DIARY FOR MARCH.

1. Thurs. *St. David.*
4. SUN... *3rd Sunday in Lent.*
5. Mon... Recorder's Court sits. Last day for notice of trial for County Courts.
11. SUN... *4th Sunday in Lent.*
12. Mon... Last day for service for York and Peel.
13. Tues... Qr. Sessions and Co. Court Sitttings in each Co.
15. Thurs. Sitting Court of Error and Appeal.
17. Satur. *St. Patrick.*
18. SUN... *5th Sunday in Lent.*
22. Thurs. Declare for York and Peel.
25. SUN... *6th Sunday in Lent. Lady Day. Annun. V. M.*
30. Friday *Good Friday.*
31. Satur. Last day for notice of trial for York and Peel.

The Local Courts'

AND

MUNICIPAL GAZETTE.

MARCH, 1866.

LAW REFORMS IN ENGLAND.

Two measures of law reform are promised in the Queen's speech; one a bill to consolidate and amend the bankruptcy laws, the other a bill founded on the report of the royal commission on the subject of capital punishment.

The first we understand will effect, if carried out, rather a sweeping change. It is said that bankruptcy in name will be abolished, as well as all Courts of Bankruptcy. Debtors and creditors will be left to settle their affairs between themselves according to the general law, provided that a debtor may make a general assignment for the benefit of his creditors, and if his estate pay 6s. 8d. in the pound, that is to operate as a discharge from his debts; but if it does not, his after acquired property shall be liable until the debt is extinguished by the Statute of Limitations. Now this, it seems to us, is very much like having no law at all on the subject of insolvency. Is this to be the end of the boasted bankruptcy laws of England? If this is an advisable measure, and we presume the Government know what is required by the country, we have gone quite far enough in the somewhat limited enactment of 1864. The proposed measure is said to make no provision for the punishment of fraud. There may be, and probably is, a somewhat higher tone of public feeling in England, but we very much question whether there is such an absence of fraud in mercantile transactions even there, as to permit of the want of some punishment to to prevent it.

By the other bill referred to, it is proposed to restrict capital punishment to "murder properly so termed," and this capital punishment is to be removed from public gaze. The report of the Commission on capital punishment was, we think, eminently unsatisfactory, nor did *it*, whatever conclusion we may have arrived at from other sources, convince us that any change such as is proposed is required. Any measure which tends to the *prevention* of crime as distinguished from its *punishment* is what every right-thinking man desires, and we hope that the proposed change may be a move in the right direction. If it prove so we should lose no time in following the lead, even if we do not ourselves try some other road with the same destination in view.

ESCAPE OF PRISONERS ON TECHNICAL GROUNDS.

(*Continued from page* 20.)

Some courts are occasionally very careful that prisoners shall not be tried unawares and very probably the prisoner in the following case was as much surprised at the result of it as we could be. Several boys were tried before the Police Court, Inverness, for theft. A woman who had purchased the stolen property attended the court as a witness, but was not examined, as the boys pleaded guilty. The Bailie who tried the case intimated publicly to the superintendent of police that the woman should be put upon trial for reset of theft. The superintendent thereon told the woman that she would be tried accordingly; but he allowed her at that time to go home, on her promising to attend the court when he should require her. Five days afterwards a police-officer called upon her, and stated that she was wanted by the superintendent, and she attended the court on that verbal intimation, and was tried and convicted. A suspension of the conviction was brought, because it was alleged that she had not received sufficient intimation that she was to be tried. The conviction was quashed on the ground that verbal citation was irregular, and that she should have been apprehended and brought to court in terms of a warrant by the Bailie. Lord Deas dissented from the judgment, holding that the woman had received sufficient previous intimation that she was to be tried;

and that, as she had appeared voluntarily, and had not requested delay, she had no ground to complain of the proceedings.

A party was charged before the Sheriff summarily at Dumfries with falsehood, fraud, and wilful imposition. The complaint concluded for imprisonment for a period not exceeding sixty days. The sheriff, after evidence was led, found the charge proven, and was about to pronounce sentence of imprisonment, when the prisoner, by his agent, requested, as matter of favour, that a *fine* might be imposed to save him from going to prison. Thereupon the sheriff, not keeping in view the limited conclusions of the complaint, imposed a fine, with the alternative of imprisonment. The fine was paid, and a suspension was forthwith raised on various grounds, and *inter alia* on the ungracious one that the imposition of a fine was incompetent, as not within the prayer of the complaint. This ground of suspension alone prevailed, and the conviction was set aside. We question whether a like favour would be shewn to this prisoner by the sheriff if brought before him a second time.

A somewhat similar case is the following: A farm-servant was convicted, under the Master and Servant Act, before a Justice of Peace court, of having deserted his service, and he was sentenced to fourteen days' imprisonment. He complained, by bill of suspension, of this sentence, because the justices had not *added hard labour* to his imprisonment; and the Lords set aside the sentence as not conforming to the statute. Lord Neaves in delivering his opinion, said that the farm-servant had a substantial interest to object to the want of hard labour, because the legislature intended thereby that the working man's bodily strength and habits of industry should be kept up!

This was an interesting theory, apparently invented by his Lordship to suit the occasion. It is certainly the first time we ever heard that hard labour was not intended as an additional punishment. The effect of this case however was to enforce a more rigid practice, more suited to the ingratitude of Scotch criminals, or shall we say to their praiseworthy desire to retain their "bodily strength and habits of industry."

In contrast to the above the following case of *Whatman* v. *Ogilvie* is referred to in the periodical from which we make these extracts. Ogilvie was charged by the justices at Banff, with having in his possession, after the prescribed period, forty-four partidges, in contravention of theGame Act 13 Geo. III., cap. 54, under which he was liable to a penalty of £5 for each bird, or two months imprisonment.

The justices found the complaint proven, and sentenced Ogilvie to pay a fine of £11, with the alternative of 132 days imprisonment, being 5s. or three days imprisonment for each bird. The prosecutor appealed against this judgment, on the ground that he was entitled to have the full penalties under the Act awarded. The judges certified the case to the High court, where it was held, that punishment had not been imposed in terms of the statute, and that the justices had no power to mitigate the penalties. The prosecutor, however, on the suggestion of the court, restricted the conclusions of the libel to *four* birds, embracing a penalty of £20 or eight months' imprisonment; and the court remitted the case to the justices to award the sentence accordingly. The full penalty under the complaint, had it not been restricted, would have amounted to £220, or imprisonment for seven years and five months. In a Perthshire case the justices modified the penalties where the number of birds was above one hundred, and the imprisonment would have amounted to upwards of twenty years. The accused in these cases might have had the conviction quashed, according to the principle adopted in the hard labour case, if they had had the sagacity to complain that they had not received the full punishment under the act.

Not a year ago a case was determined quite as absurd as any of those we have mentioned, and shewing how justice is sometimes defeated by a blind adherence to antiquated rules and formalties.

A man was charged before the Sheriff's court, Perth, with having unseasonable salmon in his possession, in contravention of the Salmon Fisheries' Act. Being found guilty, he was sentenced to pay a fine and expenses, with the alternative of thirty days' imprisonment. The sheriff, however, allowed him fourteen days to pay the money, failing payment by which time the warrant of imprisonment was to be put into execution. The prosecutor appealed against this judgment, in order to have that part relating to the fourteen days struck out, on the ground that the act of Par-

liament did not authorize the sheriff to allow any delay for payment of fine or expenses. For the respondent it was pleaded that, by a previous statute, this period was allowed before enforcing the warrant of imprisonment, and this provision appeared to be unrepealed. The court held that as no such time was allowed by the act under which the conviction was obtained, the sheriff had no discretion in the matter; and they not only declared that part of the judgment complained of to be bad, but quashed the conviction *in toto*. If the party convicted had appealed against, instead of attempted to support, the sentence, he would have had the same quashed, *with expenses*.

The articles from the *Scottish Law Magazine* from which we select these cases concludes with some pertinent observations on the state of the criminal law which can allow such absurdities to continue. For our part, though the criminal law in this country is open to some objections, we may be thankful that we have succeeded in ridding it of many of the technicalities and absurdities which, whilst bringing the administration of justice into contempt, tended nothing to the protection of life or property.

ACTIONS FOR SEDUCTION.

The unsatisfactory state of the law on this subject has often been commented on, both by writers and by judges on the bench, and there is, we think, a prevailing impression that in its present shape an action for seduction is no adequate means of preventing the immorality which it is intended to check, whilst it is in numerous cases an engine of oppression in the hands of a corrupt or designing woman.

We do not intend to discuss the matter further, but only to draw attention to the remarks of the Chief Justice of Upper Canada on the subject in a case lately before him in the Court of Queen's Bench. He says:—"Speaking for myself only, I will add that I am not inclined to extend the operation of the Seduction Act by what may be deemed a large and liberal construction. My own observation as a judge has by no means led me to think that it has had a favorable influence on female morals. I think the law, treating its object to be the prevention and punishment of seduction, not very effectual in its present shape; and that the hope or probable prospect of recovering large damages, operates at least as injuriously in one direction, as the fear of being subjected to their operation beneficially in the other."

