harrison, Q. C., shewed cause, citing *Re Burdon*, 27 L. J. C. P. 250; 31 L. J. Rep. 164; *Doe d. Mays* v. *Connell*, 22 L. J. Q. B. 321.

O'Brien, contra, referred to Con. Stat. U. C. cap. 22, sec. 172; *Russell* on Awards, 141 *et seq.*; *Leslie* v. *Richardson*, 6 C. B. 378.

MORRISON, J., made an order extending the time as asked in the summons.

INSOLVENCY CASES.

(Before the Judge of the County Court of the County of Wentworth.)

[*Reported by* S. F. Lazier, Esq., *Barrister-at-Law*]

IN RE LAWSON BROTHERS, INSOLVENTS.

Insolvency—Deed of Composition and Discharge.

Held, 1. That a deed of composition and discharge under sec. 9 of the Insolvent Act of 1864, purporting to be between the majority of the creditors of $100 and upwards of the first part, and the Insolvents of the second part, is valid, though the *non-assenting* creditors were not specially made parties to the deed.

2. A creditor who has accepted the terms of a deed of composition cannot afterwards contest the confirmation of the Insolvents' discharge.

3. The debt of a secured creditor who has elected to accept his security in full of his claim, and obtained the consent of the assignee to such election, is not to be estimated in considering the amount of indebtedness.

[September 7th, 1869.]

This was an application by the insolvents to the Judge of the County Court of the County of Wentworth for a confirmation of the deed of

composition and discharge made by the insolvents.

The sections of the deed in dispute were as follows:

"This deed of composition and discharge is made and executed in duplicate under and in pursuance of the Insolvent Act of 1864, and the Act amending the same, by and between the undersigned persons, parties, corporations and firms, being a majority in number of those of the creditors of John Lawson and Joseph Lawson (insolvents hereinafter named), who are respectively creditors for sums of one hundred dollars and upwards, and who represent at least three-fourths in value of the liabilities of the said Insolvents (subject to be computed as in the said Acts provided) of the first part, and the said John Lawson and Joseph Lawson the said insolvents, trading and carrying on business by and under the name and style of Lawson Brothers, of the second part.

Whereas * * * the majority in number of the insolvents' creditors for sums of one hundred dollars and upwards, representing at least three-fourths in value of the liabilities of the said insolvents, propose, and the said insolvents have assented and agreed to the proposal, that they, the said insolvents should compound for all their debts and liabilities at the rate of fifty cents on the dollar, such composition t be paid, and payable in six equal quarterly payments at three, six, nine, twelve, fifteen and eighteen months respectively from the date of these presents, and to be secured by the promissory notes of the said insolvents, payable respectively at the periods aforesaid at the Royal Canadian Bank, in the City of Hamilton, and endorsed by Edward Lawson of the City of Toronto, Merchant, and Thomas Lawson of Middlesex County, Farmer.

And the said parties of the first part do hereby agree, that such promissory notes of the said insolvents, amounting in the aggregate to a sum equal to the said composition of fifty cents on the dollar on the liabilities of the said insolvents so endorsed, and made payable as aforesaid, shall be, and be taken and accepted by the creditors of the said insolvents in full satisfaction and discharge of their respective claims * * *

And the said insolvents covenant with each of the said parties hereto of the first part, to deliver the promissory notes so endorsed as aforesaid, and to deposit this deed with the Clerk of the County Court of the County of Wentworth for the benefit of all parties interested herein:—* * * In Witness, &c."

The deed was signed by the insolvents and forty two creditors, including one secured creditor and six other creditors each having claims under $100. A supplementary and amended schedule of creditors was also attached to the deed shewing the total number of creditors to be fifty two, and the total number of liabilities of the insolvents at $54,831.65.

All the firms signed in the partnership name, and several of them by procuration. One firm signed as follows: Wakefield, Coate & Co., per F. W. Coate.

A. Crooks, Q. C. and *N. Kingsmill*, for Geo. Winks & Co., J. G. Mackenzie & Co., W. J. McMaster & Co. and F. J. Clarkson & Co. opposed the confirmation of the insolvents' discharge, upon the grounds:—

1. That the deed is unequal in its provisions, nor being made with the non-assenting creditors, and the non-assenting creditors being unable to sue upon the covenant made with the assenting creditors to deliver the promissory notes as provided for in the deed. The non-assenting creditors should have been made parties to the deed.

