DIARY FOR APRIL.

1. Fri .. Local School Supt. term of office begins.
3. SUN. *5th Sunday in Lent.*
4. Mon. County Court (York) Term begins.
7. Thur. Local Treasurers to return arrears of taxes due to County Treasurer.
9. Sat.. County Court Term ends.
10. SUN. *Palm Sunday.*
15. Fri.. *Good Friday.*
17. SUN. *Easter Sunday.*
18. Mon. *Easter Monday.*
23. Sat.. *St. George.*
24. SUN. *1st Sunday after Easter.*
25. Mon. *St. Mark.*
30. Sat... Articles, &c., to be left with Secretary Law Society, Last Day for L. C. to ret. occupied lands to Co, Tr Grammar and Common School Fund to be apportioned. Co. Treas to make up books and enter arrears.

The Local Courts'
AND
MUNICIPAL GAZETTE.

APRIL, 1870.

RECENT MUNICIPAL CASES.

The usual crop of applications to unseat municipal councillors of various kinds and degrees is now nearly gathered in. There have not been many, but those of any general interest which we propose to notice are the following:—

Reg. ex rel. Ford v. *McRae*, which appears in another column, speaks for itself. The others are not as yet reported.

Reg. ex rel. Gibb v. *White* was a novel application, to test the right of an Indian, as such, to hold office as a Municipal Councillor. Mr. White, whose election was sought to be set aside, is the son of a Chief of the Wyandott or Huron Indians of Anderdon. For many years past he has been engaged in trade, and is the owner in fee simple of patented lands (apart from the Indian Reserve, to a share of which he is also entitled) on which he lives, the value being beyond the necessary qualification. It was contested that as he was not an "enfranchised" Indian under the provisions of the statutes in that behalf he had not become entitled to all the rights and privileges of other British subjects. It was however held that the provisions as to enfranchisement related only to the property acquired from that set apart for the tribe, and that there is no law in existence in this country which prevents an Indian, who is otherwise qualified, from holding any municipal office. We cannot regret that such is the law, and we should have been much surprised to have found it otherwise. It would certainly be a reproach to us if a descendant of the former owners of the soil—our allies and friends in many a hard fight for this very country—one who, in the opinion of his white neighbors, is of sufficient intelligence and position so to command their respect as to be elected in preference to a white man—should be debarred from holding the position to which he has been chosen.

Amongst the papers filed on shewing cause was a copy of the treaty between Sir Wm. Johnson and the Huron Indians of Detroit, dated 18th July, 1764, the original of which is in the posssesion of Mr. White's brother, and was produced on the argument. It may be interesting to many of our readers to know its contents:—

"Articles of Peace, Friendship and Alliance, concluded by Sir William Johnson, Baronet, his Majesty's sole Agent and Superintendent of Indian Affairs for the Northern District of North America, and Colonel of the Six United Nations, &c., on behalf of his Britannic Majesty, with the Huron Indians of the Detroit.

ARTICLE 1ST.

Sir William Johnson, Bart., doth agree with the Hurons that a firm and absolute peace shall take place from the date of these presents between the English and them, and that they be admitted into the chain of Friendship and Alliance with his Britannic Majesty; to which end the Hurons are immediately to stop any attempts towards hostilities which might be meditated by any of their people, and they engage never to attempt disturbing the public tranquility hereafter, or to conceal such attempts of any others, but will use their utmost endeavours to preserve inviolable the peace they hereby enter into, and so hand it down to posterity.

ARTICLE 2ND.

That any English who may be prisoners or deserters, and any Negroes, Panis, or other slaves amongst the Hurons, who are British property, shall be delivered up within one month to the Cammandant of the Detroit, and that the Hurons use all possible endeavours to get those who are in the hands of the neighboring nations; engaging never to entertain any deserters, fugitives, or slaves, but should any such fly to them for protection, they are to deliver them up to the next commanding officer.

ARTICLE 3RD.

That they will not from henceforth maintain any friendship with any of his Majesty's enemies or maintain any intercourse with those who may promote war and troubles, but will oppose their

designs and treat them as common enemies; and that they will never listen to any idle stories of any White man or Indian who may spread false reports; but if any matter of grievance arises they are either through the channel of the Commandant of Detroit, or by personal application to Sir William Johnson, to represent their complaints.

ARTICLE 4TH.

That they acknowledge his Britannic Majesty's right to all the lands above their village, on both sides the Strait to Lake St. Clair, in as full and ample manner as the same was ever claimed or enjoyed by the French.

ARTICLE 5TH.

That they do to the utmost secure the Strait or Passage from Lake Erie to the Detroit, and do use their utmost endeavours to protect the navigation thereof, either with ships or boats, against any attempts of an enemy, as well as defend all persons who may have occasion to go or return from Detroit by land or water. And lastly, that they do now or at any other time, at the requisition of the Commandant of Detroit, or of any others his Majesty's officers, furnish such a number of their warriors as may appear necessary for the protection thereof or the annoyance of the enemy.

In consequence of the perfect agreement of the Hurons to the foregoing articles, Sir William Johnson doth, by virtue of the powers and authorities to him given by his Majesty, promise and declare that all hostilities on the part of his Majesty against the Hurons shall cease, that past offences shall be forgiven, and that the said Indians shall enjoy all their original rights and privileges, as also be indulged with a free, fair and open trade, agreeable to such regulations as his Majesty shall direct.

Given under my hand and seal at arms, at Niagara, the 18th day of July, 1764.

(Signed) WM. JOHNSON.

[L.S.]

The Chiefs of the Hurons have, in testimony of their accordation to the foregoing articles, subscribed the marks of their respective tribes, the whole being first clearly explained to them."

We cannot undertake to give with any correctness the names of the chiefs who signed the; treaty but, aftertheir names appear their *totems*, the first being a tortoise, the second something said by the learned to represent a beaver, the third is the figure of a man, and the fourth another tortoise. It would be somewhat strange that if, after the lapse of more than a century, Her Majesty should call upon the Hurons, in the words of treaty, "to furnish such a number of warriors as may be necessary for the protection [of her subjects] or the annoyance of the enemy." Yet such circumstance is not only not impossible, but has even been contemplated within the past few months.

In *Reg. ex rel. Flater* v. *Vanvelsor*, the objection taken by the relator was to the property qualification of the defendant, who qualified on real estate rated on the roll at $470. It appeared to have been sufficient unless reduced by the amount of a mortgage for a large sum, which however was shewn to have been paid before the election, or unless reduced by the amount due on a *fi. fa.* lands, which was in the sheriff's hands as a lien at the time of the election. It was contended that the defendant had goods sufficient to cover the claim, and therefore, as the goods must have been exhausted first, that there was in reality nothing which could be looked upon as sufficient to reduce the qualification. It was unnecessary to decide this point, though Mr. Dalton, before whom the case came, thought as long as the *fi. fa.* lands was in the sheriff's hands it must be considered as a lien or incumbrance for all purposes; but he raised the point whether liens or charges of that nature could be taken into account at all—and he held that as the statute said nothing about incumbrances, and that they could not be taken into consideration; in fact that if a person appeared to be rated on the roll for a sufficient amount, that alone, so far as his property was concerned, was all that the statute required, even though his equity of redemption or beneficial interest in such property might be worth less than nothing. The point, though nearly approached in another case, was not before, curiously enough, expressly decided.

Another case was that of *Reg. ex rel. McGouverin* v. *Lawler*, which, though not deciding any question of qualification or disqualification is new on a matter of procedure.

The defendants election was not complained of, but the relator sought to unseat him on the ground that he had been convicted of selling liquor without a license, and had thereby under 32 Vic. cap. 32, sec. 17 (Ontario), forfeited his office. It was however held, that the proceedings taken under sections 130 and 131 of the Municipal Act by summons, in the nature of a *quo warranto* summons, were not applicable to such a case as this, whatever

the common law remedy might be in such a case; and reference was also made to sections 120, 124 and 125, as affecting the case.

