DIARY FOR SEPTEMBER.

1. SUN.. *14th Sunday after Trinity.*
8. SUN.. *15th Sunday after Trinity.*
15. SUN.. *16th Sunday after Trinity.*
21. Sat. .. *St. Matthew.*
22. SUN.. *17th Sunday after Trinity.*
29. SUN.. *18th Sunday after Trinity.*

CONTENTS.

The Local Courts'
AND
MUNICIPAL GAZETTE.

SEPTEMBER, 1872.

The Right Honourable Sir Barnes Peacock, late Chief Justice of the High Court of Calcutta, was appointed in June last a member of the Judicial Committee of the Privy Council, with a salary of £5.000 a year. Sir Jas. W. Colville, one of his colleagues on the Judicial Committee, is also a retired Chief Justice of the same Indian Court.

Mr. Baron Hughes, one of the judges of the Irish Exchequer, died last July. It is said that his successor will be the present Attorney-General for Ireland, the Right Honourable Richard Dowse, M.P.

In noticing the death of Matthew Davenport Hill, Q. C.,—the senior in the list of Queen's Counsel—the *Law Magazine* and the *Solicitors' Journal* advert to the fact, that in 1838 he won general respect and admiration by his gratuitous defence of twelve men, who had been condemned to transportation by a Canadian Court for political offences in Canada and who were brought to London on a writ of *habeas corpus*, obtained on the ground of an illegal conviction. He succeeded in getting the conviction quashed as to one half the number.

It has lately been held in the English Court of Bankruptcy, by one registrar sitting as chief judge in an appeal from another registrar, that a liquidation by arrangement cannot be sanctioned by the court in a case where the debtor was without assets. It appears from the judgment, that the point was not argued; no cases are referred to, and the matter is disposed of by a broad declaration that it was clear to the mind of the registrar that the Legislature never intended that a debtor, who has not a single farthing for his creditors, should avail himself of the provisions of the bankruptcy law. The practice is stigmatised as an ingenious device to revive a most obnoxious practice under the old law, that of white-washing, and ought to receive no countenance from the court: *Ex parte Ash*, 16 Sol. J. 574. The *Revue Critique* lately discussed this question under the Dominion

Statute, and came to an opposite conclusion. The law has been settled in this Province, in a case not cited in the *Revue* (*Re Thomas*, 15 Gr. 196) that the want of assets is no reason why the case should not fall within the scope of the Act.

A gift for life of consumable articles with a limitation over, in a testamentary instrument, is usually held to vest in the donee the absolute ownership. There have been conflicting decisions as to the effect of such a gift in the case of farm-stock. But lately the Master of the Rolls has held (in *Cockayne* v. *Harrison*, 20 W. R. 504) 8 C. L J. N. S. 219, that the subject of such a bequest being in the nature of stock-in-trade, only a life-interest passed as to so much of the stock as was of a consumable nature, and that the gift over was operative.

It has been held in Chambers by Mr. Justice Gwynne in *Jameson* v. *Kerr*, that goods may be replevied out of the hands of a guardian in Insolvency, notwithstanding the provisions of Con. Stat. U. C. cap. 29, sec. 2. This is an important decision. The same point has arisen in Nova Scotia, but has not yet been decided, so far as we have heard.

STAMP OBLITERATORS.

The Government of Ontario propose doing a good deed in the working of Division Courts, which we are glad to notice, especially as it chimes in with what we have always contended for, namely, that every convenience should be given to officers in performing their duties, and that they should not be taxed to provide, as they have been, not merely conveniences but even necessaries.

Those who are acquainted with the practical working of the Courts, know the difficulty of making headway with business during the sittings, when the Judge has to see stamps put on the papers and cancelled in his presence. They will therefore appreciate the act of the Attorney General in ordering obliterators for the use of clerks, thereby saving the time of judges, officers, suitors and witnesses. The County Judge of Simcoe was so impressed with the necessity of some such labor-saving and time-saving machine, that he got at his own expense some instruments for cancelling stamps, which, though rather roughly constructed, nevertheless answered the purpose, and were found of the greatest service.

"CAUSE OF ACTION"—WHERE IT ARISES.

Mr. Harrison in his commentary upon the 44th section of the Common Law Procedure Act (as Consolidated), remarks that much difficulty has arisen about the meaning of the words "Cause of action" contained in that section. The difficulty has, of late, been much increased by the various conflicting decisions of the English Courts upon the corresponding sections of their statute, *i.e.*, the 18th and 19th of the C. L. P. Act of 1852. The result of this conflict is briefly this: the English Common Pleas holds that the statute includes a case where the whole cause of action, technically speaking, has not arisen within the jurisdiction, but where such an act has been done on the part of the defendant, as in popular parlance, gives the plaintiff his cause of complaint. The Queen's Bench holds precisely the opposite of this, namely, that the *whole* cause of action and not merely the act or omission which *completes* the cause of action, must arise within the jurisdiction, in order that the language of the statute may be fully met. The Exchequer has occupied a somewhat intermediate position, and some of its decisions have been, so to speak, of an uncertain sound Thus *Fife* v. *Round*, 30 L. T. R. 291, is in accord with the holding of the Common Pleas, while the later case of *Sichel* v. *Borch*, 2 H. & C. 954, agrees with the view of the Queen's Bench—though it is to be observed that the court does not advert to its former contrary decision. In the last-reported case in the Exchequer, *Durham* v. *Spence*, L. R. 6 Exch. 46, a majority of the judges adopted the views of the Court of Common Pleas, as expounded in *Jackson* v. *Spittall*, L. R. 5 C. P. 542, and held that the "cause of action" referred merely to the act or omission constituting the violation of duty complained of, and creating the necessity for commencing the action. Kelly, C.B., strongly dissented and upheld the interpretation given of the words by the Queen's Bench. Subsequent to *Durham* v. *Spence*, the only other case reported is that of *Cherry* v. *Thompson*, (in the Queen's Bench) 26 L.T.N.S. 791, where all the judges—Cockburn, C.J., Blackburn, Lush and Quain, J.J.—unanimously affirm the construction put by their court upon the statute.

Thus the practice stands in about as great confusion as once obtained upon the question

of security for costs, in cases where foreigners within the jurisdiction were suing in the English Courts—a subject lately discussed in this journal. With colonial deference for English precedents, it will be rather a nice matter for our judges now to say what court or what practice they will follow. We have no reported decisions on the section in question, but the practice, as we understand, has always been in Ontario to hold that it must be shown that the whole cause of action arose within the Province. But suppose a case now to be brought before the judges in term—how would they decide? Follow the holding of the Queen's Bench, as has often been done in matters of practice, where the English Courts were at variance? (Per Robinson, C.J., in *Gill* v. *Hodgson*, 1 Prac. R. 381). Or, hold that the decisions of the Common Pleas, *plus* the later decisions of the Exchequer, outweigh those of the Bench? It seems to us that the true way out of the quandary is the eminently sensible course adopted by Mr. Justice Wilson, in *Hawkins* v. *Paterson*, 3 P. R. 264, where he says, "I am not prepared to adopt as a rule that we are to follow the decisions of the Queen's Bench, in England, more than those of the other courts. * * I think we should exercise our own judgment as to which is the best rule and practice to adopt, if there be a difference in the English Courts, and adopt that which will be the most convenient and suitable for ourselves, whether it shall be the decision of the one court or the other."

In that case the learned judge gave effect to the practice of the Courts of Common Pleas and Exchequer as against that of the Queen's Bench. In the present conflict we incline to think (if we may speak without presumption, where great masters of the law differ) that the practice of the Queen's Bench should be preferred to that of the other common law courts. As a matter of verbal interpretation, we think "cause of action" should be taken o mean the *whole* cause of action. Such has been the uniform meaning attributed to it when used in the English County Courts Act and in our Division Courts Act.

Again, to hold that provincial courts can entertain a suit against a foreigner where, for instance, only the breach of contract has taken place within the jurisdiction and he is not personally served, may give rise to very grave questions of what is clumsily called "private international law," in case the defendant has no assets within the province and it is sought to make him liable on the judgment so obtained in the forum of his domicile.

This is just one of those troublesome questions that can only be settled by a gradual course of decision. As it is merely a matter of practice, it is thereby excluded from being a subject of error or appeal, so that each court is left to independent action, and to do what seems right in its own eyes.

SELECTIONS.

Iowa has added herself to the list of States which have abolished capital punishment. In that State all crimes heretofore punishable with death shall, hereafter, be punished by imprisonment for life at hard labor in the State penitentiary, and the governor shall grant no pardons, except on recommendation of the general assembly.

The tendency of modern philanthropy is to make punishment for crime as easy as posible, in a physical point of view. Granting everything that may be said, in a general way, in favor of improved modes of punishing crimes we think that the danger is upon us of making the doom of criminals too easy, physically.

Death is the severest physical injury that can befall a human being, and it is only in the extremest cases that such a punishment should be inflicted at all. But we have been able to find no adequate reason for abandoning the custom of ages of putting one to death who wilfully and deliberately kills another. In such a case, at least, we believe in the strict *lex talionis*, the doctrine of "an eye for an eye," "a tooth for a tooth," a "life for a life," not to exact retribution (for that cannot be), but for the safety of society. Self-preservation is the first and strongest law of nature; and the professional criminal, at least, will run more chances of being imprisoned for life, than of being hung immediately on conviction. The laws specifying what crimes shall be punished by death, and regulating the execution of criminals condemned to death, may and ought to be, *modified* in many instances, but the total abolition of capital punishment is a dangerous experiment.—*Albany Law Journal.*

It has recently been decided in the Supreme Court of Main, that the following instrument is a negotiable promissory note, payable to bearer, for the amount named in it:

"Nobleboro', October 4, 1869. Nathaniel O. Winslow. By labor 16¼ days, @ $4 per day, $67. Good to bearer. Wm. Vannah."