2. The deed is not proven to have been executed by the requisite number and proportion in value of creditors.

3. The authority of the agents who execute for their firms in the partnership name should be produced, and the partners should sign the deed in their individual names.

4. The secured claims should be estimated in ascertaining the number and value of the claims of those creditors who have signed the deed.

Ex parte Cockburn, 9 L. T. 464; *ex parte Harris*, 9 L. T. 239; Lindley on Partnership, p. 223; *Duggan* v. *O'Connell*, 12 Ir. Eq. 566, were cited in favour of these objections.

M. O'Reilly, Q. C., and *S. F. Lazier*, for the insolvents. Mackenzie & Co., McMaster & Co. and Clarkson & Co. have accepted the composition notes and the first payment in cash under the provisions of the deed, and are therefore estopped from disputing it. Winks & Co. have not proved their claim and cannot appear to oppose the insolvents' discharge until they file their claim. The objection of inequality in the provisions of the deed cannot be taken under sub-section 6 of section 9 of the Insolvent Act of 1864. There is in reality no inequality in this deed; and affidavits are filed shewing that the insolvents had furnished the Assignee with the composition notes for all the creditors (including Winks & Co.), and money for the first payment under the deed. *Blumberg* v. *Rose*, L. R. 1 Ex. 232; *Gresby* v. *Gibson*, L. R. 1 Ex. 112; *Rixon* v. *Emary*, L. R. 3 C. P. 546. The English Bankruptcy Act of 1861 is very different from the Canadian Insolvency Acts of 1864 and 1865.

Debts of secured creditors who elect to retain their securities with the consent of the assignee are not to be estimated in ascertaining the proportion in number and value of creditors who have signed the deed. Section 9, sub-sections 1 & 3, and sub-sections 4 & 5 of section 5 of the Insolvent Act of 1864.

The execution by any one partner of a deed of composition and discharge in the partnership name is sufficient, as any one of the firm can release the debt. Lindley on Partnership, p. 234. The affidavits of the principals that their agents had authority to sign for them are sufficient without production of the authority.

Logie, Co. J.,—*Messrs. Crooks, Kingsmill & Cattanach* appear for the following creditors, namely: Geo. Winks & Co., J. G. Mackenzie & Co., W. J. McMaster & Co., and T. J. Clarkson & Co., for the purpose of opposing the confirmation of the insolvents discharge.

Of these it appears by the affidavit of the official assignee, and by the production of the cheques for the cash payment indorsed by the creditors respectively, that the composition notes indorsed as provided by the deed, and cheques for the cash payment were sent to J. G. Mackenzie & Co., W. J. McMaster & Co., and T. J. Clarkson

& Co., an apparently accepted by them, at least they have retained the notes and accepted the cash, and I think by so doing they are precluded from now contesting the confirmation of the insolvents discharge.

Messrs. Geo. Winks & Co. have not proved their claim, and it is contended on their behalf that they have a right to appear and oppose the discharge—on the other hand it is urged that as they have not proved their claim, they are not to be considered as creditors, and have no right to oppose. I think under the Act of 1864 they have a right to come here and oppose. Sub-section 6 of section 9 provides, that "*any creditor* of the insolvent may appear and oppose" the confirmation of the discharge—and sub-section 5 of section 12 defines a creditor to mean "every person to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety." It is admitted that Messrs. Winks & Co. are creditors, the insolvents have inserted their claim in the schedule of their liabilities, and it appears by the affidavit of Joseph Lawson that cash for the first instalment and composition notes for the other instalments, pursuant to the terms of the deed, have been lodged in the hands of the official assignee for Messrs. Winks & Co. I think there can be no doubt as to their right to contest.

The confirmation of the discharge of the insolvents is opposed on the grounds:—

1st. That the insolvents have not procured the requsite proportion in value of creditors to execute the deed.

2nd. That the deed is unequal in its provisions.