COUNTY JUDGES' CRIMINAL COURTS.

A writer in the *Law Times* draws attention to the remarks that appeared in this Journal in November last on this subject, and speaks fully of the jurisdiction and procedure of the Courts as we detailed them. This article, which will be found in another place, shews that the conductors of that leading periodical fully comprehend the importance of the "gigantic stride in legislation" in the "remarkable act" referred to. Whilst fully concurring in the views we expressed as to its advantages, they think it advisable to wait till the Act is tested by time and experience before following our example, though at the same time they are bound to admit that it proceeds in the direction of the inevitable tendency, which will eventually give prisoners the option, in England as well as here, of being tried with or without a jury.

EXTRAORDINARY TRIAL IN CHINA.

A friend in China has sent us a paper, the *Overland China Mail*, published at Hong Kong, containing a report of a case of much interest and instruction to all persons concerned in the administration of criminal justice. During the absence in England of Chief Justice Smale, of the Supreme Court in the British Colony of Hong Kong, four Chinamen, Shek Aluk, Shek Achung, Shek Chung Leen, and Shek Qui Leen, the master and three of the crew of a junk, where tried, convicted and sentenced to be hung, for the murder of one Mahoney a police officer. This conviction was obtained upon the evidence of three Chinamen, Tung Pak Foo, Lee Akwai, and Lum Asang, who deposed to their presence at the date of the murder; the two latter deposed that they saw the four men and Tung Fak Foo, all armed, land from the Yee Lee junk on Saiwan Bay for Sowkewan; and Tung Pak Foo deposed that he was present participating with the four in the murder, and that he saw the wound which caused the death inflicted by the first prisoner.

The final decision as to their execution was fortunately delayed beyond the usual period, owing to special local circumstances.

On the 4th of November, some respectable Chinese residents in the Colony, being entire strangers to the four convicted men, presented a petition in which they alleged reasons for suspecting that the testimony of all the three witnessess was false, and they made out so strong a case as to induce the Governor in Council to commute the sentence of all four prisoners to penal servitude for life.

Suspicions were subsequently aroused as to the truth of the statements of these witnesses, and they were indicted for perjury, and ultimately convicted before Chief Justice Smale, on the clearest evidence of guilt.

The learned Chief Justice after reciting the facts and shewing the justice of the conviction used the following language in sentencing the prisoners:—

"Lum Assang and Lee Akwai, you have each been convicted of perjury in swearing on the trial of Shek Aluk, Shek Achung, Shek Chung Leen, and Shek Qui Leen, that they were landed from Saiwan Bay to near Sowkewan, on the night of the 17th of April last. You knew that they were on a trial for a crime for which you believed that there lives would, on conviction, be forfeited. You have admitted your crime, and you have made reparation as far as you can in the evidence you have repeatedly given; I have considered the excuse made by each of you, that you have each been subjected to imprisonment in the Police Chop, and to the pressure of the influence of the authority of the Water Police there to coerce you into perjury.

The learned counsel, Mr. Hayllar, after your trial, speaking for his client, the prosecutor, whilst he ably argued that all this forms no answer to the charge against you—that it did not exonerate you from legal guilt—admitted in expressive terms that the coercion which, as he said, had been proved, formed a very strong case of coercion is addressed to me in mitigation of punishment, that it formed quite a terrorism affecting your minds when you gave your testimony.

Concurring in all that has been humanely put forward, I must as judge blame you. Although I do not greatly wonder that the vile influences which were exercised prevailed over you, and although others were certainly far greater criminals, I cannot exonerate you from criminality.

I pass on each of you the lightest sentence, which considering all the circumstances of this case I can award.

The sentence of the Court on you, Lum Assang, is that you be imprisoned and kept to hard labor for six calendar months.

The sentence of the Court on you, Lee Akwai, is that you be imprisoned and kept to hard labor for six calendar months.

You, Tung Pak Foo, were defended by counsel who took every possible point and urged every possible topic in your favor. You are without excuse; no influence appears to have been exercised over you, and with great cunning (which all but succeeded). you deposed to facts and circumstances which you knew to be entirely untrue, as was demonstrated by your unsuccessful efforts by coercion and terror to suborn others to sustain your story by perjury. Your character as a person habitually on such terms with pirates as that a mere note from you was sufficient to protect honest trading boats from piracy, was proved on your trial. If you had your full deserts you ought to suffer the severest punishment possible.

The sentence of the Court on you for the crime of which you have been convicted, is that you be kept in penal servitude for seven years.

You, Choy Asam and Tung Pak Foo, have each been convicted of conspiracy, the object of which was in order to gain the Government reward of $500 to accuse in this Court, Shek Aluk, Shek Achung, Shek Chung Leen, and Shek Qui Leen of the crime of murder.

Neither of you had any excuse for your most wicked conduct.

The sentence on you, Choy Asam, is that you be imprisoned and kept to hard labour for five years.

The sentence on you, Tung Pak Foo, is that for this your crime of conspiracy, you be imprisoned and kept to hard labour for two years. This sentence and imprisonment to commence and take effect from and after the expiration or sooner determination of the sentence of penal servitude to which this Court has already sentenced you.

The result of these protracted trials is that it has been proved that Shek Aluk, Shek Achung, Shek Chung Leen, Shek Qui Leen, are not only "Not Guilty," of the murder of which they were convicted, but that they were innocent—absolutely innocent—indeed, that they are peaceable and honest sailors. Every right-minded man must deeply sympathize with them for the mental tortures—worse than bodily tortures—to which they have been subjected in the fear of death—of an ignominious death—aggravated by the feeling that they were innocent.

The Government can, and I hope will largely (it is beyond its power adequately to) compensate these poor men for the wrongs done to them.

I see that Tuk Cheong and some of the other respectable Chinese residents to whose exertions so much praise is due, are present.

No words I can utter can increase the satisfaction which they must feel, that by exerting themselves they have proved the innocence of the four men, and with so good an effect. Every right-minded man must feel indebted to them. I trust that the success of their efforts will well satisfy them for the money which they have with right good heart expended to bring together such a mass of conclusive evidence, as has enabled this Court to exercise its most noble function, the elucidation of innocence. These efforts have been well seconded by the very able way in which the facts of the case have been marshalled before the Court. I trust that this success will induce them and other respectable Chinamen to take in future a more active part in effectually aiding the Government in the suppression of crime and violence, and in securing good order, in which they have as deep an interest as any other persons in this Colony.

Reflecting persons may probably be shocked that four innocent men were so near being executed, and will ask what security there is that the irrevocable penalty of death has not often been inflicted in this Colony on innocent persons. I confess that I shuddered when this question forced itself on me; but on careful reflection, I feel assured that there is no just reason for alarm.

A Blue Book published in 1866, Report of the Capital Punishment Commission, gives for three years, 1861-63, fifty-two as the number of executions in England, under fifteen judges, while during the same period thirty men were executed under sentences by one judge in this Colony. I have not the English Returns up to this date, but there have been since 1863, thirty-seven executions in this Colony, which I believe is in a ratio to the executions in England much greater than the proportion was in previous years. It appears that executions in this small Colony have been since 1860 more than half, probably two thirds part, in number of all the executions in all England.

With a responsiblity greater, I believe, than weighs on any other judge administering English Criminal Law, I have ever followed what the Chief Baron Sir Fitzroy Kelly stated in the same Report to be practiced in all English Courts. I have always 'exercised a degree of care, and caution in conduct of trials for life and death—vastly superior to that which formerly prevailed.' These cases confirm my resolution to exercise the like care and caution as long as I may preside in this Court.