DEATH OF THE CLERK OF THE PROCESS.

We regret to record the sudden death of Mr. Robert Stanton, who expired at his residence on Saturday night, the 24th ultimo, at the age of 72 years.

Mr. Stanton was a native born Canadian, and fought bravely in the war of 1812, by the side of his old friends, the late Chief Justice Robinson and Chief Justice McLean, and others, most of whom have now passed away. He distinguished himself at the battle of Queenston Heights, and was subsequeutly taken prisoner on the capture of York, now Toronto, by the forces under General Pike. At the time of the Rebellion of 1837, he again turned out in defence of his country.

He was much respected by his many friends. We, as well as others, will be sorry to miss his pleasant face and hearty greeting from his cosy little office in the north-east corner of Osgoode Hall.

SELECTIONS.

THE DETECTION OF CRIME.

One of the principal differences between the French and English methods of proceedings against criminals has just received a striking illustration in the United States District Court, beford Judge Betts.

A Commission Rogatory was sent from the Juge d'Instruction, Tribunal of First Instance at Versailles, to take testimony in regard to Etienne Barthelemy Poncet, charged with the murder of M. Delavergne, judge of one of the County Courts in France. In October last, M. Delavergne, while crossing from London to Paris, made the acquaintance of Poncet, who entered his service as a valet. On their arrival in Paris, they went to a hotel, and next day went out to take a walk. The judge did not return, and on the following day his body was found in the Bois de Boulogne; he had been robbed. Poncet was arrested, but no proof could be found against him except that he had plenty of money. He was, however, held for trial, and as, on his examination, he spoke of residence in New York, and named persons here whom he knew, the present Commission was sent to take all that could be found concerning him. The French Consul, through his attorney, Mr. C. E. Whitehead, submitted evi-

dence which showed that Poncet came to this country from Cayenne, an escaped forçat; that he was in the United States Army for a few months, received the bounty and was discharged at Governor's Island for ignorance of English; that he then went to Eijux hotel, where he lived last August. He was finally assisted by Mr. Windelscheffer, an actor in one of the theatres, and his wife, and a Mr. Hilland, a tailor in Third street, to return to France, taking passage in the Queen, in September. Mr. Hiland, on his examination, said that he had received a letter from Poncet, announcing a box of presents coming by express. This box was intercepted, and in it were found the watch and ornaments of the murdered judge. The commission, with the testimony, was formerly executed yesterday, and will be immediately returned to the court at Versailles.

Thus the proofs of a murder have been discovered. It could not have been done by the English or American system, which permit no such rigid examination of persons suspected of crime as is compulsory in France. Still we cannot acknowledge that the French system is the preferable one. Its effectiveness is but one of the compensations of despotism. And it is better that one murderer should escape, than that a thousand guiltless, though suspected men, should be put to the torture of a cross examination by a judge.—*N. Y. Transcript.*

ANOTHER POLICE BLUNDER.

At the Mildenhall petty sessions, a man was formally discharged from custody by the magistrates, under the following circumstances:—It appears that the metropolitan police had received information from the parish authorities of Mildenhall that a man belonging to a neighbouring parish had left his wife and children chargeable to the Mildenhall Union, and that the delinquent was supposed to be somewhere in the metropolis. One of the force, from the description given, and the photograph furnished by the union authorities, suspected a certain carpenter, and at once apprehended the man at the shop where he was employed, on the charge of deserting his wife and family, and leaving them chargeable to Mildenhall Union. Protesting in vain his innocence, the young man was taken into custody, and on the following day conveyed to Mildenhall, but when brought face to face with his supposed wife it was apparent that the officer had committed a mistake, and had captured and brought seventy miles into the country the wrong man.

THE LAW & PRACTICE OF THE DIVISION COURTS.

(*Continued from page* 6)

(OMITTED UNDER THE HEAD TREATING OF "WHERE THE CAUSE OF ACTION ARISES," VOL. I. PAGE 153.)

In a recent case (*Sichel* v. *Borch*, 9 L. T N. S. 657) the meaning of the terms "Cause of action," was considered in the Court of Exchequer.

An inhabitant and native of Norway drew a bill of exchange there, endorsed it there, and posted it from thence to England, where it was received, accepted, and again endorsed. It was held, in an action by the endorsees against the drawer, the foreigner in Norway, that such a suit was not maintainable, as the whole cause of action, within the meaning of the C. L. P. Act, 1852, secs. 18 & 19, did not arise within the jurisdiction of the superior courts.

In giving judgment, Pollock, C. B., observed:—"The cause of action mentioned in secs. 18 and 19 means, in my judgment, the whole cause of action which has arisen within the jurisdiction, not the mere breach; that alone is not enough; for it is the contract complete which gives rise to that breach. The cause of action—that is the whole cause of action—was neither entirely in Norway nor in London; but it would be requisite to have the evidence of what took place at both. I am not satisfied, therefore, that the whole cause of action arose within the jurisdiction, and the statute does not, in my opinion, in this case apply."

A person ceases to have a domicile or dwelling in a place the moment he abandons it without an intention of returning there, though he has not established a dwelling elsewhere (*Nutbrown's case*, 2 East. P. C. 496.) A prisoner, it was held, resides where the prison is (*Rex* v. *Salford*, 3 Magistrates Cases, 5), and in a case before the Judge of the London Sheriff's Court (2 C. C. C. 292), the defendant, who was a Dublin attorney, had been taken in execution in another suit and lodged in the Whitecross Street Prison, where he was served with the process of the County Court, he was held liable to the jurisdiction of the London Sheriff's Court. But a mere temporary imprisonment would probably not be held to constitute a dwelling within the meaning of the Division Court Act. (See 10 East. 25; *Rex* v. *Birmingham*, 14 East. 252; *Rex* v. *Ludlow*, 4 B. & Ald. 662.)

A corporation dwells at the principal office where its business is transacted, and it is wholly immaterial where the members of the company reside (*Taylor* v. *Crowland Gas Co.* 3 W. R. 368, and see *Brown* v. *L. & N. W. Railway*, 11 Weekly Rep. 884.)

The remaining portion of sec. 71 remains to be noticed, *i. e.*, that a suit cognizable in a Division Court may be entered and tried in the court holden for the division,

B. (2) In which the defendants, or any one of the defendants, *carries on business* at the time the action is brought.

The term "business" includes any profession, trade, or calling, carried on for the sake of profit. It must, however, be as a calling, and not as an accidental occupation. The amount of business done is immaterial, provided there exists the intention of making such business a person's general occupation. Thus, under the Bankruptcy Act, it has been holden that the chief criterion whether a man be a trader or not is, what was his *intention* in buying and selling; and the *quantum* of trading has been held immaterial, provided it be the man's common and ordinary mode of dealing. (*Patman* v. *Vaughan*, 1 T. R. 572; *Ex parte Cromwell*, 1 M. D. & D. 158; *Holroyd* v. *Gwynne*, 2 Taunt. 176; *Ex parte Blackmore*, 6 Ves. 3.)

To constitute the carrying on business it would seem that it is necessary there should be a repeated practice of so doing, or a commencement coupled with an intention to continue it, for a single act or transaction, though otherwise of the nature required, would not be sufficient. (See the cases Arch. Banky. 10th, ed. 52.) The declaration of a party as to the object of his doing any particular act, as buying or selling, or holding himself out as carrying on a business, is admissable of his intention in so doing. But although decisions on the bankruptcy law may throw much light on this enactment, it is to be borne in mind that to create a "trading" within the bankrupt law, the party must have bought and sold goods again. But a man may *carry on business* without doing so: in other words, a "trading" implies buying to sell again; the terms "carrying on business" do not necessarily do so.

In order to constitute a carrying on a business, it is not necessary that the party should be doing so legally: thus, an individual who carries on a trade of smuggling, or a person engaged in trading, although specially forbidden to trade by statute, may be a bankrupt as a trader. (*Ex parte Meymott*, 1 Atk. 196; *Cobb* v. *Symonds*, 3 M. D. & D. 125.) Nor is it necessary that the party should keep an office or open shop, or conduct his business in the ordinary way. (*Ex parte Wilson*, 1 Atk. 218.) It would appear that the business must be on the defendant's own account, and not as the servant of another. And a clerk in the Privy Council office, it was held, was not a person carrying on a business within the meaning of sec. 128 of the English County Courts Act.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

DRIVING CATTLE OR CONVEYING IN VAN.—By the Islington Parish Act, 1857, it is forbidden to conduct or drive cattle upon any street, road, or pathway within the parish of Islington between the hours of twelve on Saturday night and twelve on Sunday night.

Held, that the words "conduct or drive" did not apply to the conveyance of cattle in a van.—*Triggs* v. *Lester*, 14 W. R. 279.

RECEIVING STOLEN GOODS — POSSESSION BY OWNER AFTER THE THEFT.—Goods which have been stolen lose the character of "stolen goods" if, after the theft, the possession and control of them is obtained by the true owner.