Exception is taken to the execution of the deed by R. A. Hoskins & Co., John Macdonald & Co., and A. C. Sutherland & Co., on the ground that being executed by attorney or agent, there is not sufficient proof of the authority to execute, that the powers of attorney should be proved and produced. Even if these three claims are not included among those who assented, there would still be a sufficient proportion of creditors who have executed; but I think the proof of authority is sufficient. Affidavits made by John Macdonald, A. C. Sutherland, and a partner of Hoskins & Co., are filed—proving that the agents who executed for these creditors respectively had authority, and that their acts had been duly confirmed. All that is required, I think, is to satisfy the mind of the Judge with a reasonable degree of certainty that the deed was executed by a proper proportion of creditors, and that the same degree of certainty would not be necessary as on a trial between party and party. I hold, then, that proof of execution and of authority to sign is sufficient in all the cases. There are only two secured creditors, Marcus Holmes and H. A. Joseph, whose claims amount to $4570 00, and it is contended by the opposing creditor that these claims should be included in estimating the amount of indebtedness and proportion in value of those who have executed. Sub-section 5, of section 5, provides for the case of creditors holding security, undoubtedly they are creditors who may prove prior to any election to accept the security in satisfaction of their claims. But if the secured creditor elects to accept the security and not to prove, and the official assignee on behalf of the creditors assents to his retaining the security on these terms he certainly ceases to be a creditor who can prove, and his debt cannot be taken into consideration in estimating the amount of indebtedness. That is the case with these two secured creditors, they both elected to accept the securities they held, and not to prove, and it appears by the affidavit of the assignee that he has assented to the retention by them of their securities.

Exception is also taken to the execution of the deed by Wakefield, Coate & Co., on the ground that it is signed by one for the firm after the dissolution of the partnership, for the purpose of winding up the business and fulfilling engagements made during the existence of the partnership. Each partner has the same authority after dissolution to sign the name of the firm, and execute deeds of compositlon for debts due to the firm as he had before; Mr. Coate might have signed the name of the firm without signing for them in his own name. The execution by Wakefield, Coate & Co., is sufficient. (See Collyer on Partnership, Story on Partnership, 15 Ves. 227, 1 Taunt, 104.)

The next question to be decided by me, is, whether the deed of composition is unequal in its provisions. It is made between the *undersigned* parties, corporations, and firms, &c., of the first part, and the insolvents of the second part, and contains a covenant by the insolvents with the *parties thereto* of the first part. to deliver the notes mentioned in the deed on request, &c., the covenant being with the parties who have signed and not with the whole body of creditors, it is contended that those who have not executed the deed are not in as formidable a position as those who have, not being in a position to enforce the covenant, and *Ex parte Cockburn*, 9 L. J. Rep. 464, is relied on by the contesting creditor.

There is a wide difference between the English Bankruptcy Act of 1861, under which most of the decisions have taken place, and our Insolvent Act. The 187th section of the English Act contains this clause:—"And if the Court shall be satisfied that the deed has been duly entered into and executed, and that its forms are reasonable and calculated to benefit the general body of the creditors under the estate, it shall by order, &c." There is no such clause in our Act, and there is a great deal of force in the argument of Mr. Lazier for the insolvents, that the grounds of opposition by creditors must be confined to those mentioned in sub-section 6 of section 9, and I think that under our Act the mere fact of the non-executing creditors not being so favourably placed as those who executed, would not be sufficient to avoid the deed or to refuse the confirmation, unless the inequality between the creditors or any other creditors of the insolvents amounted to a fraud upon any of the creditors or a fraudulent preference in favor of some of them. (If the statutes were alike the following cases would bear on this point: *Ilderton* v. *Castrique*, 32 L. J. C. P. 206; *Benham* v. *Broadhurst*, 34 L. J. Ex. 61; *Chesterfield Silk Co.* v. *Hawkins*, 34 L. J. Ex. 121; *Gresty* v. *Gibson*, L. R. 1 Ex. 112; *Reeves* v. *Watts*, L.R 1, 2. 13, 412; *McLaren* v. *Bapter*, 36 L. J. C. P. 247; *Tetley* v. *Wanless*, 36 L. J. Ex. 25; *Blumberg* v. *Rose*, L. R. 1 Ex. 232.)