I have obtained from Mr. Douglas, the very intelligent and able Superintendent of the Gaol, a return of all cases, 66 in number, which have ended in an execution, since I came in 1861 to this Colony. I find from Mr. Douglass that in nearly every case since he came to the Colony, the criminal has confessed his crime—indeed in every case where I have presided—and I have no

reason to suspect that any one innocent man has been executed on the sentence of any judge in this Colony."

SELECTIONS.

VENDOR AND PURCHASER—NOTICE OF TENANCY

James v. *Linchfield*, M.R., 18 W. R. 158.

Everything that puts a purchaser on inquiry amounts to notice; and it has long been settled that the occupation of a tenant amounts to notice to the purchaser of the actual interest of the tenant in the property(*Taylor* v. *Stibbert*, 2 Ves. 437).

A purchaser who takes it for granted that the occupation of a tenant is from year to year only, will nevertheless be bound, if it turns out that the tenant enjoys a larger interest, or has an option to purchase (*Daniel* v. *Davison*, 16 Ves. 249).

As between tenant and purchaser, then, the purchaser cannot, after notice of a tenancy, set up the defence of purchase for valuable consideration without notice, whatever the actual tenancy or tenant's right may turn out to be. In the case before us the Master of the Rolls decided that the same principle was applicable to cases between vendor and purchaser, as to cases between purchaser and tenant. The purchaser in the present instance was tenant from year to year, and assumed that the remainder of the property contracted to be purchased, which he knew to be in the occupation of A. B., was held upon similar terms. It turned out that A. B. had in his pocket when the contract was made an agreement for a lease for twenty-one years of the portion of the property occupied by him; and the purchaser in consequence filed his bill against the vendor for specific performance with an abatement. If it had been a case of mistake although on the purchaser's part only, and not common to him and the vendor, yet, as the matter rested in contract, and no deed had been executed, the Court might, it seems, have rectified the error (*Harris* v. *Pepperell* 16 W. R. 68, L. R. 5 Eq. 1, as was done in *Garrard* v. *Frankel*, 30 Beav. 445). where a person supposed he had entered into a contract for a lease at one rent, and it turned out that the rent specified was of a larger amount. But in the present instance there was no case of mistake, inasmuch as the purchaser was put upon inquiry by his knowledge of the fact of A. B.'s occupation, and therefore specific performance with an abatement was refused.—*Solicitors' Journal.*

CURIOUS TENURES.—Middleton Cheney, or Chenduit.—It is the custom in summer to strew the floor of this Church with hay cut from Ash Meadow, and in Winter straw is found at the expense of the Rector. A peculiar tenure also prevails in the lordship of this parish; when estates descend in the female line, the elder sister inherits by law.—*Oxford Journal.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

LANDLORD AND TENANT.—In 1860, A. made a lease to B., who covenanted therein not to assign or part with the possession of the premises without A.'s written consent, and there was a re-entry clause. In 1865, B. with A.'s written assent to the transfer on the old terms, sold to C., and let him into possession without a formal assignment. In 1867, C., with A.'s written assent, assigned the term to trustees for creditors. The trustees sold to defendant, who took possession. *Held*, that there had been no forfeiture. There was never an assignee of the whole term, so as to be subject to the covenants in the lease, and B.'s covenant was not broken by letting C. into possession as he did, nor by the transfer by the trustees to defendant—*West* v. *Dobb*, L. R. 4 Q. B. 634.

LEGACY.—A testator gave to his wife "any money that I may die possessed of, or which may be due and owing to me at the time of my decease." He had insured his own life. *Held*, that the debt accruing under the policy at his death passed by the above bequest—*Petty* v. *Willson*, L. R. 4 Ch. 574.

LIBEL.—To charge A. in the newspaper with ingratitude in politically opposing B., and to allege that at a past time A. was in pecuniary straits, and was aided by B., and had since paid his debts, as the only support of the charge, is libellous—*Cox* v. *Lee*, L. R. 4 Ex. 284.

MASTER AND SERVANT.—Defendant sent his carman and clerk with a horse and cart to deliver some wine, and bring back some empty bottles. Instead of returning directly, as was his duty, the carman, when about a quarter of a mile from the defendant's offices, drove off in another direction on business of the clerk's; and, while he was thus driving, negligently ran over the plaintiff. *Held*, that defendant was not liable. —*Storey* v. *Ashton*, L. R. 4 Q. B. 476.

NEGLIGENCE.—The plaintiff on getting into a railway carriage, having a parcel in his right hand, placed his left hand on the back of the open door to aid him in mounting the step. It was after dark, and he could see no handle, if there was one. The guard, without warning, slammed the door, throwing the plaintiff forward and crushing his hand between the door and door-post. *Held*, that the defendants were not entitled,

to a nonsuit. The jury were justified in finding that the guard was negligent and that the plaintiff was not. (Exch. Ch.)—*Fordhum* v. *Brighton Railway Co.*, L. R. 4 C. P. 619; s. c. L. R. 3 C. P. 368.

MORTGAGE.—A mortgagee is bound to convey the legal estate in the mortgaged property, and to deliver up the title deeds, to a person from whom he has accepted a tender of his principal, interest, and costs, although such person may have only a partial interest in the equity of redemption.—*Pearce* v. *Morris*, L. R. 8 Eq 217.

PARLIAMENT.—Members of either House of Parliament are not criminally liable for a conspiracy to make statements which they know to be false, in the House, to the injury of a third person.—*Ex parte Wason*, L. R. 4 Q. B. 573.

PRESUMPTION OF DEATH, &C.—There is a presumption of law that a person who has not been heard of for seven years is dead, but there is no presumption of his death at any particular period of the seven years.

There is no legal presumption that a person shewn to be alive at a given time has continued to live for any particular period after that given time.

A person whose title depends upon A having survived B, must prove affirmatively by evidence that A did survive B

Review of all the authorities on the subject.

F. by his will bequeathed the residue of his estate to his nephews and nieces, share and share alike. F. died on the 5th January, 1861. N. P. M., one of the nephews, left his home in Germany, on the 19th August, 1853, and always wrote home regularly until August 1858. The last letter received from him was addressed to his mother, from on board the United States' frigate *Roanoke*, 15th August, 1851. He was never directly heard of again by any of his family. In 1867, upon enquiries being made of the United States' naval authorities, information was received that N. M., a sergeant of marines in the service of the United States, deserted June 6th, 1860, while on leave from New York to join the Philadelphia Station, and had not since been heard of. This information was in answer to a letter of enquiry which stated the letter of N. P. M. of the 15th August, 1858, to his mother. A petition was, in 1869, presented by the administrator of N. P. M. for payment to him of a share of a residue of the estate of F., which was in court to an account entitled "The account of the share intended for N. P. M." Vice-Chancellor James, contrary to his own view of the law, but in deference to previous authorities, ordered the fund to be paid to the administrator of N. P. M.

On Appeal,

Held, that the administrator of N. P. M. not having proved that N. P. M. survived the testator, had not established any title to the fund.

The Vice-Chancellor's order was therefore discharged.—*Re Phene's Trusts*, 18 W. R. 303.

PATENT—INJUNCTION.—In an action for an infringement of a patent, an application under the C. L. P. Act for an injunction to restrain the defendant was refused, the patent having been very recently granted, and their being conflicting affidavits as to the rights of the plaintiff to the patent, and *held* that the plaintiff must establish his title at law before he would be entitled to an injunction.

Semble 1. That the application would also have been refused under the Patent Act of 1869, sec. 24.

2. That to entitle a plaintiff to an interim injunction or account he must waive all claim to more than nominal damages at the trial.—*Bonathan* v. *Bowmanville Furniture Manufacturing Company*, Chambers, Feb. 11, 1870.

OFFER TO BECOME SECURITY—GUARANTEE—CONSTRUCTION.—A guarantee should be construed as all other contracts, not strictly as against either side, but by collecting the real intention of the parties from the instrument and the surrounding circumstances, taking the words in their ordinary sense, unless by the known usage of trade they have acquired a peculiar meaning.