MAGISTRATES, MUNICIPAL, INSOLVENCY & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

Where a debtor made an assignment to trustees for the benefit of his creditors, providing by the terms of the instrument that the benefits conferred by it should be confined to those creditors who should execute it within one year, or notify the trustees in writing of their assent to it; and where one creditor had been aware of the terms of the deed, and had neglected to sign it, but had notified one of the trustees of his assent; and where another creditor had not been aware of the deed, but had taken no proceedings hostile to it, and had given his assent to it when it came to his knowledge; and where another, though aware of the deed and its provisions, had neither executed it nor notified the trustees of his assent to it, but had never acted contrary, or taken proceedings hostile, to it:

Held, that they were entitled to come in and prove their claims equally with those creditors who had executed the deed in accordance with its terms, although they had allowed more than ten years to elapse.

Objection being made to the application being made by petition in Chambers, and not by a separate suit,

Held, that it was properly made in Chambers by petition in the original suit.

The Statute of Limitations being urged against the admission of the claims,

Held, that the relation of *trustee* and *cestui que trust* had been established between the assignees and the creditors who had acquiesced in the deed, as well as those who had actually executed it, and that therefore the statute was inoperative. There was also the additional reason, in two cases, that the statute had never begun to run, owing to the creditors' right of action having arisen after the debtor had absconded.—*Gunn* v. *Adams*, 8 L. J. N. S. 211.

CRIMINAL LAW—EVIDENCE.

A prosecutrix, in an indictment for an indecent assault amounting to an attempt at rape, if asked on cross-examination whether she has had connection with a person other than the prisoner, cannot be contradicted.—*Reg.* v. *Holmes*, L. R. 1 C. C. 334.

CRIMINAL LAW—LARCENY.

The prisoner, whose goods were in the hands of a bailiff under a warrant of execution, forcibly took the warrant from the bailiff, thinking to deprive him of his authority. *Held*, that the prisoner was not guilty of larceny, but of taking for a fraudulent purpose.—*Reg.* v. *Bailey*, L. R. 1 C. C. 347.

FORGERY—BILLS AND NOTES.

Indictment for forging an instrument being an I. O. U. for thirty-five pounds purporting to be signed by the prisoner and one W. The latter's name was forged. *Held*, that the instrument was an "undertaking for the payment of money" within 24 & 25 Vic. c. 92 s. 23.—*Reg.* v. *Chambers*, L. R. 1 C. C. 341.

INSOLVENCY.

1. The word "due" in the English Bankrupt Act means "presently payable."—*Ex parte Sturt; In re Pearcy*, L. R. 13 Eq. 309.

2. Under the English Bankrupt Act the holder of a note signed by two members of a firm, by the firm, and by other persons, was allowed to prove against, and receive dividends from, the estates of the said two partners and against the joint estate of the firm.—*Ex parte Honey; In re Jeffery*, L. R. 7 Ch. 178.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

BAILMENT—NEGLIGENCE.

The defendants received, as ordinary bailees, a dog to be carried on their road. The dog had on its neck, when delivered to the defendants, a collar, to which was attached a strap. The defendants secured the dog by the strap, and the dog slipped its collar, escaped, and was killed. *Held*, that securing the dog by the collar was the ordinary and proper way, and that the defendants were not guilty of negligence in fastening the dog by the strap suggested by the plaintiff, who delivered the dog without notice that the fastening was unsafe. Judgment for defendant.—*Richardson* v. *North Eastern Railway Co.*, L. R. 7 C. P. 75.

BILLS AND NOTES—STATUTE OF LIMITATION.

The maker of a note in 1846 indorsed the note with his name and the year 1866. *Held*, that the indorsement was a sufficient acknowledgment to take the note out of the statute of limitations.—*Bourdin* v. *Greenwood*, L. R. 13 Eq. 281.

CORPORATION, FOREIGN.

An American company had a place of business in England and was there sued, the writ being served on the head officer of the English branch, who was not the head officer of the American corporation in the United States. *Held*, that the company could be sued in Eng-

land; and that said writ was properly served. *Newby* v. *Colt's Patent Firearms Co.*, L. R. 7 Q. B. 293; s. c.

GOOD-WILL.

The defendant, who had sold the good-will of a business to the plaintiff, began business again, giving out that the same was a continuation of his former business, and soliciting his former customers for orders. *Held*, that the defendant was entitled to publish any advertisement or circular to the world at large announcing that he was carrying on said business, but was not entitled by private letter, or by a visit, or by his agent, to solicit a customer of the old firm to transfer his custom to him, the new firm.—*Labouchere* v. *Dawson*, L. R. 13 Eq. 322.

NEGLIGENCE—CONTRADICTORY EVIDENCE—NONSUIT.

The defendant having charge of the plaintiff's colt, took it to a blacksmith's shop to be shod for the first time, and having tied it there went out. The colt pulling back, threw itself, and received injuries of which it died. The plaintiff sued the defendant for negligence in so tying the colt instead of having it held while being shod; and several witnesses were of opinion that what the defendant had done was improper, while others thought he had adopted the proper plan.

Held, not a case in which there should be a nonsuit, on the ground that the evidence was consistent either with the existence or non-existence of negligence; but that the question was for the jury. *Cotton* v. *Wood*, 8 C. B. N. S. 568, and *Jackson* v. *Hyde*, 28 U. C. R. 294, distinguished. —*Henderson* v. *Barnes*, 32 U. C. R. 176.

[In giving judgment, the court used the following language:—"In the present case, it can hardly be said that any question of skill or science arises. It is, properly speaking, a mere matter of opinion, and any juror could, after hearing the facts, equally well judge of the propriety of the acts complained of, as any witness called to pass his opinion as to them. Affirmatively, there was abundance of testimony of negligence, in the opinion of the plaintiff's witnesses. Can we say that it is not evidence of negligence to take a colt to a blacksmith's shop to be shod for the first time, to tie him there by the neck, and to leave it so tied, with no person to look after the animal or watch it, and being so left it gets injured, and, as alleged, from the colt being so tied and unattended? Witnesses may be called and testify that they would have done just what the defendant did, and that they could see no negligence; but it is obvious there are various circumstances to be considered in cases of this nature; for instance, much depends upon the temper and character of the horse; what would be considered a proper course with one horse, might be a very negligent way of treating another."]

NEGLIGENCE.

Defendant, in pursuance of a contract, laid down a gas-pipe from the main to a metre in the plaintiff's shop. Gas escaped from a defect existing in the pipe when laid, and the servant of a gas-fitter employed by the plaintiff went into the shop to find out the cause, carrying a lighted candle. The jury found that this was negligence on the servant's part. The escaped gas exploded and damaged the shop. *Held*, that the defendant was liable, and was not exonerated by the negligence of said servant.—*Burrows* v. *March Gas and Coke Co.*, L. R. 7 Ex. (Ex. Ch.) 96; s. c. L. R. 5 Ex. 67.

RAILWAY.

A railway company gave the plaintiff notice that it would require his leasehold premises, and subsequently entered into possession and paid for the same. *Held*, that the plaintiff was entitled to a decree that the company should accept an assignment of the lease and engage to indemnify the plaintiff against the rent and the covenants in the lease.—*Harding* v. *Metropolitan Railway Co.*, L. R. 7 Ch. 154.

SLANDER.

Action for slander in imputing adultery to the plaintiff whereby she was injured in her character and reputation, and became alienated from and deprived of the cohabitation of her husband, and lost and was deprived of the companionship and ceased to receive the hospitality of divers friends. On demurrer, *held*, that the alleged loss of hospitality was sufficient to sustain the declaration, and was such a consequence as might reasonably and naturally be expected to follow the use of such slanderous words. Also, that the real damage was to the wife, and would sustain an action by husband and wife. — *Davies* v. *Solomon*, L. R. 7 Q. B. 112.

WILL.

Testator being tenant of a farm from year to year, bequeathed his farming stock, consisting of consumable articles, to his wife during the term of her widowhood, and then over.

Held, that the gift was made for the purpose of enabling her to carry on the testator's business of a farmer, and that she was entitled to an interest in the stock during her widowhood only, the ordinary rule as to *res quæ usu consumuntur* not applying.—*Cockayne* v. *Harrison*, 26 L. T. N.S. 385; 8 L. J. N.S. 215.

2. A testator appointed A. and the testator's "friend" B. executors of his will, and gave each a legacy of £1000 "as a remembrance." B. never acted as executor. *Held*, that B. was entitled to the legacy without proving the will. —*Bubb* v. *Yetverton*, L. R. 13 Eq. 131.

CANADA REPORTS.

ONTARIO.

COMMON PLEAS.

PALMER v. MCLENNAN.

Account stated—Evidence of—Promissory Note—Stamps.

Held, that an instrument in this form, "Good to Mr. Palmer for $850 on demand," was not a promissory note, and so requiring a stamp, but that (GWYNNE, J., dissenting), in the absence of any explanation of the circumstances under which it was given, it was *prima facie* evidence to go to a jury of an account stated.

[22 C. P., 257.]

This was an action against the defendants, as executors of Duncan McLennan, executor of Donald Campbell. The declaration was for money payable to defendants, as executors to plaintiff; for money lent by plaintiff to Donald Campbell; money paid; money received by D. Campbell, for plaintiff; interest; and for money found to be due from D. Campbell to plaintiff, on accounts stated between them.

Pleas, never indebted, payment by D. Campbell, and payment by D. McLennan.

The case was tried at Ottawa, before A. Richards, Q. C., sitting for the Chief Justice.