In the case of the deed now under consideration, I think on the state of facts as shewn in the affidavits filed, and on examination of the deed itself, that there is no inequality between the assenting and non-assenting creditors, even

under the English Act, and authorities cited. It may be true that the non-executing creditors could not sue on the covenant to deliver the notes; but the covenant has been fulfilled; money and indorsed notes for the composition, payable to all the creditors assenting and non-assenting, have been placed in the hands of the assignee, and with the exception of Winks & Co., all have received the money and composition notes to which they were entitled, and Messrs. Winks & Co., are entitled at any time to prove their claim and receive the money and notes held by the assignee for them. The insolvents have done all in their power to carry out the arrangement made with their creditors; the arrangement itself is fair and equal, and if there is any slight inequality between the assenting and non-assenting creditors, which I think there is not, it is only incident to the position of a non-assenting creditor. In *Blumberg* v. *Rose*, Pollock, C. B., says in his judgment—"It is impossible where there are two sets of creditors, assenting and non-assenting, but that there should be some degree of practical inequality. But to a deed equal in principle, inequality in effect is no objection."

The memorandum attached hereto shows that the insolvents have obtained the execution of the deed of composition and discharge by a majority in number representing three-fourths in value of the creditors whose claims are above $100, and as the deed is fair, and the insolvents have complied with all the requirements of the act, I think they are entitled to the confirmation of their discharge.

Memorandum attached to the judgment.

Total number of creditors			52
Secured creditors who have accepted securities with consent of assignee			2
Creditors under $100			6 8
			44
No. of creditors over $100 who have executed deed			35
Total liabilties of insclvents		$54,831	65
Less secured claims as above	$4,570 00		
And claims under $100	313 49	4,883	47
		$50,233	42
Proportion of creditors required		$37,675	07
Amount of unsecured claims over $100 of those who have executed the deed		$40,934	58
Proportion in value who have signed, deducting the claims of John Macdonald & Co., Sutherland & Co., and Hoskins & Co		$38,449	71

REVIEWS.

ON PARLIAMENTARY GOVERNMENT IN ENGLAND; ITS ORIGIN, DEVELOPMENT AND PRACTICAL OPERATION. By Alpheus Todd, Librarian to the House of Commons of Canada, in two volumes. Vol II., London: Longman, Green & Co., 1869.

This is emphatically one of the books of the day, whether we look at it with reference to the subject treated of, the clearness, comprehensiveness of its arrangement, or the great learning evinced in its preparation.

We may well feel proud that in Canada has been found a writer who has supplied to England a work which, if we can believe cotemporary critics, and if our own humble judgment does not lead us astray, is destined to be, as has been said of it by an English critic, "an authority on the important subject of which it treats, and which ought to have a place along with Sir Erskine May's Parliamentary Practice and Constitutional History, on the shelves of every member of the Legislature." The author is not "without honor in his own country," for who that pretends to know anything of the inside of the Houses of Parliament in Canada but knows, as many have experienced, the ready courtesy and research that has solved and explained so many troublesome doubts on points of Parliamentary Practice or Constitutional Law. But this work will give Mr. Todd a reputation as a writer such as few possess, for wherever the Anglo-Saxon law extends, or wherever exist the principles of Parliamentary Government such as we have it and such as it is in England, this book will be the great authority. Mr. Todd's familiarity with the subject, was known years before he gave the public the benefit of his learning—but it is one thing to be thoroughly conversant with a subject, and another to sit down steadily and methodically to commit that knowledge to paper, in such a way as to bring the whole of an intricate and little understood subject clearly and intelligently before the reader, and that with apt authority and example for each proposition. In this Mr. Todd has succeeded in a way that has called forth the admiration of exacting reviewers in England, and of those who are most competent to form an opinion as to its intrinsic merits. In fact to repeat the first sentence of the review of this elaborate work in *The Law Magazine* (August, 1869), "There could be no better exposition of the theory and practice of Parliamentary Government in England than that contained in the treatise of Mr. Todd, now completed by the volume before us." Or as another reviewer says, "Every Englishman who can read should read this book."