In this case it appeared that one H., requiring some proof spirits for the purpose of a trade carried on by him, received from defendant, a friend of his, a letter of introduction to plaintiff, a distiller, to whom defendant was well known, but H. an entire stranger, though, as well as defendant, living in his neighbourhood. There had not been, as far as it appeared, any previous application by H. to plaintiff for a credit, nor had the latter declined dealing with him without a guarantee. The letter to plaintiff was as follows: "The bearer is Mr. Joseph Hugill, a friend of mine, who wishes to purchase some proof spirits, which he hears that you manufacture. If you can arrange matters to your mutual satisfaction, I am sure Mr. Hugill will prove a very reliable person to deal with. I will myself, with pleasure, become security for anything he may be disposed to give an order for."

Held, upon the authority of *McIver* v. *Richardson*, 1 M. & S. 557, that this letter did not import a perfect and conclusive guarantee in itself,

but that to make it such it was necessary that plaintiff should have notified defendant that he accepted the proffered guarantee, and that he had given or meant to give credit to H. on the strength of it.—*Kastner* v. *Winstanley*, 20 U. C. C. P. 101.

PROMISSORY NOTE—STAMPS—29 VIC. CH. 4, SEC. 3.—In an action by endorsee against maker, it appeared that the proper adhesive stamps were upon the note, but they had not been cancelled by stamping or writing the date thereon. *Held*, that under 29 Vic. ch. 4, sec. 3, the note was of no avail, and that the plaintiff therefore could not recover.

The plea was that no stamps were ever affixed to the note according to the requirements of the statute. *Semble*, that the defence was admissible under this plea, but, as an amendment would have been allowed, the point was not expressly decided.—*Young* v. *Waggoner*, 29 U. C. Q. B. 35.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

VOTER.—By 30 & 31 Vict. c. 102, s. 3, every "man" having certain qualifications and not subject to any legal incapacity is entitled to the franchise. By a previous act, 13 & 14 Vict. c. 21, s. 4, "in all Acts, words importing the masculine gender shall be deemed and taken to include females, ... unless the contrary . . . . . is expressly provided." *Held*, that women could not vote for members of parliament under the first-mentioned act: (1) because subject to a legal incapacity; (2) because the word "man" in said act does not include women.—*Chorlton* v. *Lings*, L. R. 4 C. P. 374; *Chorlton* v. *Kessler*, *ib.* 397.

ONTARIO REPORTS.

QUEEN'S BENCH.

WRIGHT V. GARDEN AND WIFE.

(*Continued from page* 38.)

ADAM WILSON, J.—The law relating to the property and rights of married women has been very materially altered, both in England and in this country, within the last few years.

By the divorce act, Imperial Statute 20 & 21 Vic. ch. 85, assented to on the 28th August, 1857, the wife is in certain cases clothed with an independent personal *status* at law with respect to her rights and property, similar to the rights which she possessed and possesses in equity with respect to her separate estate.

In this province the legislation is contained in Consol. Stat. U. C. ch. 73, the original act being passed on the 4th of May, 1859.

The 14th and 18th sections are the only ones which specifically refer to the contracts of married women. But the 14th section refers only to those contracts of women who have been married since the 4th of May, 1859, which they had made before their marriage.

The 18th section provides, that in any action or proceeding at law or in equity by or against a married woman, upon any contract made or debt incurred by her before marriage, her husband shall be made a party to it if residing in the province, but if absent therefrom the action or proceeding may go on for or against her alone.

In such proceeding it must be averred the cause of action accrued before marriage, and that the woman has separate estate, and the judgment or decree, if against the woman, shall be to recover of her separate estate only, unless the husband plead or put in a false plea or answer, in which case he is to pay the costs occasioned thereby.

There are four cases under this act in which the contracts of a married woman may have to be considered:—The contracts made before marriage, observing the distinction whether the marriage was before or after the 4th of May, 1859; and her contracts made after marriage, observing the same distinction as to the time of her marriage.

The 14th section of the act, it will be seen, applies expressly to only one of these four cases; to the contracts of a woman, made before her marriage, who has been married since the 4th of May, 1859. In such case she is to be liable to the extent and value of her separate property in the same manner as if she were sole and unmarried. By the 18th section her husband must be joined as a defendant in the suit with her, if he is resident in the province

There does not seem to have been much necessity for this express provision in the case alluded to, unless for the purpose of saving the husband's property when the wife had a separate estate. Without this provision both the husband and wife would by the general law have been liable to be sued for all the debts of the wife contracted *dum sola*, and on a judgment recovered against them the property of both or each of them would have been liable.

It must therefore be considered as a benefit intended for the husband only.

A contract made by the woman when single, is not properly a separate contract, and the expression separate estate has application and meaning only during the coverture. Before marriage the woman's property is not separate estate. On the death of her husband her separate property which she had during his life ceases to be separate property, and on a re-marriage it becomes separate property again.

The 18th section goes beyond the 14th section, for it protects the husband from all debts contracted by his wife before marriage, whether the marriage took place before or after the 4th May, 1859, for it makes no difference in this respect; and in all cases where he is joined with her in the suit, the judgment or decree, if against her, is to be against her separate estate only.

And even when the husband, since the 4th of May, 1859, takes an interest in his wife's sepa-

rate property under any settlement on marriage, he is by the 15th section only to be liable for her ante-nuptial engagements to the extent or value of that interest, and no more.

The husband is therefore not liable for his wife's debts contracted before marriage, out of his own estate, when she has separate property, or there is a marriage settlement.

Practically, this may relieve the husband in every case from his wife's engagements entered into *dum sola*, for in every case the wife must have some separate property. It is difficult to conceive the case of a woman having no separate estate of any kind at the time of her marriage or in any way acquired by her after marriage.

The husband then being safe from the wife's ante-nuptial debts, is not liable for her married engagements if she can contract under the statute in respect of her separate estate, or if she has *no authority to contract* by virtue of the statute.

The wife is liable for her contracts entered into *dum sola* to the extent of her separate estate, but not to those made during her marriage, unless she has power by statute to contract in respect of her separate estate, and then only to the extent of that estate.

In this particular case the contract was entered into by the female defendant since her marriage. It is not, therefore, a case expressly provided for by the statute, as contracts of married women are provided for by the Imperial Act 20 & 21 Vic. ch 85, secs. 25 & 26, after a judicial separation has been pronounced.

The question then is, has a married woman, having separate estate, authority to contract in respect of that estate?

There are two kinds of separate estate, real and personal. The statute deals very differently with them.

The real estate which is called her separate property she cannot sell or lease without the consent and concurrence of her husband. It is not therefore properly separate estate at all, as it wants the principal element and characteristic of it, the power of disposition over it without the control or interference of her husband just as if she were still a single woman.

The 25th section of the act declares that over both real and personal estate the married woman shall have complete dominion, free from her husband's debts and obligations, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried, any law, usage, or custom, to the contrary notwithstanding.

This section would probably have been held to have conferred upon the wife as ample powers to deal with her real, as well as with her personal estate, in all respects as she could have dealt with it by the doctrines of the Court of Equity before the passing of this act, in case it had been settled to her separate use. But by an act 22 Vic. ch 35, following immediately after the Married Women's Separate Estate Act, ch. 34 of the same session, there is contained a section, 6. which alters most materially the powers of married women over their real property which has been called separate estate.

The sec. of ch. 35, is as follows:—"The requirements heretofore necessary to give validity at law to a conveyance by a married woman of any of her real estate, shall continue to be necessary for that purpose with respect to deeds of conveyance executed after the passing of this act, notwithstanding anything contained in this act *or in any act which has been or may be passed during the present session of parliament*. But this section shall not affect any other remedy at law or in equity which a purchaser or other person may have upon any contract or deed of a married woman which may be hereafter executed in respect of her real estate."