Some thieves having stolen a passengers' luggage from a railway station, one of them took it to another station of the same company, and forwarded it by train addressed to the prisoner at Brighton. Soon after it had reached the Brighton station, a policeman opened the parcel, and finding that it contained the stolen property, tied it up, and directed the companys' porter, in whose charge it was, not to part with it, and on the day following told him to take it to the place where it was addressed and where it was received from him by the prisoner. In an indictment for receiving, the property was laid in the railway company and the prisoner was convicted.

Held, by a majority of the court (Erle, C. J., and Mellor, J., *dissentientibus*) that the conviction was wrong.—*Reg.* v. *Schmidt*, 14 W. R. 236.

MISDEMEANOUR—REFUSING TO AID CONSTABLES—ASSAULT TO PREVENT APPREHENSION—INDICTMENT.—An indictment for refusing to aid certain constables in the execution of their duty, alleged that before eommitting the offence, to wit, on the 25th May, 1865, T. B. and J. B. were in the custody of certain constables upon a charge of felony; that they assaulted the constables with intent to resist their lawful apprehension

that the constables called upon the prisoner for assistance to prevent the assault, and that he unlawfully refused to aid them. It was objected that the indictment was bad, upon the grounds, first, that it did not show a lawful apprehension; secondly, that there could be no assault to prevent apprehension, T. B. and J. B. being already apprehended; thirdly, that it was not stated that the refusal was on the same day and year as the assault, nor that it was the same assault, and that it ought to have been alleged that the prisoner did not aid. The prisoner having been convicted.

Held, that the conviction was right.—*Reg.* v. *Sherlock*, 14 W. R. 288.

Common Schools—Injunction.—A bill was filed by a rate-payer seeking to restrain the trustees of a school from allowing the school-house to be used for religious services, but the bill did not allege that it was filed on behalf of the plaintiff and all other rate-payers; two of the three school trustees consented to the injunction being granted as asked. The court refused the application on the grounds first, that the suit was improperly constituted; and if it had been, it appearing that a majority of the trustees were in favor of the views of the plaintiff, they had, themselves, the power to do that which they consented to the court doing. And if the bill had been by the plaintiff on behalf of himself and all other rate-payers whether then the suit would have been properly constituted. *Quære.*—*Rabian* v. *School Trustees of Thurlow*, 12 U. C. Chan. R. 115.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Lien on Goods for Freight.—A contract to carry a given number of articles for a lump sum, and any further number of similar articles if any, at so much a head, is divisible; and a lien for the excess over the lump sum does not attach to the whole.—*Prenty* v. *Midland G. W. R. W. Co.*, 14 W. R. 315.

Will—Misdescription—Parol Evidence.—Where there is a person corresponding in name and address, but not in other particulars, to the description of the legatee contained in the will, and another person corresponding in every particular except the Christian name, the Court admitted parol evidence to show that the latter was the person intended to be benefitted.—*Re J. H. Roland*, 14 W. R. 317.

Act of Bankruptcy—Fraudulent Assignment.—An assignment of the whole of a trader's property upon trusts for sale to secure a present advance of money, which, without the lender's knowledge, is applied in payment of an antecedent debt of the borrower, is not fraudulent, and consequently not an act of bankruptcy.—*In re Colemere*, 14 W. R. 318.

Discretion of Arbitrator—Close of Plaintiff's Case—Refusal by Arbitrator to re-open.—At the close of the plaintiff's case the arbitrator intimated that he was of opinion that the plaintiff had no case, and that the verdict should be found for the defendant, whereupon plaintiff tendered some further evidence, but the arbitrator refused to re-open the case. *Held*, that the Court had no power to set aside the award, it being a matter entirely for the arbitrator's discretion whether he should allow the case to be re-opened.—*Henning* v. *Parker*, 14 W. R. 328.

Agreement — Performance prevented by Fire—Act of God.—Where a plumber agreed to do the plumbing work to a house then about to be erected, and to furnish the materials for a gross sum to be paid in instalments, the last two to be paid as follows: $1500 when all the work should be completed, and the balance, $1000. when the work should be tested and found to be sufficient; the payments to be made upon the certificate of a certain architect that they were due according to the contract; and a substantial part of the work was not yet finished when an accidental fire occurred, and destroyed the building; the work not having been tested, and no certificate obtained from the architect: *Held*, that the plumber could recover no part of the last two payments.—*Niblo* v. *Brusse et al.*, 44 Barb. (U. S. Rep.)

Contract — Non-compliance with.—By the contract the plaintiff was to furnish a monument of "good white marble." He did furnish a monument of which the material was "good white marble," but it had a discoloration on it, produced by accident, but temporary in its character, and by lapse of time and by exposure to the open air and frost would disappeaar: *Held*, that the contract was not complied with, and the plaintiff was justified in refusing to accept the monument. The substitution of "Octavia J." for "Octavia Jane" was also a substantial defect, although made by the marble-worker in good faith, believing the inscription as he made it would look better and be more satisfactory.—*Viall* v. *Hubbard*, 37 Vert. (U. S. Rep.)

CROWN LANDS—JURISDICTION OF AGENTS BEFORE PATENT.—This court has jurisdiction in a proper case to give relief against a fraudulent assignment by a locatee of the Crown, before the issuing of letters patent, but a bill for the purpose must shew why it is necessary to come to this court.—*Bull* v. *Frank*, 10 U. C. Chan. R. 80.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

MILLER v. THE CORPORATION OF THE TOWNSHIP OF NORTH FREDERICKSBURGH.

C. S. U. C. ch. 54, sec. 337—Limitation of actions.

The Municipal Act. sec. 337, provides that actions against a municipal corporation for not repairing highways must be brought "within three months after the damages have been sustained."

The plaintiff's mare fell through a bridge, and died four months after from the injuries received: *Held*, that the statute began to run from the occurrence of the accident, not from the death.

[Q. B., M. T., 1865.]

Appeal from the County Court of Lennox and Addington.

This action was brought on the 6th of May, 2865, against the Municipality of North Frelericksburgh, for the loss of the plaintiff's mare, which fell through a hole in a bridge on the Mohawk Bay road, on the 27th of November, 1864, and died on the 23rd of March, 1865, from the injuries received.

It was objected at the trial that the action was not brought within three months after the damages had been sustained, according to section 337 of the Municipal Act, Con. Stats. U. C. ch. 54

The learned judge held at the trial, and afterwards in term, that the three months began to run from the death of the mare and not from the occurrence of the injury, and that her value was to be considered at the time of her death, horses having risen considerably in market value in the interval; and a rule *nisi* obtained to enter a nonsuit was discharged.

On these points the defendants appealed.

Moss, for the appellants, cited *Patterson* v. *The Great Western R. W. Co.* 8 U. C. C. P. 89; *Turner* v. *The Corporation of Brantford*, 13 U.C.C.P. 109; *Snure* v. *The Great Western R. W. Co.* 13 U.C.Q.B. 376; *Moison* v. *The Great Western R. W. Co.* 14 U.C.Q.B. 109; *Vanhorn* v. *The Grand Trunk R. W. Co.* 18 U.C.Q.B. 356; *Brown* v. *The Brockville and Ottawa R. W. Co.* 20 U. C. Q. B. 202; *Whitehouse* v. *Fellowes*, 10 C. B. N. S. 784; Con. Stats. C. ch. 66, sec. 83.

Gwynne, Q.C., contra.—The statute expressly makes defendants responsible for "*all* damages" sustained, and this is not carried into effect, if the action must be brought before the whole extent of the injury is known or has been suffered, as the appellants contend for. He cited *Roberts* v. *Read*, 16 East. 215; *Gillon* v. *Boddington*, Ry. & Moo. 161, S. C. 1 C. & P. 541; Mayne on Damages, 37.

HAGARTY, J., delivered the judgment of the court.

The words of the section are. "and the corporation shall be civilly responsible for all damages sustained by any person by reason of such default," (*i. e.*, default in repairing), "but the action must be brought within three months after the damages have been sustained"

The case of *Bonomi* v. *Backhouse*, E. B. & E. 622, relied on in the court below, established, in the words of the judgment of the Exchequer Chamber, that "no cause of action accrued from the mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiff; and that the cause of action did accrue when the actual damage first occurred." E. B. & E. 659; and in the House of Lords, 1 B. & S. Am. Ed. 970, 9 H. L. Cas. 503.

In such a case we think the same rule would apply, whether the words creating the limitation were "from the accruing of the action," or, as in the case in appeal, "after the damages have been sustained." No wrongful act was in fact done till the damage accrued.

In the case before us, defendants were answerable in damages to parties injured by their neglect to perform a statutable duty, namely, the keeping in repair of a bridge. No cause of action vests in any person against them for damages till an injury is sustained by their default. As soon as the mare was injured by falling or stepping into the hole in the bridge, the plaintiff's cause of action was complete. His damages were then sustained, in the words of the statute. The subsequent death of his mare was merely an additional evidence of the extent of his damages, and in our judgment cannot be held "a sustaining of damage" in the view of the statute.