The second volume commences with an enquiry into and description of the councils of the Crown under prerogative governments, and it is curious to remark, though the observation is not novel, the wonderful similarity, taking times and circumstances into consideration between the relative powers of, and interdependence between the sovereign and his Witan or Council in the Saxon period, and the

Kings, Lords and Commons of the present day.

The author gives an interesting account of the increasing and encroaching influence of the Sovereigns from the time of the Norman Kings down to the reign of the second Stuart, when the overwhelming power of the kingly office received its death blow; upon which followed the development of constitutional government and the increasing influence of the Council, known afterwards as the Cabinet Council, which since the time of the Saxons and up to the time of Wm. III., had been more or less "a pliant instrument in the hands of the reign ing monarch, but was made responsible to Parliament by the Revolution of 1688."

In the second chapter the present position, history, powers and responsibilities of the Privy Council under parliamentary government are discussed, and here the attention of the reader is drawn to the main distinction between the Privy Council and the Cabinet Council :—

"Ever since the separate existence of the Cabinet Council as a governmental body, meetings of the Privy Council have ceased to be holden, for purposes of deliberation. At the commencement of the reign of George III., we find this distinction between the two councils clearly recognised—that the one is assembled for deliberative, and the other merely for formal and ceremonial purposes. It is, in fact, an established principle, that 'it would be contrary to constitutional practice that the sovereign should preside at any council where deliberation or discussion takes place.'

At meetings of the Privy Council, the sovereign occupies the chair. The President of the Council sits at the Queen's left hand; it being noticeable that this functionary 'does not possess the authority usually exercised by the president of a court of justice." (Vol. I., p. 58.)

The administrative functions of the Privy Council, as a Department of State, are also fully explained in another part of the work.

The author in the 3rd chapter, returning from the general survey of the King's Councils under prerogative government, proceeds to discuss the rise, progress, and present condition of the Cabinet Council, the supreme governing body in the political system of Great Britain. The ground occupied in this chapter is entirely new, and the reader will look in vain in any other work for the information which is to be found in this chapter,—and it has been no idle head or hand that has so exhausted the subject and arranged his material in such a lucid shape.

In speaking of the office of Prime Minister he says :—

"The development of the office of Prime Minister in the hands of men who combine the highest qualities of statesmanship with great administrative and parliamentary experience—such as Sir Robert Walpole, the two Pitts, and Sir Robert Peel—has contributed materially to the growth and perfection of parliamentary government. Before the Revolution, the king himself was the mainspring of the State, and the one who shaped and directed the national policy. If he invoked the assistance of wiser men in this undertaking, it was that they might help him to mature his own plans, not that they might rule under the shadow of his name. With the overthrow of prerogative government all this was changed. When the king was obliged to frame his policy so as to conciliate the approbation of Parliament, it became necessary that his chief advisers should be statesmen in whom Parliament could confide. And no ministers will accept responsibility unless they are free to offer such advice as they think best, and to retire from office, if they are required to do anything which they cannot endorse. In every ministry, moreover, the opinions of the strongest man must ultimately prevail. Thus, by an easy gradation, the personal authority of the sovereign under prerogative government receded into the background, and was replaced by the supremacy of the Prime Minister under parliamentary government. In the transition period which immediately succeeded the Revolution, William III., by virtue of his capacity for rule, as well as of his kingly office, was the actual head and chief controller of his own ministries. But the monarchs who succeeded him upon the throne of England were vastly his inferiors in the art of government. George I. was unable to converse in the English language, and, therefore, disabled from a systematic interference in administrative details. His son, though less incapable, was conscious of his imperfect knowledge of domestic affairs, and, like his father, directed his attention almost exclusively to foreign politics. This tended to reduce the personal authority of the sovereign to a very low ebb, and in the same proportion to increase the influence and authority of the cabinet. But with the accession of George III. a reaction, begun in the preceding reign, set in for a time. Anxious to prove himself a faithful and efficient ruler, and being well qualified for the discharge of the functions of royalty, George III. lost no opportunity of aggrandising his office. Whereupon the power of the crown, which had been weakened and obscured by the ignorance and indifference of his immediate predecessors, became once more predominant. Not satisfied, however, with the exercise of his undoubted authority, the king repeatedly overstepped the lawful bounds of prerogative and the acknowledged limits of his exalted station. It was reserved for William Pitt, whose pre-eminent abilities as First Minister of the