This section, all but the italics, which I have marked, is now sec. 15 of ch. 85 of the Consol. Stat. U. C.

The effect of it is to prevent a married woman from dealing with her property as separate estate, and, as a consequence, to prevent her from charging it or contracting in respect of it: *Royal Canadian Bank* v. *Mitchell and Wife*, 14 Grant, 412; *Emrick* v. *Sullivan*, 25 U. C. Q. B. 105.

This is the effect of it at law at any rate, though I must confess I am quite unable to comprehend the meaning of the proviso. It practically nullifies the beneficial purpose of the statute, which was introduced no doubt to give effect to the report and recommendation of the society for amendment of the law made in 1856, and published in the *Law Magazine*, Vol. I., N. S., 391, and in other contemporaneous publications.

It is there said, p. 406, "Your committee, on the grounds above set forth, recommend that a law of property as to married women should be based on the following principles:—1. The common law rules which make marriage a gift of all the woman's personal property to the husband to be repealed. 2. Power in married women to hold separate property by law as she now may in equity. 3. A woman marrying without an ante-nuptial contract to retain her property and after acquisitions and earnings as if she were a *feme sole*. 4. A married woman, having separate property, to be liable on her separate contracts, whether made before or after marriage. 5. A husband not to be liable for the ante-nuptial debts of his wife any further than any property brought to him by his wife under settlement extends. 6. A married woman to have the power of making a will; and on her death intestate, the principles of the Statute of Distributions as to her husband's personalty, *mutatis mutandis*, to apply to the property of the wife. 7. The rights of succession between husband and wife, whether as to real or personal estate, to curtesy or dower, to be framed on principles of equal justice to each party."

The statute no doubt fetters the separate estate even in a court of equity, for by the fourth section no conveyance or act of the wife can affect the husband's right to curtesy, and it may even fetter it further.

She had unlimited power before the act to deprive her husband of his curtesy, because she dealt with her property in equity in all respects as if she were a *feme solie*.

There is no such limitation as to separate personal property, and if she is to hold it "free from his debts and obligations" (under the 2nd section) "contracted after the 4th May, 1859, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried; any law usage, or custom, to the contrary notwithstanding," she must have the right and power to deal with it

just as she pleases, and to contract in respect of it as an incident and necessary consequence of her interest in and authority over the subject property.

I need not quote the language of the different judges: it is sufficient to refer to some of their decisions: *Tullett* v. *Armstrong*, 1 Beav. 1, 4 M. & Cr. 377; *Vansittart* v. *Vansittart*, 4 K. & J. 62; *Woodward* v. *Woodward*, 9 Jur. N. S. 882; *Matthewman's* case, L. R. 3 Eq. 781; *Butler* v. *Cumpston*, L. R. 7 Eq. 16; *Taylor* v. *Meads*, 11 Jur. N. S. 166

She may even contract with and sue her husband: *Cannel* v. *Buchle*, 2 P. Wms 243; *Griffith* v. *Hood*, 2 Ves. Sen. 452; *Woodward* v. *Woodward*, 9 Jur. N. S. 882; *Vansittart* v. *Vansittart*, 4 K. & J. 62.

After a protection order to secure the wife's separate earnings, she acts alone as if a single woman: *Bathe* v. *Bank of England*, 4 Jur. N.S. 505; *In re Kingsley*, 4 Jur. N. S. 1010.

She may after such order be sued alone, without her husband: *Rudye* v. *Weedon*, 4 DeG. & J. 216. 5 Jur. N. S. 723; *Thomas* v. *Head*, 2 F. & F. 88; *In re Rainsdon*, 5 Jur. N. S. 55.

And such an order is a bar to an action brought against the husband in respect of those claims which the wife might be sued for: *Tempany* v. *Hakewill*, 1 F. & F. 438.

If the wife could not by suit protect her separate estate or earnings from and against her husband's wrongful interference with or appropriation of them, her separate estate or any order of protection would be a farce. It is against him and his acts that the protection is needed. The doctrine of separate estate being established, it must, as Lord Chancellor Westbury said in *Taylor* v. *Meads*, "be consistently followed to its legitimate consequences," which embraces the right to contract with respect to it, and to dispose of it in any manner she pleases.

In England a woman having a protection order may, by the express language of the statute, sue her husband or any of his creditors, or any one claiming under him, if he seize or detain her protected property, and she not only may recover the property but double its value.

This provision as to suing the husband may have been put in the statute from extreme caution, or because she was thereby enabled to recover a special penalty against him The authority to sue him was and is complete in equity by reason of the separate estate, which creates an independent *status* of the wife, and if this separate estate be established at law, it carries with it the same rules prevailing in the court whose beneficial procedure and doctrine have been extended as part of the general law of the land.

I have no doubt that in respect of the personal separate estate of the wife she can contract in all respects as a *feme sole*, because she has the absolute disposing power over it. *Chamberlin* v. *McDonald*, 14 Grant, 447, is I think to this effect also.

The property is bound by the general engagements contracted in respect of such estate, though no reference is made in the course of the contract to that estate. There is some difference of opinion whether the real estate is bound to the like extent, without writing, by the contracts of the wife as personal estate is, but there is no doubt that the personalty is bound without writing: *Johnson* v. *Gallaghar*, 3 DeJ. F. & J. 494, 7 Jur. N S. 273, per Lord Justice Turner; *Butler* v. *Cumpston*, L. R. 7 Eq 16; *Matthewman's* case, L.R. 3 Eq. 784; *Shattock* v. *Shattock*, L. R. 2 Eq. 182; *Murray* v. *Barlee*, 3 M. & K. 233; *Owens* v. *Dickinson*, Cr. & Ph. 53; *Vaughan* v. *Vanderstegen*, 2 Drew. 183.

If the wife be liable for the claim in this cause, the declaration, I think, shews a contract made by her in respect of her separate estate, and for which separate estate such as can be made liable should be alone liable. The declaration on common law principles should disclose a perfect cause of action. It does this by shewing that the wife had separate estate and made the contract in respect of it.

I do not think it is necessary to aver there is separate estate liable for it; because she may happen to acquire property hereafter, and that will become subject to the payment of the debt if the judgment obtained against her.

In proceedings against unincorporated insurance companies the declaration sets out, when the fact is so, that the insured is to be paid out of the funds of the company, but there is no averment made that there are funds to meet the payment: *Gurney* v. *Rawlins*, 2 M. & W. 87.

I do not see on what ground the husband is sued. He must be joined when the debt was contracted before marriage, as before stated, but there is no provision that he is to be sued for debts incurred by her after marriage.

It appears to me therefore that the wife would, if sued alone, be liable to the extent of such part of her separate estate as can be attached for the cause of action set out in the declaration; but that the husband is not a proper party to the action.

Holding the wife individually liable is carrying out the enactments of the statute to their legitimate consequence. Potentially she could contract at law before the passing of the act, through the intervention of trustee: *Haselinton* v. *Gill*, 3 T. R. 620, n; *Jarman* v. *Woollaton*, 3 T. R. 620; *Carne* v. *Brice*, 7 M. & W. 183.

By this statute she can do so alone, without the aid of trustees, and responsibility is the inevitable consequence of her legally authorised acts. See the numerous cases collected in *Williams* on Executors, 6th Ed., 59 and in *White & Tudor's* Leading Cases in Equity, 3rd Ed., vol. I, 435, and subsequent pages, in commenting on *Hulme* v. *Tenant*, 1 Bro. C. C. 16.

Kraemer v. *Gless*, 10 U. C. C. P. 470, is utterly opposed to the opinion I have expressed. It was there decided that the statute does not alter the power of a married woman to make contracts, and that she was not enabled to bind herself while a *feme covert* more than she could do before the statute was passed.