Mr. Gwynne, in his ingenious argument, admitted that an action might be brought immediately after the accident, and that a recovery would be a bar to all future actions, even if it were erroneously thought that the mare would completely recover, and her subsequent death would give no additional claim.

In a case like this, there is no question of what is called "continuing damage," as in the case of a nuisance, or the diversion of a stream or penning back of water, which from day to day is occasioning injury, and for which a fresh action may be daily instituted. Here all connection between the cause and the injury, all injurious action by defendants against the plaintiff, ceases from the happening of the accident. The plaintiff has sustained the whole of his damages; his mare is fatally injured. The damage is not the less because he does not know its full extent, or because (if he sue before her death) his witnesses may not speak with certainty as to the fatal character of the injury, or because other witnesses for defendants may declare that she will recover, and regain all her former vigour and usefulness.

It seems to us a misconception to speak of the death of the mare, at an interval of three, six, or nine months after the accident, as the "sustaining of the damage" mentioned in the act.

It is quite true that requiring the action to be brought within three months from the cause of action may create more difficulty in duly proving the proper measure of damage. This cannot be

avoided. It is a difficulty occurring in numerous cases; for assault and battery, injuries (not fatal) in public conveyances, &c. Contradictory testimony is frequently adduced as to the temporary or permanent character of the alleged injury; but the damage, be it small or great, has been sustained by the plaintiff as against the defendants by the occurrence of the unlawful act of commission or omission. However difficult to prove, it has been sustained; the effects of the injury may be developing themselves very slowly, and perhaps obscurely.

If the view of the court below be law, it will deprive municipalities of the special protection given them by the statute, and extend the period of limitation indefinitely until three months after, not the default causing the injury, but the ultimate development of its effects by the death of the person or animal the subject of such injury.

We think the appeal must be allowed, and the rule to enter a nonsuit, on the leave reserved, be made absolute.

It is not necessary to discuss the question of value.

Appeal allowed.

Short v. Parmer et al.

Fence viewers—Effect of their award—C. S. U. C., ch. 54, sec. 360.

Defendants having impounded the plaintiff's horses for getting into his field, the matter was referred to the fence viewers of the township, who awarded that defendants' fence was lawful, and appraised the damage. The plaintiff replevied, and desired to prove that the defendants had put up a fence higher after the horses got over and before the award.

Held (affirming the judgment of the County Court), that under Consol. Stat. U. C., ch. 54, sec. 360, the award was conclusive as to the legality of the fence at the time of the alleged trespass.

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

Appeal from the County Court of the county of Prince Edward.

Replevin for two horses.

The defendants, William B. Parmer in his own right and Cornelius Parmer as his servant, acknowledged the taking and impounding of the horses, alleging that they were doing damage on William B. Parmer's land. The plaintiff, in his answer to this avowry, pleaded that he was the occupier of certain land in the township of Sophiasburg, adjoining that of William B. Parmer, and that the horses lawfully feeding thereon escaped into the *locus in quo* through the defect of fences which the defendants were bound to repair. On this the defendants took issue.

At the trial it appeared that the horses having been impounded by the defendants, it was agreed between the parties that the question of the lawfulness of the fence and the damages should be referred to two fence viewers, who proceeded to examine the fence and estimate the damage, Cornelius Parmer and the plaintiff being with them. They awarded in writing that the fence was a lawful one, and appraised the damages at two dollars.

The plaintiff asserted before the fence viewers that the fence had been down at the place pointed out to them previous to the horses getting in, and had been put up afterwards and before the award, but he did not offer any evidence of the fact or ask for delay. The plaintiff at the trial tendered evidence to the same effect, which the defendants' counsel objected to, contending that it was one of the questions submitted to the fence viewers, and which they had decided, and that their decision was final. The learned judge sustained the objection; and the plaintiff declining to take a nonsuit, he charged in favor of defendants. Ths jury, however, found for the plaintiff.

The defendants obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, which after argument was made absolute, and the plaintiff thereupon appealed.

C. S. Patterson, for the appellant, cited *Bardons* v. *Selby*, 1 C. & M. 500; *Glover* v. *Dixon*, 9 Ex. 158.

S. Richards, Q. C., contra.

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

We think the obvious intention of the 360th section of the Muincipal Act, is that the fence viewers shall determine the question of the legality of the fences, as well as the damages done by the animals impounded for trespassing, and upon their determination the rights of the respective parties must so far depend. In our view, therefore, it was not open to the defendants to bring again in question the *sufficiency* of the fences, that being determined by the fence viewers; and they must be assumed to have determined the state of the fence at the time of the alleged trespass, because that is the obvious duty imposed on them by the statute.

No dispute appears to have been raised at the trial upon the avowry The right of the defendant William Parmer to distrain, assuming the cattle to be trespassing, was not apparently denied. That the whole question turned, according to the judge's notes of evidence, upon the proof of the allegation in the defendant's plea as to the sufficiency of the fence, which, it seems not to have been denied, the defendant William was bound to repair.

We think, therefore, we should uphold the decision of the court below, and dismiss this appeal with costs.

Appeal dismissed.

COMMON PLEAS.

(*Reported by* S. J. Vankoughnet, Esq., M.A., *Barrister-at-Law, and Reporter to the Court.*)

Harrold v. The Corporation of the County of Simcoe, and the Corporation of the County of Ontario.

Action for not repairing a bridge—Common law liability—Notice of action—Con. Stats. U. C. ch. 126; ch. 54, sec. 341.

In an action against defendants for negligence in not keeping sufficiently secured a bridge, which had passed from the crown under their control, in consequence of which it broke away from its fastenings, and injury was thereby caused to plaintiff.

Held, that defendants were liable to plaintiff at common law in a civil action for the injury sustained by him, although the property and freehold in the bridge were not vested in them: and that they were not entitled to notice of action under Con. Stats. U. C. ch. 126, as they were sued, not for acts done, to which that statute alone applied, but for acts omitted to be done by them.

Held, also, that defendants were bound to maintain the bridge, after it came into their hands, in the same state of repair that they would have been if it had been built by themselves, and not merely in the condition in which it was when they received it from the crown.

Semble, that if the accident complained of had occurred within so short a period after the transfer of the bridge to the defendants that they had not had time to ascertain its defects, they would not, under the circumstances of their not having had any voice either in its construction or in its transfer, have been liable to plaintiff.

Quære, whether the Commissioner of Public Works, if furnished with funds to repair the bridge, would not have been liable to indictment, if, with full knowledge of its dangerous condition, he had wilfully neglected to repair it.

Sec. 341, Con. Stats. U. C. ch. 54, does not limit the responsibility of counties to the same kind of responsibility to which magistrates in Quarter Sessions are subjected, that is, to criminal responsibility merely: the object of the statute is to transfer from the magistrates to the county councils all their powers, &c., and on the completion of such transfer, the councils are to hold the property affected in like manner, and subject to their general duties and *liabilities* respecting other property belonging to them.

[C. P., T. T., 1865.]

The first count of the declaration stated that a draw-bridge, which was part of the public highway between the two counties, at "The Narrows, on Lake Simcoe, had been improperly left open, by reason whereof the plaintiff, who was lawfully passing along the highway, fell into "The Narrows" and broke his leg, and was otherwise greatly injured.

The second count stated that the bridge had been improperly fastened, by reason whereof it got open, and the plaintiff fell into "The Narrows," and was injured, as before mentioned.

The county of Simcoe pleaded, Not guilty by statute, 22 Vic. ch. 26, secs. 1, 10, 11, 16, 20.

The county of Ontario pleaded simply, Not guilty.

The cause was tried at the last assizes for York and Peel, before the Chief Justice of this court, when a verdict was rendered for the plaintiff, with $1,500 damages.

The defendants objected that they were entitled to a notice of action, which had not been given; and that they were not liable according to the 341st section of the Municipal Act, nor under secs. 336, 7 of the same act. Leave was reserved to them to move for a nonsuit on these grounds.

The jury were desired to say:

1. Whether the bridge had been closed on the night of the accident, and properly secured with the means which the bridge-keeper had it in his power to use.

2. If so closed and secured, whether the fastenings were of such a character as were reasonably proper or safe to secure the bridge for the use and purpose for which it was used, and the manner of using it.

The jury were then told, that if the bridge had not been properly secured with the means which the bridge-keeper had at his disposal, and the accident had occurred from that cause, then to find for the plaintiff; or, if properly secured, and the injury occurred from the improper fastenings, to find also for the plaintiff; and that they must say, from the evidence, whether the fastenings were reasonably proper and safe for the purposes for which they had been used.

The counsel for the defendants requested that the jury should, also, be told that if the defendants kept the bridge in as good repair as when they received it from the government, they were not liable: the Chief Justice declined to give this direction.

The evidence was very long; but as nothing whatever turned upon it, it becomes unnecessary to insert it.