The plaintiff produced the following document, admitted, to be signed by Donald Campbell:

"Good to Mr Palmer, for eight hundred and fifty dollars, on demand. 10th November, 1866.

D. CAMPBELL."

No other evidence was offered.

For defendant it was objected that this document was a promissory note, and required a stamp: 2. That there was no evidence of an account stated, or of any previous dealing between the parties: 3. That it was not an account stated between plaintiff and defendants, there being no privity between them.

A verdict was entered for plaintiff, with leave to defendants to move to enter a nonsuit.

In Michaelmas term last *Harrison*, Q. C., obtained a rule on the leave reserved, to which *S. Richards*, Q. C., shewed cause, citing *Horne* v. *Redfearn*, 4 B. N. C. 433; *Sibree* v. *Tripp*, 15 M. & W. 23; *Tyke* v. *Cosford*, 14 C. P. 64.

Harrison, Q. C., contra, cited *Toms* v. *Sills*, 29 U. C. 497; *Ellis* v. *Mason*, 7 Dowl, 598; *Brooks* v. *Elkins*, 2 M. & W. 74; *Wheatley* v. *Williams*, 1 M. & W. 533; *Green* v. *Davis*, 4 B & C 235; *Walker* v. *Roberts*, C. & M. 590; *Ritchie* v. *Prout*, 16 C. P. 426; *Byles* Bills (ed. 1856), 11.

HAGARTY, C. J.—The case presented at the trial was certainly not free from suspicion. The memorandum is dated November, 1866. The action is brought in July, 1871, nearly five years after, and against a second set of executors. The first question to be considered is the plaintiff's right to recover by the simple production of this instrument. It is either an admission of an existing debt to support an account stated, or it is a promissory note. If the latter, the objection as to the want of a stamp must prevail.

"In order to constitute an account stated, there must be a statement of some certain amount of money being due, which must be made either to the party himself or to some agent of his"—per Parke, B., in *Hughes* v. *Thorpe*, 5 M. & W. 667.

There is no doubt that in the paper in evidence there is a statement of a specific amount, and the document declares that it is "good to plaintiff for that amount, on demand."

It is not easy to find any legal definition of the word "good." It is not so specific as an "I. O. U.," which seems to have acquired a definite meaning as an admission of a debt. My brother Wilson somewhat discusses the point in *Tyke* v. *Cosford*, 14 C. P. 68. He says, "The words are, 'good to T. T. (the plaintiff) to the amount of $300, to be paid to him.' This seems to be an express declaration or acknowledgment of debt, for whatever 'good' may mean, 'to be paid,' must surely mean something. Suppose 'good' had not been there at all, but the instrument had been merely, 'the amount of $300 to be paid to T. T.,' it can scarcely be doubted that this would have been as strong and as direct an acknowledgment as could well have been made of a debt against the person making it. He thinks this the same as "I. O. T. T. $300." He adds, "A plain I. O. U. so much money, is evidence of an account stated, but with the words 'to be paid' it becomes a promissory note," referring to *Brooks* v. *Elkins*, 2 M. & W. 74; *Waithman* v. *Elsee*, 1 C. & K. 35. Again, he says he inclines to hold that the word "good" would have amounted to an acknowledgment sufficient to sustain an account stated, if payable in money. "As 'I owe you' is an acknowlegdment, 'due to you' should be so too, and it is so according to the cases in *Hump.* Rep. Why not also 'good to you?'"

My own strong impression is, that "good" in this instrument must be considered as equivalent to "due," and that no rational distinction can be drawn between them. If the document mean anything it must be, in substance, to import that it is to be considered as declaring to the plaintiff that on demand he is entitled to $850 from the person signing it; that it is to be good to him to enable him to demand such sum from the signer.

Brown v. *Gilman*, 13 Mass. 158, was a case of a memorandum signed, "Good for $126 on demand," signed by defendant. It was decided that a holder, who could not prove it was given to him, could not recover. No question is raised as to the effect of the word "good." Parker, C. J., says: "On a count for money lent, money had and received, &c., it would be conclusive evidence of so much due, unless the party signing it should prove it was given with a different intent. The present plaintiff must shew it was given to him."

In *Franklin* v. *March*, 6 New Hamp. 364, "Good to R. B. or order, for $30, borrowed money," was held a good promissory note. Parke, J., says "Good to R. C. or order," is equivalent to a "promise to pay R. C. or order."

I do not refer to these American cases for any other purpose than to shew the common understanding as to the term "good." It is, I think,

a word of well known popular meaning. "A bon" is, I presume, its equivalent, and is also a word very well known. In fact, I think, in this country, it is a word used instead of the "I. O U." of known old country significance. Assuming it to bear the same meaning as the common I. O. U., we have to consider its effect in evidence without any explanation of the circumstances under which it is given. By itself I think it sufficiently imports a consideration. The case cited of *Tyke* v. *Cosford* bears on that point, and is supported by *Davies* v. *Wilkinson*, 10 A. & E. 98.

There is no doubt that it is always open to defendant to rebut any inference to be raised by the production of such an instrument; and if in fact no debt be due or account stated, the document goes for nothing. In support of this view may be cited *Lemere* v. *Elliot*, 6 H. & N. 658, where the late Chief Baron says, "An I. O U. professes to be the result of an account stated in respect of a *debt due*, and it is important not to make fiction supply the place of truth and say that an account has been stated in respect of a debt where in reality there was none."

A late case in our Queen's Bench, *Toms* v *Sills*, 29 U. C. 498, is also in point. The evidence shewed there was no debt due. The plaintiff, as attorney for V., had a bill of costs against the defendant, who had been sued by V. He paid part of the bill, and wrote at the foot, "I will pay the above balance in a week." He owed nothing to his opponent's attorney, and on this evidence the Court, in appeal, properly held there could not be a recovery on an account stated. But in the absence of any contradictions or explanations of the circumstances under which it was given, I am of opinion that it is *primâ facie* evidence to go to a jury of an account stated and settled between the parties.

In *Fessenmayer* v. *Adcock*, 16 M. & W. 449, Parke, B., says, "In *Curtis* v. *Rickards*, 1 M. & Gr. 46, the production by the plaintiff of the I. O. U. was held *primâ facie* evidence that an account had been stated by the defendant with him, though no name was mentioned in the instrument, that is of a payee. I agree with that decision."

In *Lubbock* v. *Tribe*, 3 M. & W. 613, Lord Abinger says, "Where there is a promise to pay a sum of money as due from A. B., it is evidence of an account stated, which means this, that the simple promise, if it stand unexplained and uncontradicted, is evidence to go to a jury that the plaintiff claims that sum to be due, and that there are matters of account between the parties."

In *Porter* v. *Cooper*, 1 C. M. & R. 394 Parke, B., says, "If there is an admission of a sum of money being due, for which an action would lie, that will be evidence to go to a jury on the count for an account stated." Alderson, B., to same effect.

It remains to consider the objection as to the want of a stamp. Our Stamp Act gives us no definition of a promissory note, and is much more meagre in this respect than the Imperial Statutes. It merely declares that every promissory note, draft, or bill of exchange, shall require stamps. Sec. 3 does not help us further.

The English authorities seem to hold that an "I. O. U." simply does not require a stamp.

In *Melanotte* v. *Teasdale*, 13 M. & W. 216, Pollock, C B., says: "The doctrine that an I. O. U. simply does not require a stamp, has been so long established, and so many instruments have been drawn on the faith of it, that it must be considered settled law." In that case the addition of the words, "which I borrowed of M." (the deceased), was held to carry the case no further than a mere acknowledgement. There were also the words, "to pay her 5 per cent. till paid." He says these words were mere surplusage, and that the only agreement of which the paper was evidence, is an agreement to pay interest on the £45, which is not necessarily of the value of £20. This is to shew that it did not require an *agreement* stamp.

Byles on Bills (1866), 11: "If there be no words amoun ing to a promise, the instrument is merely evidence of a debt, and may be received as such between the original parties. Such is the common memorandum I. O. U."

Smith v *Smith*, 1 F. & F. 539.—On the authority of the last case cited, Byles, J., held the following not to require a stamp: "This is to certify that I owe £210 to A. B I promise to pay interest at five per cent," the promise only referring to the interest See also *Taylor* v. *Steele*, 16 M. & W. 665; *Bayley* on Bills (1849), and cases there collected, page 3.

In the case before us it is brought down to the point whether the introduction of the words "on demand" makes the instrument a note. I have examined a great many cases, and can find none exactly similar. If the words were "*to be paid* on demand," according to my brother Wilson's view, in *Tyke* v. *Cosford*, it becomes a promissory note. He adds, "the words 'to be paid' have some meaning, and that is that they create an express promise." He cites *Brooks* v. *Elkins*, 2 M. & W 74; *Waithman* v. *Elsee*, 1 C. & K. 35. The first of these cases was, "I. O. U. £20, to be paid on 22nd inst" The Court held it to be either a promissory note or an agreement for payment of money, and in either case it requires a stamp. The latter case is a *Nisi Prius* decision of Rolfe, B., and is to same effect. Are we then, in the absence of direct authority, to carry the decisions further, and hold the words "on demand" to import a promise to pay? The addition of the words, in the case before us, is mere surplusage, and has no effect on the operation of the instrument. An action would lie five minutes after its execution, without the aid of the words. A note specifying no time of payment is payable on demand.

In *Sibree* v. *Trip*, 15 M. & W. 23, the following was held not to be a note:—"Bristol, August 14, 1843. Mem.—Mr. S. has this day deposited with me £500, on the sale of £10,300 £3 per cent. Spanish, to be returned on demand." Signed by defendant. Pollock, C. B., says, "It is difficult to lay down a rule which shall be applicable to all cases, but it seems to me that a promissory note, whether referred to in the Statute of Anne or in the text books, means something which the parties *intend* to be a promissory note. We cannot suppose the Legislature intended to prevent parties from making written contracts relating to the payment of money, other than bills and notes."