In my view, the old policy of the common law was purposely subverted, and the enlightened system of law applicable to the separate estates of married women as administered in courts of equity was, in every particular, extended to the general law, and substituted for the harsh and unreasonable rules of the feudal times.

I cannot understand why a wife is not to have the absolute rights of property, with all the incidents and responsibilities of and resulting from ownership, when the legislature has declared she shall have it (her personal property at any rate),

in as full and ample a manner as if she were sole and unmarried, and to make it more emphatic, has added, *any law, usage, or custom, to the contrary notwithstanding.*"

The mental and moral capacity of the wife were never questioned, for she was allowed to perform many acts requiring ability, discretion, or act as agent and attorney for another in all matters of business requiring skill and judgment, as well where it was in the business of another as where it was in her own business, as in dealing with property settled to her separate use. She could perform a condition without the concurrence of her husband, as to convey an estate to J. S., which was devised to her on condition of so conveying; and she could make a will of her personalty with her husband's consent. She could also make a will as executrix against his consent, and she had absolute power to act as a *feme sole* during the exile or transportation of her husband.

Before her marriage she could fill a great variety of offices: see *The King* v. *Stubbs*, 2 T. R. 395–397, and *Co. Lit.* 326. The legal fiction was that "Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognised than is the *cestui que trust* or the mortgagor, the legal estate, which is the only estate the law recognizes, being in others,"—Per Lord Brougham, C., in *Murray* v. *Barlee*, 3 M. & K. 220.

It was to establish her individual entity, and to attach those rights to it in law which she was in fact capable of exercising, that led to the interference of the legislature. It is our duty to give effect to a statute which was so manifestly intended to have been the Married Women's Bill of Rights.

I am of opinion the personal separate estate is at the complete disposal of the wife in this country, as it is at her disposal in the courts of equity in England.

And I am of opinion that a wife may contract in respect of her real as well as of her personal separate estate, although she cannot, by any direct act of her own, charge or dispose of it without the consent of her husband.

The effect of such a contract will be to bind her present or future separate personal property, and I am not satisfied it will not bind her real property also. It may bind her real property, firstly, because the Imperial Act 5 Geo II ch. 7, makes real estate liable as goods and chattels for debts, and by the like process; and, secondly, because the restrictive clauses in ch. 85, sec. 15, and in ch. 73, sec. 4, apply only to conveyances and acts of the wife, and not to judgments recovered adversely to or in good faith against her. Her position in this respect may be likened to that of a tenant for years who is restrained from alienating. The provision applies only to the acts of the tenant, and not to those transfers which take effect by operation of law, as by bankruptcy or sale on execution.

The giving of a warrant of attorney for the *bonâ fide* purpose of a judgment being entered up against the debtor and his property seized, was held to be no breach of his covenant as lessee not to encumber or charge the property demised or the term granted, even under the 1 & 2 Vic. ch. 110, sec. 13, which was similar in its effect to the Consol. Stat. U. C., ch. 89, secs. 48, 49, while these provisions were in force, so long as it was not given with the object of evading the restriction: *Croft* v. *Lumley*, 4 Jur. N. S. 903 H. L., 6 H. L Cas. 672; *Doe dem Mitchinson* v. *Carter*, 8 T. R. 57, 300.

I am not able to adopt the judgment of the court in *Kraemer* v. *Gless*. It appears to me, and I need not say that I express and mean to express myself with all respect for the very learned and able judges who concurred in that judgment, that it is a judgment opposed to the object and principle of the statute; and as it is the only decision upon the act, and the act introduces a branch of law to which we have not before been accustomed, I think I am warranted by the course taken in many other cases under similar circumstances, when I entertain a very strong opinion myself, to deliver that opinion, although it differs from a previous decision.

It is only in peculiar instances this should be done, for the general rule is undoubtedly to follow an adjudicated case by a court of equal authority; but I consider this to be a peculiar case, and to justify me in following precedents applicable under the like circumstances.

In my opinion judgment should be given for the defendants, because the husband should not have been joined as a defendant; but on the general question my opinion is in favour of the plaintiff.

Judgment for defendants.

COMMON PLEAS.

(*Reported by* S. J. VAN KOUGHNET, ESQ., *Barrister-at-Law, Reporter to the Court.*)

CORPORATION OF THE TOWN OF ST. CATHARINES v. GARDNER.

Road Co.—Portion of road running through town—Obligation to repair.

Plaintiffs, a joint stock road company, were in operation, in possession of their road and in receipt of tolls several years before the incorporation of the town of Clifton, within which portion of the road in question lay:

Held, following *Regina* v. *Brown and Street*, 13 C P. 356, that plaintiffs were still entitled to collect the tolls within the limits of the town of Clifton, notwithstanding the incorporation of that town and the erection of some of plaintiffs' toll gates within the limits of such town.

[20 U. C. C. P. 107.]

Action for breaking down plaintiffs' toll gates and toll houses.

After the issue of the writ, by consent and order of a judge in Chambers, pursuant to sec. 154 Con. Stat. U. C. ch. 22, a case was stated for the opinion of this court.

The following were the facts agreed upon between the parties:

Plaintiffs were a joint stock company, under 12 Vic. ch. 84, and 14 & 15 Vic. cap 122, consolidated by 16 Vic. ch. 190, and also by ch. 49 of Con. Stat. U. C. and constructed their road from the Suspension Bridge to Table Rock, Niagara Falls The town of Clifton was incorporated, in 1856, by 19 Vic. ch. 63, after the construction of said road, and plaintiffs erected toll gates and collected tolls before, and continued to do so after, the incorporation of the said town and until defendant destroyed said toll gates.

The place where the gates were erected and the road from Suspension Bridge to Niagara Falls were within the limits of the town of Clifton.

Defendant was an officer of the corporation of the town of Clifton, and acted, in the commission of the act complained of, by the direction and under the authority of such corporation.

The question for the opinion of the court was whether the plaintiffs had power to levy and collect tolls within the limits of the town of Clifton against the will of the corporation of said town.

M. C. Cameron, Q. C., for the plaintiffs, cited *Regina* v. *Brown and Street*, 13 U. C. C. P. 356.

Harrison, Q. C., contra, cited *The Port Whitby and Scugog Road Co.* v. *Corporation of Town of Whitby*, 18 U C. Q. B. 40; *McGee* v. *McLaughlin*, 23 U. C. Q B. 90.

The statutes referred to are noticed in the judgment.

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

In the case of *Port Whitby and Scugog Road Co.* v. *Corporation of Town of Whitby*, 18 U C. Q B. 40, decided in 1859, the plaintiffs were a Road Company under 12 Vic. ch. 86, and 13 & 14 Vic. ch. 14, and registered in 1850. By an order in council, 3rd July, 1852, the road in question was transferred to plaintiffs, it being part of a macadamized road constructed by government from Whitby to Lake Scugog.

The town of Whitby was incorporated in 1854, and a portion of the road fell within its limits. The question was, who was bound to repair the road. It was held that the obligation to repair lay on the town, and not on the company; that although the 13 & 14 Vic. ch. 14, imposed generally on the purchasers of the government roads the obligation to repair, the statute, ch. 15, of same session, passed a few days after, created a particular exception to the general provision, and the two acts should be read as one, and the first clause of ch. 15, allowed a proviso to qualify the general terms of ch. 14; that there was nothing in 16 Vic. ch. 190, or in 18 Vic. ch. 28, incorporating the town of Whitby, or in Imperial Act 22 Vic. ch. 99, affecting the question raised.

Regina v. *Brown and Street*, 13 U. C. C. P. 356, decided four years later.—It appears that the present plaintiffs' company was sold under a decree in Chancery, and defendants, Brown and Street, became the purchasers; that the road passed through the village of Thorold. It became out of repair; and a mandamus was asked to compel Brown and Street to keep the road in repair. The court was of opinion that the portion of the road in question was not vested in the corporation of Thorold, and that it belonged to Brown and Street, who were bound to keep it in repair, as the successors of the original road company.