Crown empowered him to control successfully the proceedings of the legislature, while retaining the confidence of his sovereign, to vindicate for the Prime Minister the right to initiate a policy for the conduct of all affairs of State, and to urge the adoption thereof equally upon the Crown and upon Parliament, with the weight and influence appertaining to his responsible office, thereby securing the full and entire acceptance by each of the primary maxims of parliamentary government." (Vol. II., p. 136.)

The above, which prefaces the remarks of the author as to the development and present position of the Premier, gives incidentally a short sketch of the growth of Responsible Government, which is also spoken of in the first volume, with reference to the responsibility of Ministers for acts of the Crown, and in other places throughout the work, and in fact "Responsible" or "Parliamentary" Government are now in a measure synonymous terms, and the history of the former is necessarily included in an enquiry into the latter.

Chapter IV. is devoted to the Ministers of the Crown, concluding with the responsibility of such ministers to Parliament.

Chapter V. speaks of the Departments of State, their constitution and functions. With the next chapter Mr. Todd brings his labours to an end. This chapter is especially interesting to professional readers, and treats of the relation of the judges of the land to the Crown and to Parliament. And here again the author is the first in the field to supply information as to the proper course of procedure in Parliament against delinquent judges.

Some time ago, when speaking of the retirement of Chief Justice Lefroy, and the attacks made upon that venerable Judge, not only outside, but in both Houses of Parliament, we had occasion (2 U. C. L. J., N. S., p. 281) to touch upon the constitutional mode of bringing up the misconduct or incompetency of judges. We had at that time the pleasure of hearing Mr. Todd's (then unpublished) views on this subject. The whole matter is now given to the public in a more full and complete manner, not only with reference to the Judges 'Superior and Inferior' of Great Britain and Ireland, but also to Colonial Judges. Speaking with reference to the latter he says:

"So long as Judges of the Supreme Courts of law in the British Colonies were appointed under the authority of Imperial statute, it was customary for them to receive their appointments during pleasure. Thus, by the Act 4 Geo. IV. c. 96, which was re-enacted by the 9 Geo. IV. c. 83, the Judges of the Supreme Courts in New South Wales and Van Dieman's Land are removable at the will of the crown. And by the Act 6 & 7 Will. IV. c. 17, sec. 5, the Judges of the Supreme Courts of Judicature in the West Indies are appointed to hold office during the pleasure of the crown.

Nevertheless, the great constitutional principle, embodied in the Act of Settlement, that judicial office should be holden upon a permanent tenure, has been practically extended to all Colonial Judges; so far at least as to entitle them to claim protection against arbitrary or unjustifiable deprivation of office, and to forbid their removal for any cause of complaint except after a fair and impartial investigation on the part of the crown.

In 1782 an Imperial statute was passed which contains the following provisions:—That from henceforth no office to be exercised in any British Colony 'shall be granted or grantable by patent for any longer term than during such time as the grantee thereof, or person appointed thereto, shall discharge the duty thereof in person, and behave well therein.' That if any person holding such office shall be wilfully absent from the colony wherein the same ought to be exercised, without a reasonable cause to be allowed by the Governor and Council of the colony, 'or shall neglect the duty of such office, or otherwise misbehave therein, it shall and may be lawful to and for such Governor and Council to remove such person' from the said office: but any person who shall think himself aggrieved by such a decision may appeal to his majesty in council.

This Act still continues in force, and although it does not professedly refer to Colonial Judges, it has been repeatedly decided by the Judicial Committee of the Privy Council to extend to such functionaries. Adverting to this statute, in 1858, in the case of *Robertson* v. *The Governor-General of New South Wales*, the Judicial Committee determined that it 'applies only to offices held by patent, and to offices held for life or for a certain term,' and that an office held merely *durante bene placito* could not be considered as coming within the terms of the Act.