In *Taylor* v. *Steele* (1847), 16 M. & W. 667, Parke, B., says: "The more recent cases say

that implication is not enough, but there must be a positive engagement to pay * * I agree that an actual promise is not necessary, if there are words in the instrument from which a promise to pay can be collected." In that case the Court held that an instrument to this effect, after the date, "Received from A. B the sum of £170, for value received, for which I promise to pay her at the rate of £5 per cent. from above date," was *not* a promisory note.

Story on Notes, sec. 14: "There must be an express promise upon the face of the instrument to pay the money; a mere promise implied by law upon an acknowledged indebtment will not be sufficient."

I am wholly disinclined to carry the law any further than it has heretofore gone, and I therefore hold that this is not a promissory note requiring a stamp.

GWYNNE, J.—If this were a case wholly of the first impression I should be disposed to hold, as it appears would be held in some of the Courts in the United States, that the instrument produced in evidence here is a promissory note The words "Good to Mr. Palmer for $850 on demand," seems to me to convey a declaration by the person signing, that the instrument should be of the worth or value to Mr. Palmer of the sum named on demand, and to import a promise to pay, and so to make good the declaration in the only way it could be effectually made good; but I agree that, upon the strength of the English decisions in respect of the well-known instruments called I. O. U.'s, I am concluded from so holding, and so from giving that effect to the instrument which its tenor leads me to think the parties thereto contemplated it should have Being so concluded, I find a great difficulty in holding that this instrument upon its face, without further evidence, imports (as an "I. O. U $850 on demand," delivered to Mr. Palmer, or "due to Mr. Palmer $850 on demand," plainly would *express*) a distinct unqualified absolute admission of a debt due by the party signing it.

The expression is not to be found in any of our Reports or Text-Books, nor in any Dictionary of Law Terms, nor yet in any Dictionary of the English Language. It occurs in *Tyke* v. *Cosford* (14 C. P. 64), in connection with the words "to be paid to him," which were held to involve a promise to pay; but I have been unable to find any authority to the effect that the words "*good to A. B.*" for a sum of money on demand, have in England any recognition as a term of legal science having a defined meaning attached to them. Left to the guidance of my own judgment, unaided by authority, I am bound to say that I cannot see in such an expression any such distinct, unqualified admission of a debt due from the party signing to the party named in the document, as is indispensably necessary to render it admissible as evidence of an account stated. To my mind it conveys no more an admission of an original liability than it does an admission of money lent, or of money had and received, so as to render it admissible under those counts; but I apprehend there is no doubt that it affords no evidence whatever of money lent. Upon the whole I have been unable to bring my mind to concur in holding, without more evidence of the circumstances under which it was given, that it is evidence of an account stated; and I think, as the plaintiff, who is the only person upon this record who may reasonably be supposed capable of supplying the evidence, has abstained from offering any, of the circumstances under which it was given, and consented to a nonsuit being entered, if the mere production of the document was insufficient to entitle him to recover, that a nonsuit should be entered, unless he desires a new trial to enable him to supply the required evidence.

GALT, J., concurred with HAGARTY, C J.

Rule discharged.

HARMAN v. CLARKSON.

Insolvency—Innkeeper not a trader.

Held, reversing the judgment of the County Court, that an inn-keeper is not a trader within the meaning of the Insolvent Act of 1869.

[22 C. P. 291.]

Appeal from the County Court of the County of Peel, in an interpleader issue.

The appellant was execution creditor to one Atchison, an inn-keeper, who, after execution issued, made an assignment to the respondent, defendant in the issue, and claimant of the goods seized.

The Judge of the County Court held that Atchison was a trader within the Insolvent Act of 1869, and that his assignment was entitled to prevail against the execution.

The ground of appeal was that an inn-keeper was not a trader within the meaning of the above Act, and that his assignment could not therefore prevail against the execution in question.

George Harman, for the appeal, contended that an inn-keeper was not a trader within the meaning of the Insolvent Act; that the definition of a trader was one who bought and sold, while an inn-keeper could not be said to buy and sell, as he only bought for a particular object, namely to spend in his house, and that a great portion of his gains arose from the use of his rooms, the attendance of his servants, &c; and in the cases decided upon the Imperial Statute, 21 Jas. I., ch. 19, in which a trader was defined to be one "seeking to gain his living by buying and selling," an inn-keeper was expressly held not to be a trader within the meaning of that Act. Referring to the judgment of the County Court Judge, he contended that our Statute, 7 Vic. ch. 10, in which an inn-keeper is mentioned as coming under the definition trader, "within the meaning of that Act," not being now in force, could not consequently be relied on to explain the meaning of the word, nor could our Courts be influenced by the decisions of the Courts in the Province of Quebec, whose decisions were based upon a different system of jurisprudence, namely, the French code. He cited the following cases: *Crip* v. *Pratt*, Cro. Car. 549; *Newton* v. *Trigg*, 3 Mod. 329; *Saunderson* v. *Rowles*, 4 Burr 2065; *Willett* v. *Thomas*, 2 Chitty 657; *Buscall* v. *Hogg*, 3 Wil. 146; *Putnam* v. *Vaughan*, 1 T. R. 572.

Lash, contra. In all the English cases evidence was given of the particular nature of the business carried on, and each case was decided on its own merits. There is nothing here to shew what Atchison's business was: he may have been a trader. Our Act, 7 Vic. ch. 10, and the Imperial Act, 12 & 13 Vic. ch. 106 sec. 65,

both include inn-keeper in the word "trader." The Insolvent Act of 1869 should receive a more liberal construction than the Act of James, as that Act was penal in its nature. In *Bagwell* v. *Hamilton*, 10 U. C. L. J. 305, the Judge referred to 7 Vic. ch. 10, for a definition of the word trader. An inn-keeper buys and sells food, fodder for cattle, liquors, &c, and in some cases deals very largely with wholesale and retail merchants, and should be held to be a trader.

HAGARTY, C. J.—The sole question presented by this appeal is, whether an "inn-keeper" is a "trader" within the operation of the Insolvent Act of 1869

This Act professes to assimilate the Bankruptcy and Insolvency Laws of the different Provinces, and its first section declares that "This Act shall apply to traders only," giving no definition or explanation of that term.

The Act of 1864, sec 2, declares, "This Act shall apply in Lower Canada to traders only, and in Upper Canada to all persons, whether traders or non-traders." In sec 3 sub-secs. 2 and 3, provisions are made as to traders not meeting commercial engagements. Sec. 12 sub-sec. 5, declares that all the provisions in the Act respecting traders, shall be held to apply equally to unincorporated trading companies and co-partnerships

The Amending Act, 1865, sec. 3, makes a further provision respecting a trader's permitting an execution to remain unsatisfied, &c.

No definition is given of the word. The Bankrupt Act of 1843, 7 Vic. ch. 10, made liable to its provisions all persons being merchants, or using the trade of merchandize, bankers, brokers, persons insuring ships or other vessels, &c., builders, carpenters, shipwrights, keepers of inns, taverns, hotels, coffee houses, millers, &c., and all persons who, either for themselves or as agents or factors for others, seek their living by buying or selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders within the scope and meaning of this Act. This Act, originally limited to two years, was continued from time to time, and finally was allowed to expire about the year 18—.

An Insolvent Court was established, 8 Vic. ch. 48, but containing nothing bearing on this question: Consol. Stat. U. C., ch. 18. See also Consol. Stat. U. C. ch. 26, for relief of insolvent debtors.

The various Imperial Statutes are set out in Cook's Bankrupt Law, No. I. The Act 34 & 35 Hen. VIII. ch. 4, does not describe bankrupts beyond "divers persons craftily obtaining into their hands great substance of other men's goods, suddenly fleeing to parts unknown."

13 Eliz. ch. 7, declares who is to be deemed a bankrupt: "Any merchant or other person using or exercising the trade of merchandize by way of bargaining, exchange, rechange, bartry, chevisance, or otherwise, in gross or in retail, seeking his or her trade or living by buying or selling."

1 Jac. I. ch. 15, reciting that "frauds and deceits, as new diseases, daily increase," repeats the definition, with slight verbal alterations, substituting "persons" for "merchants."

21 Jac. I., ch. 19, (still lamenting the increase of fraud), adds to the definition, "the trade or profession of a scrivener, receiving other men's moneys or estates into his trust or custody."

13 & 14 Car. II. ch. 24, exempts certain persons putting stock into companies from the Bankrupt Laws.

10 Ann ch. 15, repeals the description of a bankrupt in that statute of James.

5 Geo. II. ch. 30, sec. 30, makes persons dealing as "bankers, brokers and factors," liable to be bankrupts.

4 Geo. III. ch. 33, speaks of "merchants, bankers, brokers, factors, scriveners, and traders," as liable to Bankrupt Laws.

45 Geo. III. ch. 124, repeats the same description,

So the law seems to have remained till the 6 Geo. IV. ch. 16, by which, amongst many others, "victuallers, keepers of inns, taverns, hotels or coffee houses," shall be deemed traders liable to become bankrupts.

Down to the passing of this Act (1825), it seems clear that an inn-keeper, simply as such, was not a trader within the meaning of the statutes.

In *Smith* v. *Scott* (9 Bing. 16) (1832), Tindal, C. J., says: "The question turns on the construction of the late Bankrupt Act, which for the first time has rendered subject to bankrupt law the vocation of "victualler, keepers of inns, taverns, hotels, or coffee houses" See also *Gibson* v. *King* (10 M. & W. 667).