The Queen's Bench decision in the Whitby case was reviewed, and it was noticed that the attention of that court had not been drawn to the fact that the 13 & 14 Vic. ch. 15, which applied exclusively to cities and towns, had been repealed by 22 Vic. ch. 99 (A. D. 1858), sec. 403; that the roads of joint stock companies were not such public roads and highways as the Legislature intended, in case they were in a city, township, town or municipal village, should vest in these municipalities.

The 13 & 14 Vic. ch. 15 is certainly repealed by the sec. quoted in the last judgment, but it seems to me that the C. P. would have decided the case as it did, even if that statute were still in force.

In the case before us, the plaintiffs' company was in operation, in possession of this road, and levying tolls thereon several years before the incorporation of Clifton. If defendant's contention be right, the act of incorporation at once divested plaintiffs' interest in all portions of the road lying within the town of Clifton, relieved them from liability to repair, and transferred such liability to the town.

We cannot distinguish this case from the decision of this court in Smith and Brown, and as no change in the statute has taken place affecting the question since that decision, we think we should follow it and leave the defendants to carry the case to the Court of Appeal, if so advised. We must not be understood as questioning the correctness of that decision.

Judgment for plaintiffs.

ELECTION CASES.

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

REG. EX REL. FORD V. MCRAE.

Treasurer—Annual appointment—Election—Contract with Corporation—Notice to electors of disqualification.

The Treasurer of a Township was appointed by annual by-laws, which were silent as to time, in 1859, 1860 and 1861. In 1861 the defendant became his surety by bond, which, however, did not state the duration of the liability. In 1863 the same Treasurer was also appointed by a similar by-law. In 1864 the by-law limited his liability to the year 1864. From thence to 1868 no time was specified, but was in that year. In 1869 the Treasurer's accounts were audited and found correct. *Held*, that this bond was only a continuing security until the expiration of the Treasurer's term of office, and that the liability ceased on his re-appointment in 1863, and that therefore the defendant had not an interest with the corporation so as to disqualify him as a councillor.

To entitle a candidate to the seat claimed by him on the ground of his opponents disqualification, it must be shewn that the qualification was objected to at the *nomination*, so that the electors might have an opportunity of nominating another candidate.

[Chambers, February, 1870.]

This was a writ of summons in the nature of a *quo warranto*, calling upon Farquhar McRae to show by what authority he exercised or enjoyed the office of Reeve of the Village of Colborne, and why Charles Raymond Ford should not be declared duly elected to the office of Reeve and admitted thereto.

The statement and relation of Ford complained that he Ford was duly elected Reeve, and ought to have been returned, &c., &c. He stated the following cause why the election of the defendant to the office should be declared invalid, and he, Ford, duly elected thereto—First, that the defendant was disqualified by reason of his having at the time of such election, an interest in a contract with the Corporation of the Village of Colborne, in that he was bound in a bond to the said corporation in $2,000, for the faithful performance by one Merriman of the duties of Treasurer of the Municipality, of which the electors had notice. That before the opening of the poll on the 3rd of January last, he Ford notified the Returning Officer and the electors then present, that he claimed to be duly elected Reeve for the present year, and protested against any poll being opened or votes taken by the

Returning Officer for candidates, and delivered to him and to the defendant printed copies of the following notice:—"Take notice that I claim to be duly elected Reeve for the Village of Colborne for the year 1870, on the ground that I am the only person duly qualified, who was nominated and seconded for that office, at the nomination of Reeve and Councillors for the Village of Colborne, for the year 1870. Mr. F. McRae, the only other person nominated for Reeve, being disqualified on the ground that he is surety for J. M. Merriman, Treasurer of this Municipality. I hereby protest against any votes being received by the Returning Officer for any candidate for Reeve, and notifiy the electors that any votes given by them for candidates for Reeve, will be thrown away,

(Signed) C. R. FORD."

The relation further stated that printed copies of such notice were posted up in conspicuous places, prior to the opening of the poll.

Robt. A. Harrison, Q.C., supported the summons, and contended that it did not matter whether there was any liability on the bond, but the question was whether there was a contract with the Corporation, and it was admitted that there was, and no discharge was shown. The bond, too, was conditional, to the effect that the Treasurer should at all times, during which he held his office, do certain acts enumerated. The office is not an annual office. The re-appointment of the Treasurer from year to year was an unnecessary Act. He cited secs. 161 and 177 of the Act of 1866; *In re McPherson, and Beeman*, 17 U. C. Q B. 99; *Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. 44; *Reg. ex rel. Rollo* v. *Beard*, 1 U. C. L. J. N. S. 126. The notice being given before the day of voting was sufficient to entitle the relator to the seat if the defendant should be disqualified; for if the electors had the notice, they threw away their votes, which was all that was required.

Armour, Q. C., shewed cause, and contended that the appointment of Treasurer was an annual one, and the bond was of no effect after the year was up: *Peppin* v. *Cooper*, 2 B. & Al. 431; *Liverpool Water Works Co.* v. *Atkinson*, 6 East, 507; *Augero* v. *Keen*, 1 M. & W. 390; *Bamford* v. *Iles*, 3 Exch. 380; *Mayor of Berwick* v. *Oswald* 1 E. & B. 295, 3 E. & B. 653, 5 H. L. Cases, 856; *Pybus* v. *Gibb*, 6 E. & B. 902; *Reg.* v. *Hall*, 1 U. C. C. P., 406; *Reg. ex rel. Hill* v. *Betts*, 4 Prac. Rep. 113 He also contended that the objection to the election was taken too late; it should have been taken at the nomination, and the notice was given just before the election: *Reg ex rel. Tinning* v. *Edgar*, 4 Prac. Rep. 36; *Reg. ex rel. Adamson* v. *Boyd*, 4 Prac. Rep. 204: *Reg.* v. *Mayor of Tewksbury*, L. R. 3 Q B. 629.

Affidavits were filed on both sides. The material facts are referred to in the judgment of

MORRISON, J.—In this case there are no disputed facts. It appears that on the 20th of December last, at the nomination of Reeve for the Village of Colborne, for the present year, the relator and defendant were duly nominated as candidates for the office—no objection at such nomination being made to the qualification of the defendant. A poll being demanded, the polling was fixed under the statute for the first Monday in January; on that day the relator publicly notified the electors, as stated in the notice set out in his statement, that he claimed to be elected Reeve, on the ground that the only other person nominated being the defendant, he the defendant was disqualified, on the ground that he was surety for the Treasurer of the Municipality, and he notified the electors that any votes given by them for Reeve would be thrown away. The election nevertheless proceeded, and the defendant was declared elected—having a majority of votes.

On the 12th of January this application was made.

It appears from the affidavits filed that Mr. Merriman, for whom it is alleged the defendant was a surety, was first appointed Treasurer by a by-law for the year 1859, again by by-laws for the years 1860 and 1861, respectively. In the latter year the defendant became one of his sureties. The bond contains no recital, but the condition is—"That if Merriman do and shall from time to time and at all times during his said office as Treasurer of the said Municipality, to which he has been appointed, well and truly account for all monies which he may from time to time receive, &c., and pay over and deliver any sum or sums ordered to be paid by the said Municipal Council, their successors or assigns, and in all things duly execute and perform the duties of his said office, and if upon his discharge or at the expiration of his term of office, he shall render up quiet and peaceable possession of the books and accounts belonging to his said office as Treasurer, &c., unto the said Municipality, their successors or assigns, then the obligation to be utterly void, &c."