The facts were that this was a government work, which, under the provisions of the statute, had been surrendered by the government, and devolved upon the defendants; that the defendants had had the bridge for about five years before the accident to the plaintiff, and had retained the same bridge-keeper who had had the charge of the bridge while it was in the possession of the government; that the bridge was fastened in the same way at the time of the accident as it had been when it was owned by the government; that on the evening of the 6th of October, 1864, a very violent storm of wind, accompanied with hail and rain, blew open the bridge, raising it, as was supposed, and drawing the staples which secured it to the abutment; and the plaintiff, coming on to the bridge in the storm and darkness, and not observing it to be open, fell from it and sustained the injury complained of.

A good deal of evidence was given to shew the insufficiency of the fastenings, and that the bridge would not have blown open if it had been secured in the manner the defendants had secured it since the accident. On the other hand, the sufficiency of the fastenings was as strongly spoken to, and that the occurrence could not have been guarded against, as it had arisen from a sudden and most unusual storm.

It appeared, also, that the councils of both corporations had passed by-laws adopting the bridge so given up by the government.

In last Easter Term *M'Carthy*, for the county of Simcoe, obtained a rule *nisi* calling upon the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered pursuant to the leave reserved, on the ground that the county of Simcoe was entitled to a notice of action, and that the defendants were not liable civilly for the negligence charged, inasmuch as the statute made them liable only as the magistrates in Quarter Sessions were liable, and they were therefore not liable civilly, and there was no liability on the defendants at the common law. Or, why a new trial should not be granted on the same ground, and on the further ground of misdirection of the learned Chief Justice, who declined to tell the jury that, as the defendants had kept the bridge in as good a state of repair as it was when it came under their control, they were not liable to the plaintiff for what had happened.

Robert A. Harrison shewed cause.—There was no misdirection; for the jury could not be told as a matter of law that the defendants were bound to keep the bridge in the same condition in which it was when they received it from the Crown.

In some cases in England it has been held that there is no legal liability upon commissioners for public works and upon others filling the like character, because they have had no funds but to distribute in the work they have been appointed to superintend: *Harris* v. *Barker*, 4 M. & Sel. 27; *Sutton* v. *Clarke*, 6 Taunt. 29; *Metcalfe* v. *Hetherington*, 11 Exch. 257; *Russell* v. *The Men of Devon*, 2 T. R. 667; *Hall* v. *Smith*, 2 Bing 156.

The defendants' liability is a statutory one: Con. Stat. U. C. c. 54, ss. 327-8, 336-7, 34; *Woods* v. *The County of Wentworth and the City of Hamilton*, 6 U. C. C. P. 101; *In re Rose and the United Counties of Stormont, Dundas, and Glengary*, 22 U. C. Q. B. 531; *In re the County*

of Waterloo and the County of Brant, 23 U. C. Q. B. 537; *Rowe* v. *The United Counties of Leeds and Grenville*, 13 U. C. C. P. 515; *Turner* v. *The Town of Brantford*, 13 U. C. C. P. 109.

The following cases, also, shew the general liability of the defendants: *The Queen* v. *The Town of Paris*, 12 U. C. C. P. 445; *Henly* v. *The Mayor and Burgesses of Lynne*, 5 Bing. 91; *Hawkeshaw* v. *The District Council of the District of Dalhousie*, 7 U. C. Q. B. 590; *Clothier* v. *Webster*, 12 C. B. N. S. 790; *Cowley* v. *The Mayor of Sunderland*, 6 H. & N. 565; *Hartnell* v. *Ryde Commissioners*, 8 L. T. N. S. 574; *Ohrby* v. *Ryde Commissioners*, 10 Jur. N. S. 1048; *Harrison* v. *Great N. R. Co.*, 10 Jur. N. S. 992, S. C. 10 L. T. N. S. 621; *Whitehouse* v. *Fellowes*, 4 L. T. N. S. 177, S. C., 10 C. B. N. S. 765; *Ricketts* v. *The Metropolitan R. Co.*, 12 L. T. N. S. 79.

The defendants, as municipal corporations, are not within the Statute of U. C. ch. 126, entitling them to notice of action; but the case of *Hodgins* v. *The United Counties of Huron and Bruce*, and now standing for judgment in the Court of Appeal, will decide this point.

But even if the defendants could claim the right to a notice of action, it could only be for an act done; but they are charged here for not doing, for a negligent omission, and, therefore, no notice was required; *March* v. *The Port Dover and Otterville Road Co.*, 15 U. C. Q. B. 138; *Harrison* v. *Brega*, 20 U. C. Q. B. 324; *Moran* v. *Palmer*. 13 U. C. C. P. 528.

McMichael for the County of Ontario, contra. —This bridge was a government highway: Con. Stat. of Canada, ch. 28, p. 334, where it appears in the schedule.

This bridge was not assumed by the defendants by secs. 74-75 of the act referred to: the Crown does not transfer such a work when it is desirous of getting rid of it: the Governor, by proclamation, simply declares it to be no longer under the control of the Commissioner of Public Works, and the statute puts it at once "under the control of the municipal authorities of the locality and of the road officers hereof in like manner with other public roads and bridges therein, and [the same] shall be maintained and kept in repair under the same provisions of law which are hereby declared to extend to such road or bridge." See, also, the acts of Crown c. 85, secs. 4 5.

By the Mun. Act of U. C. sec. 327 such a work came under the joint jurisdiction of the two counties so soon as the Crown ceased to control it: no by-law was necessary, as before stated, for the purpose of assuming it. Sec. 339 of the Municipal Act does not apply to a work lying between two counties, but a by-law was necessary under sec. 328 to regulate its management, and no such by-law has yet been passed.

The defendants are obliged to maintain the bridge now by virtue of the statutes, and by virtue of the common law in such cases: *Rex* v. *The Inhabitants of the West Riding of Yorkshire*, 5 Burr. 2594; *The King against the same defendants*, 2 East. 342; but it does not follow from this that the defendants are liable in an action for damages arising from a neglect of duty either of their masters or of their servants; and the Municipal Act (sec. 341), with a view to this very case, has declared what this liability shall be, viz., "The liability which at any time before the 1st of January, 1850, belonged to the magistrates in Quarter Sessions;" and as it is not pretended the magistrates in Quarter Sessions would have been liable in such an action as this before that day, so neither can the defendants now be liable: the case of *The Men of Devon*, before cited, is particularly applicable.

M'Carthy, for the County of Simcoe, maintained the same argument, and further contended that his clients were entitled to a notice of action: *Davis* v. *Curling*, 8 Q. B. 286, and *Moran* v. *Palmer*, before cited. He also urged that the defendants could not be charged with liability, if they appointed a competent servant and were guilty of no direct or immediate act of negligence: *Holliday* v. *The Vestry of St. Leonard's Shoreditch*, 11 C. B. N. S. 193; *Duncan* v. *Findlater*, 6 C. & Fin. 894; *Young* v. *Davis*, 7 H. & N. 760; *M'Kinnon* v. *Penson*, 9 Exch. 609; *Stevens* v. *Jeacocke*, 11 Q. B. 731; *Doe dem Murray* v. *Bridges*, 1 B. & Ad. 847; and that the indictment might be sustained when a civil action would not be: *Harris* v. *Baker*, before cited.

A. WILSON, J., delivered the judgment of the court.

This rule was argued as if had been moved for both defendants, and perhaps, it was intended it should have been; but it appears to have been moved by Mr. McCarthy for the the county of Simcoe only; the rule should, therefore, be amended, and made, as it has been treated by all parties, a joint rule.

The question of notice, we think, must be decided against the county of Simcoe, because the statute applies only to "acts done," while the present complaint is for mere acts of omission on the part of the defendants: *Newton* v. *Ellis*, 5 El. & Bl. 115.

The misdirection referred to must fail also: we do not see how the jury could have been told that the defendants had only to keep the bridge in the same state of repair as it was when they received it from the crown. It might, while it was in the custody of the crown, have been in a very insufficient condition; and although there might have been no remedy to compel its reparation, or for injuries sustained in consequence of its being out of repair, because the crown cannot be prosecuted, that is no reason why the defendants should be exempted from liablity, when no such reason protects them from suit or prosecution. We do not say that a public officer, even the Commissioner of Public Works, might not have been liable to be indicted, if he had been provided with funds specially to repair the bridge, and had wilfully neglected to do so, with full knowledge of its dangerous condition; but however this may be, it is not at all applicable to the case of the defendants.

This bridge was kept by the defendants as a safe and convenient thoroughfare. The public were invited to use it: they could not tell whether the bridge had been built by the crown or by the defendants, or who else it was built by; and they could not be required to discriminate as to the relative safety of one bridge over another, because one was built by the crown and the other by the municipality; nor are their rights to be measured, nor their means of redress for injuries sustained to be affected, by the con-

sideration that the defendants were not the builders of the bridge.

If a private person erect a bridge at his own expense, and present it to the county, and the county continue to use it, they must maintain it thereafter in like manner as if they had built it themselves; and the same rule applies to works of this kind put up, and afterwards transferred by the crown. A person who continues a nuisance is just as liable as the person who originally created it. We have examined every case which has been cited, and many additional cases; but we find nothing to countenance the doctrine contended for by the defendants. The case of *Henly* v. *The Mayor of Lynne*, (5 Bing. 91, 3 B. & Ad. 77, and 1 B. N. C. 222,) is the nearest to it.