Saunderson v. *Rowles* (4 Bur 2067) is a decision of Lord Mansfield, that a victualler was not within the Act He says: "We are all clear that this man is not within these laws, upon the authority of the determined case of an innkeeper, and also upon the reason of the thing." These reasons are fully set out. "It is not such a contract as is made amongst merchants and shopkeepers, or other dealers, in the ordinary course of trade or commerce."

It seems perfectly clear that under the term "trader," unassisted by statutable interpretation, an inn keeper, as such, is not subject to the bankrupt laws.

The learned Judge of the Court below considered that as the 7 Vic. ch. 10, defined the expression "trader," and declared that innkeepers should be considered traders within the scope and meaning of that Act, that we might consider this a Legislative declaration on the point. I am unable to accede to this view.

The Act in question was allowed to expire, and our Legislature for some years abandoned the policy of the bankrupt laws. In 1864 it passed a law, applying its principles only in Lower Canada, and to all persons, traders, or non-traders in this Province. Then the existing law of 1869 declares expressly that it shall apply to "traders only."

I do not see what right we have to give this word any larger meaning than it has in itself, or to include within its meaning the numerous classes of persons declared by a long expired, temporary Act, to be within its scope and meaning.

If the 6 Geo. had been allowed to expire in England, or had been repealed, and after some years a new statute had reverted to the already cited definition of 13 Eliz. ch 7, I am of opinion that it would have been impossible to apply the Act to the classes embraced by the repealed

Act. If our expired Act absolutely made all the persons therein specified "traders," they would be so for all purposes other (I presume) beside those of bankruptcy. But it only makes an inn-keeper, as I understand it, a trader "within the scope and meaning of the Act." Our Legislature, I consider, have advisedly used a special term, "trader," without in any way enlarging its meaning. Whoever is included in the term "trader," standing in its unexplained sense, is within the Insolvent Law. No one else can be, as it seems to be. Therefore, on the express decisions in the English Courts, down to the 6 Geo. IV. ch 16, when the inn-keepers first came under the Bankrupt Law, I think we are bound to allow this appeal.

An inn-keeper may, of course, be shewn to be within the law by some trading carried on apart from the mere position of an inn-keeper; but, simply *quatenus* inn-keeper, he was held not to be within the law.

I have referred to the authorities mentioned in the decision below. Popham on the Insolvent Law p. 18, states: "In the Province of Quebec, there is a wider signification given to the meaning of the word, as regards its application to the Insolvent Law. The word "trader" is there held to embrace (here follow many classes): "Hotels, tavern, eating-house, and boarding-keepers," referring to *Patterson* v. *Walsh* (Robertson's Digest 49), *McRoberts* v. *Scott*, (*Ib*). The first case is a decision in the year 1819, and decides that a tavern-keeper is a trader and dealer, and his note to a merchant, payable to his order, may be transferred by a blank endorsement, it is a commercial note. So in *McRoberts* v. *Scott*, in 1821. I have examined all the cases referred to in the book, as far as I can find them. They all seem to hold merely that such persons are to be governed by commercial law, and do not refer to Insolvent or Bankrupt Acts. For instance, to shew that "auctioneers" are traders, *Pozer* v. *Clapham* (Stuart's Appeal Cases, 122,) is cited; an action brought by co-partners in trade against a merchant to recover money overpaid to him on a sale: *Per curiam*, "This is clearly a commercial matter, and consequently the proof must be weighed, according to the rules of evidence, by the law of England. It refers to a decision of 1809, that the transactions of tradesmen and artisans, in the way of their trade, are to be considered as commercial matters, and recourse must be had to the English laws of evidence, under 10th sec., Ord. 15, Geo. III. ch. 2.

I can find no decision of a Lower Canada Court on this Insolvent Act. There may be such, no doubt. In Ontario I see no rule for our guidance, but the statute law already referred to,

GWYNNE, J.—The Act appears to be defective in not having a clause defining the meaning of the term "traders" as used in the Act, and giving to it a more extended application than in its ordinary acceptation it has. There are interpretation clauses (142 & 143) defining the meaning to be attached to divers words used in the Act; but the term "traders" is not one of them. In the absence of a statutory declaration of the description of persons intended to be comprehended in the term, we must construe it according to its ordinary acceptation. It was at a very early period decided, in *Swift* v. *Eyres*, Cro. Car. 546, and *Newton* v. *Trigg*, 3 Mod. 329, that an inn-keeper, *qua* inn-keeper, was not a trader within the statutes relating to bankrupts, unless so declared to be by those statutes. Ever since these decisions it has been customary for the Legislature to declare, in the several Bankrupt Laws which have been enacted, who shall be deemed to be traders within their provisions. In the absence of such a declaration we must be governed by the old decisions, and hold that within the Insolvent Act of 1869, an inn-keeper, *qua* inn-keeper, is not a trader.

The judgment to be entered below will be judgment for the plaintiff therein, the now appellant, with costs.

GALT, J., concurred.

Appeal allowed, with costs.

NOTE.—*Richardson's Dictionary*: "*Trading* or *Trade*, a way or course, trodden and re-trodden, passed and re-passed, a way of course pursued or kept, a concourse or intercourse, a regular or habitual course or practice, employment, occupation in merchandize or commerce, intercourse for buying, selling or bartering, commerce, traffic."

Imperial Dictionary: "*Trader*, one engaged in trade or commerce, a dealer in buying, in selling or barter. *Trade* is chiefly used to denote the barter or purchase and sale of goods, wares and merchandize, either by wholesale or retail."

REG. EX REL. CLEMENT v. COUNTY OF WENTWORTH.

By-law in aid of railway—Ratepayers' assent not obtained —By-Law quashed.

A by-law of a County Council, in aid of a railway, to the extent of $20,000, which had not been submitted to the ratepayers under the Municipal Institutions Act of 1866, was on that ground quashed.

[22 C. P. 300.]

In Hilary term last *E. Osler* obtained a rule to quash By-law No 210, entitled "A by-law to aid the Hamilton and Lake Erie Railway Co., by a free grant or donation of debentures, by way of bonus, to the extent of $20,000," on certain terms, &c., on the ground that it was passed by the County Council without having been submitted to the vote, and without securing the assent of the ratepayers, and on other grounds.

It was admitted that the by-law had not been submitted to the ratepayers.

The by-law recited the desire of the council to aid the railway by a free grant or donation of debentures to the extent of $20,000, and that it would require $2,200 to be raised annually by special rate to pay the debentures and interest. The debentures were to be payable within twenty years, interest at six per cent., half yearly.

Burton, Q. C., now shewed cause, and urged, first, that on the construction of the Act, it was not necessary to submit any by-law granting a bonus to a railway to the ratepayers, irrespective of the amount.

Secondly, that, as this by-law was for an amount not exceeding $20,000, it need not be so submitted. He cited *Bramston* v. *Mayor of Colchester*, 6 E. & B. 246.

Osler, contra, referred to *McLean* v. *Cornwall*, 31 U. C. 314; *Jenkins* v. *Corporation of Elgin*, 21 C. P. 325; Dwarris' Statutes, 568.

HAGARTY, C. J.—Section 349 of the Municipal Act of 1866, declares that a municipality may pass by-laws, 1st For subscribing for shares or lending to or guaranteeing the payment of any sum of money borrowed by a railway corporation,

to which section 18 of 14 & 15 Vic. ch. 51, (Ry. Consol. Act), or sec. 75 to 78 of the Consolidated Railway Act have been, or may be made applicable by any special Act. 2nd. For endorsing or guaranteeing debentures of railway companies. 3rd. For issuing debentures therefor. 4th. For prescribing the manner and form of debentures, and how they are to be signed. "But no municipal corporation shall subscribe for stock or incur a debt or liability for the purposes aforesaid, unless the by-law, before the final passing thereof, shall receive the assent of the electors of the municipality in the manner provided by this Act."

By the Ontario Act 34 Vic. ch. 30, sec. 6, the following sub-section is added to section 349 of said Act, "For granting bonuses to any railway, and to any person or persons, or company, establishing and maintaining manufacturing establishments within the bounds of such municipality, and for issuing debentures payable at such time or times, and bearing or not bearing interest, as the municipality may think meet, for the purpose of raising money to meet such bonuses."

Mr. Burton urged that this new sub-section was to be added to section 349, and would properly come after and not before the proviso as to submitting the by-law to the ratepayers.

We are fully satisfied that this view cannot be sustained. The last Act gives a further power to pass by-laws under a new sub-section, which we think is to form one of the group of sub-sections, and that the added sub-section, equally with the original subsections, is to be followed by and subject to the general proviso as to the assent of the electors.

We cannot understand any other construction according to the rules for interpretation of statutes, and apart from anything to be learned from authority, the natural construction of writing would place the sub-section in such a position. "No debt shall be incurred for the purposes aforesaid, unless," &c. These purposes were set forth in the preceding sub-sections, and here it is declared, not that a new section shall be added to the Act, but that a new sub-section shall be added to the 349th section.

It is, we think, to form part of that section, to be one of the "purposes" of the section, and must be subject to the general proviso as to "the purposes" aforesaid.

We can hardly concur that the Legislature could have designed, while forbidding the council from taking stock in a railway company without the electors' consent, to permit the council to make a present to the company of any amount they might please, without such assent.

The charter of this company (33 Vic. ch. 36, sec. 7,) makes it lawful for any municipality to aid the company by loaning, guaranteeing, or giving money, by way of bonus, or other means; provided that no such aid, loan, bonus, or guarantee shall be given except after the passing of by-laws and their adoption by the ratepayers as provided by the Railway Act, and provided also that such by-law be made in conformity with the Municipal Acts.

Section 77, Consolidated Railway Act Canada ch. 66, provides that no municipality should subscribe for stock, or incur any debt or liability under this Act, except by by-laws passed with the assent of the electors, &c.