From these decisions two conclusions may be drawn; firstly, that no Colonial Judges can be regarded as holding their offices 'merely' at the pleasure of the crown; and secondly, that, be the nature of their tenure what it may, the statute of the 22 Geo. III. c. 75 confers upon the crown a power of amotion similar to that which corporations possess over their officers, or to the proceedings in England before the Court of Queen's Bench, or the Lord Chancellor, for the removal of judges in the inferior courts for misconduct in office. Under this statute, all Colonial Judges are removable at the discretion of the crown, to be exercised by the Governor and Council of the particular colony, for any cause whatsoever

that may be deemed sufficient to disqualify for the proper discharge of judicial functions, subject, however, to an appeal to the Queen in Council. But before any steps are taken to remove a judge from his office by virtue of this Act, he must be allowed an opportunity of being heard in his own defence." (Vol. II., p. 467).

In connection with this subject we in Ontario must read Con. Stat. U. C. cap. 10, sec. 11, which regulates the tenure of office of the Judges of our Superior Courts, and the recent Act of the Ontario Parliament of 32 Vic. cap. 22, sec. 2, under which County Court Judges hold office during pleasure, subject to removal by the Lieutenant Government for inability, incapacity, or misbehaviour, established to the satisfaction of the Lieutenant-Governor in Council.

Numerous cases are cited to establish and explain the principles laid down by the author with reference to the cases in which Parliament should interfere and the mode of its procedure for the removal of judges. No cases, however, from this Province as yet "point the moral." Long may this continue, even though the two volumes before go through editions enough to satisfy the longing of even the most ambitious or deserving of authors.

This brief recital of the main points treated of by Mr. Todd gives no idea of the interesting and instructive matter of the work; as a mere history it contains information to be met with no where else, and given in the pleasantest and most readable manner. But it is not the historical details so interesting to the educated reader, that give the great value to the treatise; it will, we apprehend, be even more appreciated by another class of readers—those with a special knowledge of various abstruse political questions will find in it light and assistance. It is, however, only in general terms that we can speak of it in the latter sense, and we only admire at a distance those evidences of deep learning in the science of politics which is possessed by comparatively few men in England, and fewer still in Canada. When judged by those possessing this technical knowledge we think we may venture to predict that the result will be as satisfactory as it has proved to be when examined by the more general reader.

In Canada the value of such a work at this particular juncture cannot be too highly estimated. In England it is possible for leading politicians—with more wealth and consequent leisure, with a greater diffusion of political knowledge, a more liberal education than is obtainable here, and aided by the traditions of Parliamentary Government which seem to pervade the atmosphere of the British Houses of Parliament—without any *lex scripta*, to keep with but little deviation in the beaten path; here, however, it is necessarily and obviously different, and the want of even an elementary sketch has been keenly felt, and this brings to our mind another great feature in Mr. Todd's book, and that is, that it seems as admirably adapted for one class of readers as the other—equally useful as an elementary work for the student and of reference to the more advanced politician.

One more remark and we must reluctantly leave an author that has given us the most unqualified pleasure; the first volume bore evidence of Mr. Todd's strong views as to the propriety of withstanding the democratic tendency of the age, so much so that the only adverse criticism was, that the first volume had a "conservative" bias, however, that may be, the most ardent liberal can find nothing to complain of in the second volume, in fact, for all that appears therein, the learning of the author might reasonably be said to be in favour of the "whigs." But may not all this be explained to one who has read both volumes, by comparing the different subjects treated of in each, and the evident anxiety to see maintained that even balance between the sovereign and his people, so necessary for the integrity of a limited monarchy, such as now exists in the British Isles.

Such a work as this that we have now so inadequately spoken of, is just one that should be made part of the course of education for any man who aspires to any knowledge of how he should govern and how he is governed, it should therefore be made part of the course in colleges and higher class of schools; it would not be even out of place in some one of the examinations intended to test the fitness of students for call to the bar. The fact that it is written by a Canadian author need not alarm those in authority; the reputation of the author as one of the most valuable contributors to the literature of this century is now established, and as such he has already been welcomed in England and Canada by those best able to judge of his merits.