If the accident had occurred the very day after the transfer to the defendants, or within so short a time after the transfer that the defendants had not had a reasonable time to ascertain or discover the actual condition or deficiencies of the bridge, there would have been much reason in holding the defendants not liable for such an accident as this; because it would not be reasonable to charge them with accountability for the imperfections of a work which they had no share in constructing, and which they had no voice in accepting, but which was cast upon them by the mere force of law.

But no such excuse can be urged here, for more than five years had elapsed since the bridge devolved upon the defendants, and they must now be answerable for its condition, so far as the facts of this case are concerned, (we do not allude to really latent defects,) just in the same manner and to the same extent as if they had put it up by and under their own immediate authority.

The principal question, however, was whether the defendants are civilly responsible in the action or not? They contend they are not, because sec. 337, which declares other municipal corporations to be both civilly and criminally responsible does not include counties; and because sec. 341 provides, that "all powers, duties, and liabilities, which at any time before the 1st of January, 1850, belonged to the magistrates in Quarter Sessions, with respect to any particular road or bridge in a county, and not conferred or imposed upon any other municipal corporation, shall belong to the council of the county; or, in case the road or bridge lies in two or more counties, to the councils of such counties," &c.

That sec. 337 does not mean counties we do not consider of much importance; for we are of opinion, for the reasons hereafter given and upon the authority of decided cases, that there is a clear common law liability resting upon the defendants both civilly and criminally.

And as to sec. 341, we do not think it can be understood as *limiting* the responsibility of counties to just the same measure of responsibility to which the magistrates in Quarter Sessions were subjected. This is not the purpose of the statute: it is a transfer clause, or clause of conveyance from the magistrates to the county councils of all the powers, &c., and on the completion of such transfer, the councils are to hold the property operated upon in like manner, and subject to the general duties and liabilities applicable to their other property.

This section, too, it will be seen, applies only to such *particular* roads and bridges as were not conferred or imposed on any other municipal corporation; but it is difficult to say what roads or bridges can be within it, when secs. 315, 327, 336 and 339 had already conferred or imposed every road and bridge upon some municipality, excepting those government works which were specially exempted by sec. 316; and there was not the slightest evidence that this bridge was within the terms of sec. 341; nor could there have been, because it was a government bridge, preserved to the crown by sec. 314, and specially vested in the defendants by operation of this section and of the other statutory provisions before mentioned. Sec. 341 was inserted, we presume, *ex abundanti cautela*, and not because there was any case or special property upon which it could really operate.

By the acts of Canada, (ch. 28, secs. 74, 75, ch. 85, secs. 4, 5,) and by the act of Upper Canada, (ch. 54 sec. 316,) when a proclamation is issued by the Governor declaring the bridge to be no longer under the control of the Commissioner of Public Works, it comes by operation of these positive enactments "under the control of the Municipal authorities of the locality and of the road officers thereof, in like manner with other public roads and bridges, and [the statute provides that it] shall be maintained and kept in repair under the same provisions of law which are hereby declared to extend to such road or bridge." And by sec. 327 of the Municipal act it is provided, among other things, "that, a bridge wholly or partly between two counties, the councils of such municipalities shall have joint jurisdiction over it."

As to the roads, highways and bridges, which a county has jurisdiction over, it may exercise the following powers:

By sec. 218 it may close them up.

By sec. 321 it may stop up, alter, widen, divert, establish and open them.

By sec. 331, sub-sec. 1, it may open, make, preserve, improve, stop up and pull down bridges or other public communications, &c., &c., and it may enter upon, break up, take or use any land in any way necessary or convenient for such purposes, subject to the restrictions in the act.

By sub-sec. 2 it may raise money by toll on any bridge, road or other work, to defray the expense of making or repairing the same.

By sub-sec. 5 it may sell the timber, stone, sand or gravel, on any allowance or appropriation for a public road.

By sub-sec 6 it may sell the original road allowance, or any road legally stopped up or altered.

By sub-sec. 7 it may grant to road or bridge companies permission to commence or proceed with roads or bridges.

By sub-sec. 8 it may take stock in, or lend money to any such company.

By sub-sec. 9 it may grant the tolls to any one in consideration of planking, gravelling or macadamizing a road, or building a bridge.

By sub-sec. 339 it has exclusive jurisdiction over all its roads and bridges, and by sec. 340 roads or bridges it assumes by by-law it must plank, gravel, macadamise or build.

These powers are again nearly recapitulated in sec. 342.

In *Henly* v. *The Mayor of Lynne* it was held, that the corporation, taking land by a charter subject to the repairs of a pier wall, were liable to damages for non-repair of the wall. The Chief Justice in that case said: "In my opinion, any one who is appointed to discharge a public duty, and receives a compensation, in whatever shape, whether from the Crown or otherwise, is constituted a public officer * * and if by any act of negligence, or any abuse of office, any individual sustains an injury, that individual is entitled to redress in a civil action."

In *Ohrby* v *The Ryde Commissioners*, where the statute directed the commissioners, from time to time, to place such fences and posts on the sides of the footways of the streets under their management as should be necessary for the protection of passengers; and it was held they were liable at the suit of a passenger who had been injured from the want of a fence, although they were acting gratuitously, and although it did not appear they had funds, or that they were empowered to raise them; because the statute made it their duty to fence the footway, and left them no discretion to do so or not, as *they* thought fit.

It was on this right of discretion that *Harris* v. *Baker* and *Matcalfe* v. *Hetherington* were decided.

In *Gibbs* v. *The Trustees of the Liverpool Docks*, 3 H. & N. 176, in which the defendants, who were incorporated by statute, were sued for not cleansing the docks, by reason of which the plaintiff's vessel stuck in the mud and damaged the cargo, the court said, "We think if the trustees had a discretion to let the danger continue, they ought, as soon as they knew of it, to have closed the dock to the public; they had no right, with a knowledge of its dangerous condition, to keep it open to invite the vessel into peril, which they knew it must encounter, by continuing to hold out to the public that any ship, on payment of the tolls, might enter and navigate the dock * * * and for the consequences of this breach of duty we think they are responsible in an action.

We refer, also, to *Clothier* v. *Webster*, 12 C. B. N. S. 790, and to the decisions which have been pronounced in our own courts.

If, in these cases, in England, the defendants were held responsible, we cannot doubt for a moment, with the almost unlimited powers which counties in general possess, and which these defendants, jointly exercising their jurisdiction, also possess, that it was their duty to maintain this bridge in a fit and proper condition for the public benefit, and that they are responsible to the plaintiff for the injury which he has sustained by their negligence, although the property and freehold in the bridge are not vested in them, and although it is not declared by the statute expressly that they shall be liable to any one sustaining damage; for this is the liability which is imposed upon them by the common law.

We think the rule on all points should be discharged.

Rule discharged.*

* In this case leave has been granted to appeal.

COMMON LAW CHAMBERS.

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

GALLAGHER v. BATHIE.

Division Courts—Sec. 61 *D. C. Act* (*C. S. U. C. cap.* 19—*Certiorari.*

After the hearing of a cause has been proceeded with before the judge, though no jury is sworn, it is too late to serve a writ of *certiorari*.

A cause was heard and evidence taken therein, and judgment was postponed to be given at the clerk's office on a future day. Afterwards, and before that day, a writ of *certiorari* was served.

Held, too late, and a *procedendo* was awarded.

[Chambers, January 26th, 1866.]

The plaintiff, in three actions in the Seventh Division Court in the county of Simcoe against the same defendant, obtained a summons calling on the defendant Edward Bathie to shew cause why the order made on his application in the said suits, for writs of *certiorari* to remove them into the Court of Queen's Bench, and the writs of *certiorari* issued on the said order, should not be severally quashed and set aside, and writs of *procedendo* awarded on the grounds,

1. That the trials of the said causes in the Division Court had been proceeded with and the evidence on both sides taken by the judge of the Division Court, before the order was made, or the writs of *certiorari* served.

2. That the writs of *certiorari* were not, nor was either of them, served upon the judge of the Division Court until he had given his judgment and decision upon the causes or plaints respectively.

3. That the writs of *certiorari* were issued and served, contrary to the statute in that behalf. Or why one or more of the writs of *certiorari* should not be quashed and set aside, and a writ or writs of *procedendo* awarded on all or any of the grounds above mentioned, and on the further ground that the defendant Edward Bothie had not entered an appearance in this court in the causes removed thereto, although the said writs of *certiorari* and the returns thereto had been duly filed. Or why such other order should not be made therein, and as to the costs of the application as to the judge might seem proper.