It is then argued that counties can pass any by-law for a debt not exceeding $20,000 without such assent.

Section 227 of the Municipal Act enacts that every by-law (except for drainage under section 282) for raising upon credit any money, not required for ordinary expenditure and not payable within the year, must receive the assent of the electors, except that in counties the councils may raise by by-law, without submitting the same to the electors, for contracting debts or loans, any sum or sums over and above the sums required for its ordinary expenditure, not exceeding in any one year $20,000.

The decision of the first question seems to involve the second also.

If, as we think, the council cannot incur a debt by by-law to grant a bonus to a railway except with the ratepayers' assent, it seems to follow that the rule must equally apply to a bonus below as above $20,000

The power to pledge the credit of the county to the extent of $20,000, without the electors' assent must, we think, be certainly confined to lawful purposes, and not to a grant to a railway company, which can only be done with such assent.

The case may be shortly summed up thus:

By-laws to raise money for all lawful purposes beyond the ordinary expenditure, and not payable within the year, must be submitted to ratepayers, except that counties may raise on credit money not exceeding $20,000 in any one year without such submission.

But *all* aid to railways must be with the assent of the ratepayers; therefore *no* money can be given without such assent without reference to the amount.

GWYNNE, J.—If it had not been for the earnest manner in which Mr. Burton, for whose opinion I entertain the greatest respect, pressed his view upon us, I should have thought the point to be free from doubt. The whole force of his argument was that the additional sub-section, added by 34 Vic. ch. 30 to sec. 349 of the Municipal Institutions Act of 1866, must be read after the proviso at the end of the 4th sub-section of section 349; from which he drew the conclusion that the additional sub-section was not subject to the proviso. Now there is nothing in the language or structure of the sub-section enacted by 34 Vic. ch. 30, which requires that it should be so placed as contended for. The words of the 34 Vic. are, "The following sub-section is added to section 349" of 29-30 Vic ch. 51, "For granting bonuses to any railway, &c." Now the 349th section, to which this new sub-section is added, is as follows: "The council of every township, county, city, town and incorporated village may pass by-laws." Then follow four sub-sections stating the respective purposes, all beginning with the word, "For," and stating the purpose. Now the additional sub-section enacted by 34 Vic., will read as well, whether placed before the first sub-section or between it and any of the others, as after the 4th; but assuming that, having regard to the time of its being passed being subsequent to the enacting of the original section, it should be inserted and read after the fourth, then its proper place ap-

pears to be before the proviso, thus keeping all the powers together. If it be read after the proviso, then the purpose declared in the new sub-section would seem to be unnaturally and ungrammatically separated from the words at the commencement of the 349th section, so as to require their mental repetition before the words "For granting bonuses, &c.," to make the latter enactment sensible.

But, correctly speaking, the words at the end of the 349th section, commencing, "But no Municipal Corporation shall," &c., are no more part of the fourth sub-section of the 349th section of the Act of 1866 than of any other of the sections Their true character is that of a proviso to limit a qualification upon,—or exception from,—the whole section. They are not a *part of*, but a qualification *upon*, the section. When then the Act 34 Vic. declares that "the following sub-section shall be added to section 349," the subsection so added becomes *part* of the section, subject to all *its* incidents; it is inseparably annexed to a section which is subject to a proviso, and being so annexed, must be subject to the proviso, to which its principal, and that of which it is a part, is subject. The by-law, therefore, here passed, for granting a bonus to a railway, must, to be operative, receive the assent of the electors in the manner required by the Municipal Institutions Act of 1866.

GALT, J., concurred.

Rule absolute to quash by-law, with costs.

INSOLVENCY CASES.

(*Reported for the* CANADA LAW JOURNAL *by* T. LANGTON, M.A., *Student-at-Law.*)

GUNN v. ADAMS.

Assignment for the benefit of creditors—Composition deed—Time within which creditors may come in under the deed—Effect of creditors neglecting to sign within the prescribed time—Accession by assent and acquiescence—Statute of Limitations—Practice.

Where a debtor made an assignment to trustees for the benefit of his creditors, providing by the terms of the instrument that the benefits conferred by it should be confined to those creditors who should execute it within one year, or notify the trustees in writing of their assent to it; and where one creditor had been aware of the terms of the deed, and had neglected to sign it, but had notified one of the trustees of his assent; and where another creditor had not been aware of the deed, but had taken no proceedings hostile to it, and had given his assent to it when it came to his knowledge; and where another, though aware of the deed and its provisions, had neither executed it nor notified the trustees of his assent to it, but had never acted contrary, or taken proceedings hostile, to it.

Held, that they were entitled to come in and prove their claims equally with those creditors who had executed the deed in accordance with its terms, although they had allowed more than ten years to elapse.

Objection being made to the application being made by petition in Chambers, and not by a separate suit.

Held, that it was properly made in Chambers by petition in the original suit.

The Statute of Limitations being urged against the admission of the claims.

Held, that the relation of *trustee* and *cestui que trust* had been established between the assignees and the creditors who had acquiesced in the deed, as well as those who had actually executed it, and that therefore the statute was inoperative. There was also the additional reason in two cases that the statute had never begun to run owing to the creditors' right of action having arisen after the debtor had absconded.

[Chancery Chambers, April 16th., 1872.—*Mr. Taylor.*]

This suit was brought for the purpose of carrying into execution, under the decree of the Court, the trusts of a deed of composition and discharge and an assignment made in Nov., 1859, by one Pomeroy of all his estate and effects to the defendants, the trustees, for the benefit of his creditors generally. A decree was pronounced in June, 1871, referring it to the Master to inquire who were the creditors of Pomeroy, whose debts were provided for by the deed, and directing a division of what remained, after payment of costs, rateably among the creditors of Pomeroy, who should have become parties to the deed within one year from its date or in writing notified the trustees of their intention to become parties. Shortly after making this deed Pomeroy absconded.

Two of the creditors, whose claims had been rejected by the Master in consequence of their not having complied with the terms of the deed in February, 1872, presented their petitions to be allowed to come in, and prove their claims in the Master's office. The petitioner Hardy at the time had been aware of an assignment having been made, but not of the terms of the deed. Within a year, however, he had assented to it, and gave a notice to one of the trustees, though whether in writing or not was doubtful, but he had never complied strictly with its terms. The petitioner Johnson, living in an out of the way place, and taking in no newspaper, had never heard of the deed, nor seen the published notice of it until he had filed his claim in the Master's office under the decree, and he then gave his assent He had never taken proceedings to enforce his claim, nor in any way acted contrary to the provisions of the deed.

W. G. P. Cassels, for the creditors who had acceded to the terms of the deed, opposed the application, and read affidavits as to the registration of the deed, and publication of notice of it with a view to proving a notice of its terms, which would be binding upon all creditors.

C. Moss, for the petitioners, said that it had been argued that the registration of the deed was notice of its provisions to all creditors, but this was not, he contended, the effect of the Registry laws. Their effect was to constitute registration notice to any one afterwards dealing with these lands, but that it was notice to all the world had never been held. The question of notice had been brought forward to shew that Johnson was debarred from proving his claim by the fact of an advertisement of the deed having been published eighty-two times in a newspaper. He thought it was necessary for such a contention to shew that the person against whom it was desired to prove notice, took in the particular newspaper. There was an analogy in the decisions as to dissolutions of partnerships. There an advertisement of the dissolution was not notice to any one not taking in the newspaper. *Boydell* v. *Drummond*, 11 East 142; *Leeson* v. *Holt*, 1 Stark 186; *Jenkins* v. *Blizard*, 1 Stark 420. And an advertisement in this country to constitute notice to all the world must be inserted in the *Gazette*. The facts of Johnson's not having been aware of the trusts of the deed until after decree pronounced of his never having acted contrary to his provisions, and of his willingness to assent to its terms when made known to him entitled him to share in the privileges of it. In the case of *Whitmore* v. *Turquand*, 1 Johns & Hem. 444, where the question was whether certain persons

had acceded to or gone against a deed. V. C. Page Wood said that persons who had done nothing either for or against a deed of this kind were entitled to come in and prove their claims, and this decision was affirmed upon appeal (3 DeGex. F. & J. 107). It was argued there that quiescence was not accession, and that the deed being expressly upon trust for those who acceded within three months the Court had no jurisdiction to divide the property among persons who had not brought themselves within this description. But Lord Chancellor Campbell said that "since the case of *Dunch* v. *Kent*, 1 Vern. 260, the doctrine of the court has been that the time limited by such a deed for the creditors to come in is not of the essence of the deed." Again, "the intention was that all creditors should come in and take a dividend, and that the debtor after his cession should be freed from his liability to these creditors. The deed was not for the benefit of any particular class of his creditors, but for all equally. The period of three calendar months is evidently introduced with a view to hasten the arrangement, and to authorize the trustees when that period has expired to make a dividend, which the subsequent claim of other creditors should not disturb. This is the understanding which has long prevailed on the subject; and with this understanding, the supposed hardship upon a creditor who executes the deed the last hour of the last day of the limited period does not exist; for if he thinks he is secure against any more creditors coming in afterwards, and feels confident that he must receive twenty shillings in the pound, and for this reason consents to execute the deed, he has a right only to blame himself for being ignorant of the law, which he ought to have known, as he ought to know the days of grace given for the payment of a bill of exchange.

W. G. P. Cassels objected that (1) Chambers was not the proper place for an application of this kind. There was no practice which could warrant the addition of parties in this way after a Master had refused to add them. In such a case they could only be added by filing a bill for that purpose. (2.) Both these claims were barred by the Statute of Limitations. Johnston's debt had accrued in 1859, and the petition and affidavit shewed no assent, he thought, to the deed, which could operate in taking it out of the statute. Johnston knew nothing of the deed, and he did not prosecute merely because he did not know of Pomeroy's having left any property so that there was nothing to prevent the statute from running (*Darby* on Limitations, 189). (3.) Both claims were also barred by *laches*. They had lain by now for ten years. In the cases of *Joseph* v. *Bostwick*, 7 Grant 332, and *Collins* v. *Reese*, 1 Coll. 675, it was true that the time had not been considered material, but this was on account of special circumstances, which were absent in this case. As to Hardy he had not actually executed the deed, but he had assented to it. This, he submitted, was insufficient. He must have done *some act* or must have been prejudiced and prevented from proceeding in some other way (*Snell* Principles of Equity, p. 71). And even supposing that Hardy was entitled, this fact could not save him from the statute. He must have been a party to the deed to render the statute inoperative.

Rae, for the defendants, and *Foster*, for the plaintiffs, submitted to what order the Court might make.

Moss, in reply: There was nothing to shew that the estate was not given to pay all claims in full, and in such case other creditors would not be allowed to take advantage of a mere error when the parties beneficially entitled to the residue made no objection. All the objections taken were technical (1) that the application was not made in the proper *forum*. But in all kindred cases it had been made in Chambers in *Schreiber* v. *Fraser*, 2 Ch. Ch. 271, and in *Andrew* v. *Maulson*, 1 Ch. Ch. 316; (2.) That the claims were barred by the Statute of Limitations. This, he submitted, was a question for the Master, and all that need be decided upon this application was whether the petitioners were entitled to prove their claims, not whether they had any claims or whether their claims were good. The claim of Hardy was one in the schedule. He had endorsed a note of Pomeroy's, it was not due when Pomeroy left the country. He paid it when due, and thus became a creditor of Pomeroy's and when his right of action accrued, Pomeroy was out of the country, and this fact apart from any trust in his favour under the deed was a bar to the Statute's running against him. So with Johnston's claim. He had become surety for Pomeroy in a bond to B S. Upon Pomeroy's absconding Johnston became liable to and having paid B S. he became a creditor of Pomeroy's. In addition to this he submitted that the trust deed had the effect of charging all Pomeroy's debts on his real estate, and preventing the statute from running against his creditors. (3.) As *laches* this objection could not apply to Hardy, to who had done every thing necessary except sign the deed, it was aimed at Johnston, and this very fact of his taking no steps independently, but acting as if he were a party to the deed was one of the grounds upon which he relied. If he had instituted proceedings for the recovery of his debt independently of the deed he might have disentitled himself to any benefit under it. (4.) As to the last objection that assent alone was not sufficient, the petitioners could only have shewn their assent more strongly by executing the deed, and *Whitmore* v. *Turquand* was so clear on this point that it was useless to discuss it.

MR. TAYLOR on this application allowed both petitioners to come in and prove their claims, holding (1) that it was not necessary to file a bill in order to obtain the relief sought from the fact that a suit was pending and the application was properly made in Chambers by petition in the suit. Hardy's case was a similar one to *Pyper* v. *McDonald*, 5 U. C. L. J. (O. S.) 162, where no bill was considered necessary. (2.) That the debts were not barred by the statute, for the absence of Pomeroy from the country during a period commencing before their right against him accrued and extending to the present time, had prevented the statute from beginning to run. Lastly, it was plain from *Whitmore* v. *Turquand*, 1 John & Hem. 444, and from the late case *Re Baber's Trusts*, L. R. 10 Eq. 554, that a party who had done nothing inconsistent with the deed was entitled to the benefits it secured, and in the latter case, too, the application had not been by bill.

On the 15th April last a similar petition was made by one C. Stead. His position differed materially, however, from that of the former petitioners, Hardy and Johnston, in this, that he was unable to plead ignorance of the deed, and his only ground for being admitted to share the benefits it conferred, was, that he had taken no proceeding hostile to it, but had thus virtually acquiesced in its provisions, and trusted to being paid his claim in due course of administration. Evidence was also put in by the creditors to shew that Stead's claim was a joint one against Pomeroy and one Mathews; that he had sued the estate of Matthews, and proved his claim against it, and therefore could not prove against the Pomeroy estate.

C. Moss contended that to disentitle a creditor *after any lapse of time* to come in, it must be shewn that he acted contrary to the deed, *e. g.* by proceeding against the estate at law. He cited *Joseph* v. *Bostwick*, 7 Grant 332, where a creditor was debarred from enjoying the benefit of such a deed by contesting it, and trying to establish a prior claim; and he submitted that where a party had merely neglected to comply with the strict terms of the deed no lapse of time would prevent him from coming in under it, even, it seemed, where dividends had been paid, on the terms, however, of not disturbing such dividends, *Re Baber's Trusts*, L R. 10 Eq. 554, was the latest authority, and there *Spottiswoode* v. *Stockdale*, 1 G. Cooper 102, was referred to, where Lord Eldon lays down what was now contended, and that too in a case where a proviso was inserted in the deed that it was *to be void unless executed by the creditors within eleven months*. No such provision was contained in this deed, and there was no time limited for notifying the trustees; the year limited referred, only to the execution of the deed. He contended also that it need not be shewn on this motion whether or not Stead had been paid out of the Matthews estate or whether his claim was barred. These were questions for the Master. All that need be decided upon this motion, was whether Stead was entitled to prove what he claimed.

Cassels argued that it should be shewn that he had a valid claim before putting the estate to the expense of investigating it, and that if a person having knowledge of the deed did not choose to ascertain whether he had a right under it, he should not be allowed to claim the benefit of it after allowing sixteen years to go by. Stead's evidence shewed that he had always thought the Matthew's estate was liable for his claim; he had a right to prove his full claim against it, as the note under which he was a creditor was joint, and it should be assumed that he had proved to the full extent of his right when he did prove against the Matthew's estate. He again urged the objection of the Statute of Limitations, and contended that it was properly urged now, for though it was for the Master to decide a disputed *amount*, yet it should be shewn on this application that the debt was a valid one.

Moss replied that the evidence shewed that he still claimed $5,000, and that as Stead was mentioned as a creditor in the schedule to the deed, he became a *cestui que trust*, and the Statute of Limitations ceased to affect him from the date of the assignment to the trustees and their acceptance of the trusts.

MR. TAYLOR, THE REFEREE IN CHAMBERS.—The petitioner claims to be a creditor of S. S. Pomeroy, and, as such, entitled to the benefit of an assignment, made by Pomeroy for the payment of his creditors, the trusts of which are being carried out under decree in this cause. His claim appears to have arisen thus: He held a note made in April, 1856, by Mrs. Matthews and Pomeroy, the consideration for the note being an alleged balance due to him for work done on the property of the Matthews' estate, of which Mrs. Matthews was executrix, and which Pomeroy, a son-in-law, managed as her agent. Upon this note he came in to prove in a suit in this court of *Morley* v. *Matthews*, where part of his claim was allowed and the remainder disallowed, on the ground, as I understand, that it was for work done, not for the estate, but upon a portion of it, to which Pomeroy was individually entitled. It is in respect of this balance that he now seeks to prove under the decree in this suit. The deed of trust for the benefit of creditors was made by Pomeroy as far back as November, 1859, and provided for its being executed by the creditors within twelve months Due public notice of the execution appears to have been given by the trustees, but it has never been executed by the petitioner, nor does he appear ever to have informed the trustees of his acquiescence in the deed His name appears in a schedule annexed to the deed as one of the creditors of Pomeroy.

The question is, whether he is now at this late date entitled to participate in the benefit of that deed. In considering the question of delay, it is important to remember that although the deed was made in 1859, no dividend has ever been declared under it. Indeed, the trustees seem to have taken no steps to distribute the estate, nor did any creditor take proceedings to enforce a distribution until the filing of the bill in this cause, in the spring of 1871. The petitioner it appears knew of the deed being executed by Pomeroy, probably soon after it was executed, though the exact time when he became aware of it does not appear. He says, however, that he did not know of the terms of the deed, or of creditors being required to become parties to, or execute the deed within a given time. He did not take any step to notify the trustees of his claim or of his intention to take the benefit of the deed, because, he says, he did not think anything would ever come to their hands for payment of the creditors, and that he would be paid his claim out of the Matthews' estate. It is not shewn that he has taken any proceedings hostile to the terms of the deed or inconsistent with them. He has simply lain by or done nothing. Now it is well settled that even although a deed, like the one in question, have limits, a time within which the creditors are to execute it, a creditor who has failed to do so is not necessarily excluded from the benefit of the trusts. *Dunch* v. *Kent*, 1 Vern. 260; *Spottiswoode* v. *Stockdale*, 1 G. Cooper, 102; *Rawworth* v. *Parker*, 2 K. & J. 163. It is sufficient if he has assented to it or acquiesced in, or acted under its provisions and complied with its terms (*Field* v. *Lord Donoghmore*, 1 Dr. & War. 227). No case seems to lay down what acts are necessary to constitute such assent, acquiescence or compliance. All the

cases except two, which I shall afterwards refer to, where creditors have been excluded, are cases where they have acted inconsistently with the terms of the deed; as by bringing an action against the debtor when the deed contained a clause releasing him, (*Field* v. *Lord Donoghmore*, 1 Dr. & War. 227;) or, as was said in one case, actively refusing to come in, and not retracting the refusal within the time limited, (*Johnson* v. *Kershaw*, 1 DeGex & Sm. 260); or setting up a title adverse to the deed, (*Watson* v. *Knight*, 19 Beav. 369); *Brandling* v. *Plummer*, 6 W. R. 117. The two cases I mentioned above are *Lane* v. *Husband*, 14 Sim. 656, where the deed containing a release, a creditor was not allowed to come in, the debtor having in the meantime died, on the ground that the debtor could not then obtain the benefit of the consideration upon which the deed was based. The other is *Gould* v. *Robertson*, 4 DeGex & Sm. 509, which is cited in *White* and *Tudor's* L. C. as an authority, and the only authority for the proposition that a creditor who, for a long time delays, will not be allowed to claim the benefit of the deed. In that case, however, there was a provision, not found in the present deed, that in case any creditor should not come in under the deed for six months, he should be peremptorily excluded from the benefit of it. V. C. Knight Bruce held that after six years, and a correspondence extending over all that period, upon the subject of the debt in question, the creditor was not entitled to share. In a later case—*Re Baber's trusts*, L. R. 10 Eq. 554—even such a provision has been held not to exclude a creditor.