It was shewn that the judge of the County Court of the county of Simcoe, as judge of the said Division Court, had returned the several writs of *cereiorari*. That before the coming of the said writs to him, the said causes were at the said court heard and tried, and after the hearing thereof, and of the evidence on behalf of the plaintiff and of Edward Bathie (John Bathie not having been served and not appearing), judgment was postponed, pursuant to the statute, to be given en the 20th November, at the office of the clerk of the court in Mulmur. That afterwards, and before the coming of the writs, that is to say, on the 13th November, the judgment in the causes was given in writing, and mailed to the address of the clerk of the court, according to the rules of practice in that behalf, to be read to the parties. That the clerk entered the same in the Procedure Book of the court, as follows:

"20th November, 1865. Judgment for plaintiff..... $74 19
"And costs to be paid in thirty days... 9 81

(The claim in one suit.)..... $83 99"

That the said writs were served on the deputy judge of the County Court (before whom the said causes were tried, and who gave judgment therein), on the 18th November, 1865.

The claim in another suit was $60 66, and in the third, $84 75.

McCarthy shewed cause.

The writs were issued under the Division Courts' Act, see. 61.

The general rule is that a *certiorari* is in time, if served at any time before the verdict is pronounced.

The trials in these cases cannot be said to have been completed until the judgments were recorded in the Procedure Book, and before then the writs were delivered to the judge.

The Statute 43 Eliz., cap. 5, does not apply, because there is no jury in these cases, and the statute must be strictly construed. *Smith* v. *Sterling*, 3 Dow. 609; *Godley* v. *Marsden*, 6 Bing. 433. Nor does it curtail the right to issue it under the 61st section of the act at any time according to the language of that clause. All proceedings taken after service of the writ are void. *Mungean* v. *Whatley*, 20 L. J. (Ex.) 108; 6 Exch. 88.

Osler, for plaintiff.

These writs having been delivered on the 18th November, when the evidence had been taken and the written judgments prepared and sent to the clerk of the court some days before that day, were too late, and although the statute of Elizabeth may not in words apply, because there was no jury, yet the cases are within the intent and spirit of the statute, and the practice prevails in such cases. *Black* v. *Wesley*, 8 U. C. L. J. 277. He referred also to Arch. Pr. 10 Ed. 1265, 1313; and sections 61, 64, 86 and 106 of the Division Courts Act; *Cox* v. *Harrt*, 9 Burr. 759.

Reg. v. *Scaife*, 21 L. J. M. C. 221, shews that a Judge in Chambers has power to send back proceedings removed by *certiorari* from an inferior court.

ADAM WILSON, J.—It is laid down that a *certiorari* does not in general lie to remove proceedings in an inferior court after judgment, and perhaps cannot do so at all, unless for the purpose of granting execution. *Kemp* v. *Baine*, 8 Jur. 619.

It will not be granted after judgment by default signed and damages assessed, *Walker* v. *Cann*, 1 D. & R. 769, but it will be granted after judgment by default, but before the enquiry of damages has been had. *Godley* v. *Marsden*, 6 Bing. 433.

The 61st section of the Division Courts' Act provides, that "in case the debt or damages claimed in any suit brought in a Division Court amounts to $40 and upwards, and in case it appears to the judges of the Superior Courts of Common Law that the case is a fit one to be tried in one of the superior courts, and in case any judge grants leave for that purpose, such suit may by writ of *certiorari* be removed from the Division Court into either of the said superior courts, upon such terms as to payment of costs or other terms, as the judge making the order thinks fit.

Under this section, I think the legislature intended by the language used, that the suit should be removed before trial; the expressions "debt or damages claimed, and the case being a fit one "to be tried," shew that the demand must be yet in claim, that is, not adjudicated upon and yet to be tried, in order to be removed.

In these cases they had been tried and were reserved for consideration under sec. 106 of the act. The written judgments were prepared and sent to the clerk before the writs were delivered.

The plaintiff might, before the judgment was actually pronounced, have taken a nonsuit under sec. 84 of the act; and for that, and perhaps for other purposes, the judgment pronounced by the judge is put on the same footing as the verdict of the jury when there is one, but I think it is not for the purpose of removal of causes under section 61 of the act.

If it were otherwise, great and unnecessary trouble might be occasioned to the judge and to the parties and witnesses concerned, and a party might hold his writ in reserve until he had discovered what the judges opinion was, and withhold the same, if the opinion was favourable to him, and enforce it if it was adverse. Nothing could be more mischievous to the administration of speedy justice in such popular and benefical courts. The case of *Black* v. *Wesley*, shews this effect should be given to the statute of Eliz., if it can be properly done, and I think it may, under the fair exposition of section 61 of the Division Court Act.

I have not referred to that part of the summons relating to the delay in entering an appearance, because from the circumstances detailed, time would have been given for that purpose if the writs could have been maintained; neither have I referred to the merits of the case, which are so fully explained, and which shew apparently a case of some hardship against the defendant; but the facts were heard by, and I have no doubt strenuously urged before the judge who tried the suits, and yet after time for reflection he considered the plaintiff entitled to recover.

I think the order must go, and with costs, to be paid by the defendant Edward Bathie.

Procedendo awarded.

INSOLVENCY CASES.

(*Before* S. J. JONES, Esq., *Judge County Court, Brant.*)

Re WILLIAM PERRY, an Insolvent.

Held that under sec. 9, sub-secs. 1, 3 and 6 of the Insolvency Act of 1864, a *consent to a discharge* of an insolvent is operative even *without an assignment*, provided the insolvent makes and files an affidavit that he has no estate or effects to assign. In this case the only notice given was the notice to discharge.

[Brantford, 23rd Oct., 1865, & 16th Jan., 1866.]

This case coming on this day on application for order for discharge of insolvent it appeared that the notice thereof had only been inserted in the *Canada Gazette* five times. No one appeared to oppose the discharge. The matter was thereupon adjourned till the 15th January, 1866, in order to have the notice in *Gazette* properly published. The judge ordering that the same notice be published four times more with first notice of adjournment to 15th January, 1866.

On the 16th January, 1866, the case accordingly came on, on application for final order for discharge. The following papers were filed on behalf of applicant: a consent to a discharge, notices with affidavits of proper service and

publication, and an affidavit of the insolvent to the effect that he had no estate to assign, together with a schedule of his creditors.

Reference was made to Insolvent Act of 1864, sec. 9, sub-secs. 1, 3 and 6.

The day following judgment was given by

JONES, Co. J.—Under the 9th sec. of the Insolvent Act of 1864 a deed of composition and discharge may be executed by a specified proportion of the creditors which shall be binding on the others who do not so execute. But in this case however, there is no composition. The 3rd and 9th sub-secs refer to a *consent to a discharge* after an assignment. Here, it is true, there is no assignment, but as there is no estate to assign I think the consent would operate in the same manner as if an assignment had been made. I therefore make an order confirming the insolvent's discharge.

Order accordingly.

CORRESPONDENCE.

Attorneys' fees in Division Courts.

TO THE EDITORS OF THE LOCAL COURTS GAZETTE.

GENTLEMEN,—By answering the following question in the next number of your *Local Courts' Gazette*, you will much oblige several of your subscribers:—

A. sues B. in a Division Court, and at the hearing both parties are represented by attorneys. If an adjournment be asked for,—say by A.,—can the judge order him to pay to B. the costs of his (B.'s) attorney, or *vice versa?*

In two cases in the last Division Court at ———, where the parties were represented by attorneys, the judge of our county ordered the party asking for an adjournment to pay the other party the costs of his attorney. Is this course authorized by law?

Yours truly,

A SUBSCRIBER.

Beverley, Jan. 22, 1866.

[There is no authority for ordering the payment of any fees to counsel or attorneys in conducting suits in Division Courts. We think it probable our correspondent has mistaken the purport of the order referred to, or that it was a matter of arrangement between the parties.—EDS. L. C. G.]

Witness fees in Division Court—Attending court.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—Can a witness in a Division Court suit claim more than ten cents a mile and one half-dollar per day while attending court? An allowance of half a dollar per day while going to and returning from court in the same county would not be legal, I think. Rule 48 gives the judge the power to regulate witness fees, but in no case to exceed the scale in the schedule. See schedule No. 14, which says:—

Attendance per day *in court* . . . 2*s.* 6*d.*
Travelling expenses per mile one way, 0*s.* 6*d.*

CLERK D. C. Co. NORFOLK.

[We agree with our correspondent in his view of the matter.—EDS. L. C. G.]

Division Courts—Interlocutory Costs.

TO THE EDITORS OF THE LOCAL COURTS GAZETTE.

GENTLEMEN,—Is there any provision in the Division Courts Acts or rules by which the judge can order the costs of an interlocutory proceeding to be paid by either party? *e. g.*: In an order setting aside a judgment for irregularity, can a judge order the payment, by either party, of the costs of the order and the application therefor? or has he any control over such points?

2. Does such an order require a law stamp?

On the above points a diversity of opinion and practice prevails, and an answer in your valuable journal may promote uniformity, and will oblige

Your obdt. Servant,

R. H. MARSTON.

L'Original, Feb. 15, 1866.