The case of *Whitmore* v. *Turquand*, 1 J. & H. 444, was one where the question was considered in the case of a deed limiting a time for creditors to come in: a creditor who has neither assented to or dissented from the deed within the time, can afterwards be admitted to share together with those who acceded before the expiration of the stipulated time. There V. C. Page Wood allowed a creditor to come in after apparently six years, and his decree was afterwards affirmed on appeal (3 D. F. & J. 107). The latest case on this subject is *Re Baber's trusts*, L. R. 10 Eq. 554. There the deed contained the same provision as in *Gould* v. *Robertson*, excluding creditors who did not come in within a limited time, yet the creditor who all along knew of the existence of the deed and had corresponded with the trustees on the subject, but who was not aware of the provision rendering it necessary for him to execute within a limited time, was allowed to share a dividend even after nineteen years. The circumstance that he had corresponded with the trustees would not seem to have been material under *Whitmore* v. *Turquand*, and was not even alluded to by V. C. Malins in his judgment. It was contended, however, that leave to come in would not be given unless the creditor had clearly a debt for which he could prove. In other words, that if it could be shewn now that there was no debt, the court would at once refuse the application and not leave the question to be inquired into by the Master. Here it is said the debt is barred by the Statute of Limitations, having accrued due in 1856. The present case is in this way distinguished from the one formerly before me in this suit, where the debt accrued due only after the debtor had absconded.

I incline to think that the debt here is not barred. The assignment is complete, it having been acted upon by the trustees, and communicated to some, at least, of the creditors, they having executed the deed. Under such circumstances it could not be revoked by the settlor. *Cosser* v. *Radford*, 1 De Gex, J. and S., 585; *Acton* v. *Woodgate*, 2 Mil. and Keen, 495. In *McKinnon* v. *Stewart*, Lord Cranworth, in 1 Sim. N. S. 89, holding this, as clear as to creditors who have executed the deed, said, "Where they have not executed the deed, questions have often arisen how far by having been apprized of its execution, and so, perhaps, been induced to do or abstain from doing something which may affect their interests, they may not have acquired the rights of *cestuis que trust*. As all the creditors had, in that case, executed the deed, it was not necessary for him to decide the point. In Darby on Limitations, p. 190. *Simmonds* v. *Palles*, 2 J. & L. 409, 584; *Kirwan* v. *Daniels*, 5 Hare, 493; *Harland* v. *Binks*, 15 Q. B. 713, it is laid down that where creditors are parties to the assignment or it is communicated to them, the relation of trustee and *cestuis que trust* is constituted between the assignees and every one of the creditors, and so long as the property remains in the hands of the assignees, the right of any creditor to an account of the property and to payment out of it, is not barred by lapse of time.

Here the trustees are themselves beneficially interested, so the deed was not revocable. *Siggers* v. *Evans*, 5 Ell. & Bl. 367; *Lawrence* v. *Campbell*, 7 W. R. 170. That such a deed would create a good trust, for even those creditors to whom it was not communicated, and who were not parties to it, would seem to follow from *Griffiths* v. *Ricketts*, 7 Hare, 307, where Lord Langdale doubted whether such a trust having been communicated to some of the creditors, it could ever after satisfying them be revoked by the settlor, as to creditors to whom it had not been communicated. Besides, in the present case the settlor, by the deed declares that the schedule annexed contains the names of the creditors and the sums due them respectively, and then provides that other persons not mentioned in the schedule, being *bona fide* creditors of his, may come in and share and participate in the advantage to be derived from the trusts, rateably, with the other creditors. In this schedule the petitioner's name appears as a creditor, and I think the trust prevented the statute from running against his debt.

The hardship of allowing a creditor to come in now upon those who signed the deed within the limited time was urged here, as it has been in almost all the cases on this subject. The courts have always refused to give effect to the argument, and I cannot be any more attentive to it here. The order will declare the plaintiff entitled to participate in the benefit of the deed, and to come in and prove his claim under the decree. As this is, I understand, a test case brought forward by arrangement, and by the decision in which all similar cases are to be governed, both parties should have their costs out of the estate.

UNITED STATES REPORTS.

QUARTER SESSIONS, PHILADELPHIA.

COMMONWEALTH EX REL. DENNIS SHEA ET AL. *v.* WM. R. LEEDS, SHERIFF.

It is a conspiracy for two or more parties to act in concert in unlawful measures to enforce the Sunday Liquor Law. As by inducing a tavern-keeper to furnish beer on Sunday, by artifice or persuasion.

The mere admission of visitors into a tavern on Sunday is not an infraction of the Sunday Law, unless liquor is actually sold.

[Opinion by PAXSON, J., May 4, 1872.]

This case was heard upon *habeas corpus*. The relators, Dennis Shea, Frank N. Tully and Charles Hooltka, were charged with conspiracy by one G. A. Barthoulott. The latter keeps a drinking saloon, and it is alleged that the relators were engaged with others in a series of prosecutions against liquor dealers for violation of what is known as the Sunday Liquor Law. The facts of this case, as they appeared at the hearing upon the writ of *habeas corpus*, were substantially as follows:

On Sunday, the 24th of March last, the relators, Shea and Tully, called at the house of the prosecutor. The front door, window, and back entry were closed, but they obtained admission through a private entrance. There was no one in the bar-room when they entered but the prosecutor and one of his boarders. They asked the prosecutor for beer. He refused them, saying, "I don't sell beer on Sunday." After some persuasion, and being told by Shea that a friend of his (the prosecutor) had told them if they would call there they could get some beer, the prosecutor gave Shea and Tully two glasses of beer, repeating, however, his former declaration that he could not sell beer on Sunday. They then each took a piece of bread and wanted to pay for that; but this, also, was declined, and the prosecutor finally ordered them out of his place. Up to this point he did not know the relators.

On the 13th of April suit was commenced against Barthoulott, before Alderman Jennings, upon complaint of one David Evans, who styles himself the "Treasurer of the Tax-payers' Union," to recover the penalty of $50 imposed by section 2 of Act of February 26th, 1855, upon all persons who shall "sell, trade or barter any spirituous or malt liquors, wine or cider, on the first day of the week, commonly called Sunday." At the hearing Shea and Tully were examined as witnesses. The alderman dismissed the case. It further appeared that, after the above suit was commenced before the alderman, the said Evans stated to Mrs. Barthoulott, that if her husband would pay him $52.50, the suit would be discontinued and no criminal prosecution commenced.

There was also evidence that this was but one of a large number of suits before the same alderman for alleged violation of the law referred to. All of these suits were commenced upon complaint of the aforesaid David Evans, upon information furnished by these relators. In some of them there were offers to settle upon payment of penalty, with costs, to Mr Evans, and one at least of the defendants testified that he had so settled with Mr. Evans, the latter agreeing to abandon any criminal prosecution.

For the relators it was urged that they were engaged in a lawful object, to wit, the enforcement of the Sunday Liquor Law. If this was in truth their object, it was certainly a lawful one, and worthy of all commendation. Assuming such to have been their purpose, did they resort to any unlawful means to accomplish it? If they did, and if they acted in concert in the pursuance of a common design, there was a conspiracy. It was never intended that a man should violate the law in order to vindicate the law.

I am of the opinion that these relators, in their anxiety to procure evidence against Mr. Barthoulott, went a step too far. He was not engaged in any violation of law when they entered his place. They urged and persuaded him to furnish the beer; in fact they resorted to artifice and deception for that purpose. If any crime was committed, they were present aiding and abetting.

It was urged in extenuation of the conduct of the relators that their action was entirely in accordance with the practice in the detective service, not only of the police, but in other departments of the Government. This is not my understanding of the detective service. I have never known an instance of detectives deliberately procuring a man to commit a crime in order to lodge information against him. Such informers have been infamous from the time of Titus Oates.

We can have no sympathy with the men who sell liquor on Sunday in defiance of law. That there is a class of persons who habitually and insolently defy the law is a reproach to all who are charged with the prosecution of such offences. It is the duty of every good citizen to aid in the suppression of this Sunday traffic. The evils which flow from it are beyond all computation in dollars, and are felt and seen by every citizen. And I have no hesitation in saying, that few persons are more deeply interested in enforcing this law than those who are legitimately engaged in the liquor business. There is nothing which has done more to arouse an antagonism to the whole system than the spectacle witnessed every Sabbath, of drunken men reeling upon our streets.

I am aware of the difficulty of procuring testimony against this class of offenders It is believed, however, that with proper vigilance on the part of the police, and a hearty co-operation on the part of all good citizens, the selling of liquor on Sunday cannot be carried on to any great extent. Be this as it may, the resort to such means as the Commonwealth alleges were employed in this case is more than questionable. The law does not sanction it, and no solid moral reform will be promoted by it. It is quite possible that when the relators come to be heard in their defence, they may show an entirely different state of facts from those above stated. What I have said is based upon the facts as they now appear. The relators will have an ample opportunity of vindicating themselves before a jury, and for that purpose they are remanded.