[It seems to be the better opinion that, as a general rule, the judge has no authority to order the payment of interlocutory costs. Section 107 seems to give him this power incidentally in cases where a new trial is ordered; but we do not think he would have the power in the case by our correspondent. Every order requires a stamp.—EDS. L. C. G.]

Exemption Act, 23 Vic., cap. 25, sec. 4, sub-sec. 6—New points—Important to sheriffs.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—In reading your remarks in the January number of the *Law Journal*, on the exemptions of debtor's chattels from seizure under a *fi. fa.*, it occurred to me to ask the following questions, which you will, (should you deem them of sufficient importance) oblige by answering through the pages of your valuable Journal:—

1. Supposing that the debtor is only possessed of one chattel ordinarily used in his trade or occupation—say one horse—of *greater value* than $60, would the horse be liable to be sold by the sheriff, and the proceeds applied on the execution, or could the debtor claim $60 of his value.

In the case of *Davidson et al.* v. *Reynold-et al.*, Mr. Justice John Wilson, in delivering judgment, says, "We are of opinion that a horse ordinarily in a debtors occupation, of the value *of* $60 *or less*, &c., &c., is exempt &c., under the statute."

2. Is it the duty of the debtor to point out, and claim from the sheriff or his officer the goods that are exempt, or should they be left by the sheriff although no claim is made to them.

I am, Gentlemen,

Your obedient servant,

D.

Berlin, 24th Feb., 1866.

[The questions put by our correspondent are not free from difficulty, and must be answered without the aid of any decided case.

1. The part of the act to which our correspondent refers, exempts "goods and implements of, or chattels ordinarily used in the debtors occupation, *to the value* of sixty dollars." Strictly speaking, this might be read, tools, &c., *not exceeding the value* of sixty dollars. Now a horse exceeding sixty dollars in value, does not come under this description, and as it is in its nature indivisible, the difficulty arises as to the application of the act. The horse exceeding sixty dollars in value would certainly not be exempt from seizure, and not being exempt from seizure, of course might be legally sold by the sheriff. And the act makes no provision for the return of a portion of its proceeds to the debtor, where the proceeds exceed sixty dollars. In the absence of such a provision, we think, though not free from doubt, the whole proceeds would be applicable to the execution.

2. The articles specified are declared to be "*exempt* from seizure." And if there were only one article sixty dollars of the class exempt (*i.e.*, one horse of the value of $60) it would be the duty of the sheriff to refrain from seizing or selling that article. But where there are several (*i.e.*, several horses of the value of $60 each) we think it devolves upon the debtor to make a selection, and if he neglect or refuse to do so, upon proper notice from the sheriff, it would necessarily devolve on the sheriff to make the selection for him. —Eds. L. J.]

Registry Act—Affidavit of execution not on some part of instrument itself—Whether necessary.

To the Editors of the U. C. Law Journal.

Gentlemen,—The Registrar of this county refuses to receive for registration any instrument the affidavit of execution of which is written on the *last* sheet, provided there is *no portion* of the instrument itself written thereon. He contends that such is not "*made on the said instrument;*" that in some instruments there are as many as three unwritten sheets, any one of which *might* be detached from their fastenings without touching *the instrument.* Is he right in this view of the matter?

Yours truly,

Goderich. A Subscriber.

[The matter admits of argument, but we at dresent think that the affidavit is by the act required to be on some part of the instrument itself, and that annexing an affidavit does not seem to be sufficient under the wording of the statute.—Eds. L. J.]

REVIEW.

The Registry Act of 1865, (29 Vic. chap. 24), with Notes and Appendix, by Samuel George Wood, LL.B., of Osgoode Hall, Barrister-at-Law: Toronto, W. C. Chewett & Co., 1866.

We are in receipt of a copy of a most useful little book under the above title.

It commences with a preface "comprising a sketch of the history of the Registry Laws of Upper Canada, and some remarks upon the operation of the new Act," which bring us down to the present time, from the first Registry Act of 35 Geo. III., cap. 5. This is followed by an index of cases and of Statutes referred to in the notes. We then have the Act of 1865, with notes of decided cases on the subject in hand, and other matters of interest tending to elucidate doubtful points under the Act. These notes appear to be carefully prepared, and exhaust the cases which have been decided in this country on the subject of the Registry Acts, besides containing references to several English and Irish decisions. We give the following, being a note to section 64, as an example of the style.

"Registration is not notice under the Registry Acts of England and Ireland, nor was it in Upper Canada prior to Statute 13 & 14 Vic. cap. 63, sec. 8. (See *Street* v. *Commercial Bank*, 1 Grant, 169.)

"Registration is notice of the thing registered for the purpose of giving effect to any equity accruing from it, but it can be notice of any given instrument only to those who are reasonably led by the nature of the transaction in which they are engaged to examine the register with respect to it. *Boucher* v. *Smith*, 9 Grant 347.

"While the act declares that registration shall be notice, it does not provide that notice of an unregistered conveyance shall not affect a registered conveyance or judgment; and we must take it that the Legislature had knowledge of the doctrine of a Court of Equity on this head; and indeed they appear to have had it expressly under consideration, when they declared that registration should be notice. Per Vankoughnet, C., in *Bank of Montreal* v. *Baker*, 9 Grant 298.

"Registration of an instrument not required to be registered, does not create notice. (*Doe d. Kingston Building Society* v. *Rainsford*, 10 U. C. Q. B. 236; *Malcolm* v. *Charlesworth*, 1 Keen 63.)"

and again the following, which is the note to section 66:

"This section will produce an important change with respect to the rights and privileges of equitable mortgagees, whose rights, as heretofore recognized in the Court of Chancery, were specially preserved by the late Act; under which, in a case where a mortgage had been created by deposit of title deeds, and the borrower had signed a memorandum stating the sum loaned and times for re-payment, and agreeing to execute a writing to enable the lender to transfer or control the mortgages so deposited, it was held that the memorandum did not require registration to secure its priority over a subsequently registered incumbrance, See *Harrison* v. *Armour*, 11 Grant 303, and English cases there cited.

"In *Neve* v. *Pennell*, 33 L. J. Chy. 19, it was held that a memorandum not under seal, accompanying a deposit by way of equitable mortgage of deeds, requires registry.

"The latter clause of this section will not interfere with the docirine of tacking, in cases where the provisions of this act do not apply. See *Hyman* v. *Roots*, 10 Grant 340, and cases there cited"

In the appendix Mr. Wood gives us some very useful tables, evidently prepared with much labour and care.

1. A list of special deeds and documents of which the registration is necessary, in order to their validity, or to the priority of the rights of the parties, within the times within which registry is to be made, where the time is fixed by statute.

2. A list of documents which may be registered at the option of the parties.

3. A table of Miscellaneous Statutory Enactments relating to Registrars and Registration.

4. A Table of Fees payable to Registrars under sec. 68 of the Act. And with reference to this we may remark that it would have saved a world of trouble if the compiler of the Act had taken some such course, as that which Mr. Wood does, as a matter of more easy reference, for the purpose of showing the fees payable to Registrars—a part of the Act which is in a most unsatisfactory position at present, and which leads to innumerable petty annoyances, and even worse evils.

A "Postscript" is added, containing references to cases decided, and questions which had arisen during its progress through the press. Some of these questions we have already discussed, many others are open for discussion; for, as we have already said, the Act is not drawn up with that care that the importance of the subject required, or the time spent, or supposed to have been spent upon its compilation, might lead us to expect.

A very full Index completes the volume; and, in conclusion, we must say that the thanks of all concerned in the registration of titles, whether professional men, Registrars, or that multitudinous class that go by the misapplied name of "conveyancers," are due to Mr. Wood, for a very useful and complete manual on the law affecting the registration of titles in Upper Canada.

The material part of the work is got up, as usual, in Messrs. Chewett & Co.'s excellent style. The price in paper covers is one dollar, and in half calf one dollar and fifty-cents.

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

RICHARD SNELLING, of the City of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 3, 1866.)

CORONERS.

JAMES HUTTON, of Forest Village, Esquire, M D., to be an Associate Coroner for the County of Lambton. (Gazetted February 3, 1866.)

HENRY R. HANEY, of Fenwick, Esquire, M.D., to be an Associate Coroner for the County of Welland. (Gazetted February 3, 1866.)

THOMAS EYRES, of the Village of Millbrook, Esquire, to be an Associate Coroner for the United Counties of Northumberland and Durham. (Gazetted February 3, 1866.)

TO CORRESPONDENTS.

"A SUBSCRIBER"—"CLERK D C. Co. NORFOLK"—"R. H. MARSTON"—"D."—"A SUBSCRIBER"—Under "Correspondence."

"J. C." We shall answer your letter more fully next issue—at present we do not think the auditors of school section accounts can recover any compensation.

The rumour of the contemplated retirement of Dr. Lushington is revived. It is said that he will do so on the conclusion of the great case of the Banda and Kirwee Prize-money. Such a rumour has been sent about before, and, if repeated often enough, it is sure to be right at last. The probability of truth is greater than before, for the venerable judge was born so long ago as 1775, and has presided in the Admiralty Court since 1838. He is the oldest of the English Judges.