Now it appears that this Council annually appointed by by-law their Treasurer: that Mr. Merriman, as already stated, was so appointed in the years 1859, 1860 and 1861, and in the latter year the defendant became his surety. Mr. Merriman was afterwards re-appointed Treasurer by by-law in 1863, and also in 1864, in the previous years his appointment was, as to time, silent; in 1864 the by-law specifically limits his appointment to the year 1864; in the following years he was also re-appointed without specifying the period, until 1868, when his term of office was again limited to that year. At the end of all these years, including 1869, the Treasurer's accounts were duly audited and found correct. Attached to the Treasurer's affidavit is the bond in question, and it further appears by an indorsement on it, that by a resolution of the Council it has been cancelled. This was done since this application was made, and could have no effect on my decision, but I only note the fact as shewing that the Municipality consider they have no claim under it. I also may remark, that in the year 1863 this defendant was elected a member of the council.

Looking at the conditions of the bond, from which I must gather the contract between the parties, it refers to Merriman's then appointment as Treasurer, and the limit of the sureties in point of time is that of his discharge or the expiration of his term of office. Now, considering that this office of Treasurer was by the uniform rule and action of the Municipality an annual one and under the authority of an annual by-law, and the condition of the defendant's bond contemplated an expiration of the treasurer's term of office, it is, I think, only reasonable to

assume, that the Municipality and the Treasurer acted upon the assumption that the term of office expired at the end of each municipal year, and that the sureties joined in the bond knowing such to be the case and only for the year, as sworn to by the defendant. It is true, as argued by Mr. Harrison, if the Treasurer had not been re-appointed, that under the 177th section of the Municipal Act he would hold office until removed by the Council. But the fact of his re-appointment in 1863 implied at all events that his term of office expired at the end of 1862, and his re-appointment by by-law in 1864, expressly limiting his appointment to that year. At the end of that year his term of office certainly expired, and as he made no default but faithfully performed his duty, &c., as Treasurer, up to that period, his sureties under the bond in question were discharged from all liability—if they had not been discharged at the end of 1861 or 1862. There are no words in the condition indicating that the sureties engaged to be liable upon his re-appointment from time to time. The council might have taken a bond continuing the liability of the sureties upon fresh re-appointments, but such an intention should expressly appear in the bond. What was said in giving judgment in the case of *Mayor of Cambridge* v. *Dennis*, E. B. & E. 659, which was the case of a treasurer's bond, has a strong bearing on this case. There the learned judges were of opinion that the sureties did in fact look beyond the current year, but they were constrained to give judgment for the sureties. Coleridge, J., said, "I incline from what generally passes on these occasions to believe that the parties did not think much about the point, but knowing that the office was annual gave their security for it as they found it. However supposing that not to be so, we are clearly not at liberty to resort to such considerations in construing this instrument; we must take its words and apply the law to them. It is admitted that, *prima facie*, the security would be limited to the time for which the office was appointed, and it lies on the plaintiff to displace this—and that seems to be just. The obligor knows at the time to what extent he is bound, and may estimate the liability which will devolve on him during the time, but he cannot know what liability may devolve on him at a distant time. Suppose two different instruments in writing were presented to him and he were asked, will you be surety for one year or for the whole life of the officer if he continues in office, would not any man consider there was a great difference between the two. I think therefore the presumption is, the defendant proceeded upon the rate of things which he knew to exist, and that was, that the officer was appointed for a year, and was liable to be not appointed for a second year; if that was presented to the mind of the surety he would execute the bond with the knowledge of his liability, unless the terms of the instrument were altered, would be over at the end of the year." And Crompton, J., said, "It is important that we should judge by the rules of law and not by guess. Nothing is better established than that a surety executing such an instrument as this is to be taken to be giving security only in respect of the existing office. When there is a re-appointment he has a right to say the office is not the same."

On the whole I am of opinion that this bond was only a continuing security until the expiration of the Treasurer's term of office, which term ended upon his re-appointment in 1863, and at the furthest ended in 1864 under the by-law limiting it to that year, and as it appears that up to that period, and years after, the Treasurer duly performed the duties of his office, and the liability of the defendant ceased under the bond. And that at the time of the nomination of the defendant and of his election he had no interest in a contract with the corporation arising under the bond in question, and this application must therefore be discharged.

It is not necessary that I should give any judgment on the other point raised. I however considered the question, and I arrived at the conclusion, that as the defendant's qualification was not objected to at the nomination but at the time of the polling, when the electors could not nominate another candidate, it would be unjust to the electors and unreasonable under such circumstances, to deprive them of a further opportunity of electing a person of their choice.

The application must be discharged with costs.

COMMON LAW CHAMBERS.

In the Matter of Mary Therese Kinne.

Custody of infant—Right of father.

A girl aged thirteen years and ten months, who had lived with her aunt from infancy, was allowed, on an application by her father for her custody, on allegations that she was illtreated by her aunt, to elect whether she would remain with her aunt or go to her father.

Semble, That if the child had recently left or been taken away from her father she would be ordered to return to him without reference to her own choice, at all events up to the age of sixteen.

[Chambers, January 12, 1870.]

On the 6th December, 1869, *O'Brien*, on behalf of Thomas Kinne, the father of Mary Therese Kinne, obtained a writ of *habeas corpus* under the provisions of 29 & 30 Vic. cap. 45, on the fiat of Mr. Justice Galt, commanding Stephen Keever and Lucy Keever, and such other person as might have the custody or control of the said Mary Therese Kinne, to have her body before the presiding judge in Chambers, &c.

The order for this writ was founded on the following affidavit of the father of the girl who described himself of the Town of Hopewell, in the County of Albert, in New Brunswick:

"Mary Therese Kinne, now to the best of my belief residing in the Township of Harwich, in the County of Kent, of Canada, is my daughter by my late wife, Mary Kinne, now deceased. She was born in Harvey, in the County of Albert aforesaid, on the fifth day of March, one thousand eight hundred and fifty six, and for the greater part of her life she has resided with her aunt Lucy Keever, wife of said Stephen Keever. Her mother died about three years ago.

In August last I received letters from the said County of Kent, from persons acquainted with said Keever, and from the information they contained I was induced to travel from my home in New Brunswick to Chatham in Kent aforesaid, to look after the child, and from the information I have received from inquiries made since my arrival in Chatham, I have no doubt that she is and has been most brutally and in-

humanly treated by her aunt aforesaid, and that it is absolutely necessary that I should take her in my charge and provide for her myself at my home in New Brunswick.

Upon my arrival in Chatham, I had interviews with the said Keevers, and informed them of my desire that the child should return to New Brunswick with me. They seemed at first disinclined to allow this, but afterwards appeared quite willing, and Mrs. Keever said she had only wanted a little delay to prepare clothing for the girl's departure, but this appears to have been only done to lull suspicion, as both the Keevers now absolutely refuse to give up the child, and state that she has left them, and they do not know where she is, but Mrs. Keever said she could find her."

On 17th December, Stephen Keever and Lucy Keever, made and filed a return to the writ to the effect that they could not produce the said child as commanded, as she was not and had not for some weeks past been in their custody or control. This return was verified by affidavits.

An enlargement was thereupon obtained to enable Thomas Kinne to object to the sufficiency of the return to the writ, and to contradict the truth of the facts set forth in the return, under sec. 3 of 29 & 30 Vic. cap. 45.

Pending this examination of the truth of the return, and of an intended application under sec. 2 of the same act, for the apprehension of the Keevers for disobedience of the writ, Mrs. Keever appeared in Chambers with the child, alleging that since the filing of the return she had ascertained where the child was, and that she then produced her in obedience to the writ. The next day, Thomas Kinne, Mrs. Keever and the child being in court,

O'Brien moved for an order for the delivery of the child to her father. He filed affidavits charging Mrs. Keever with neglecting the child's education, with severe and improper punishment of the child: with gross acts of cruelty to her, which were alleged specifically: that Mrs. Keever was of such an ungovernable temper, that she was not fit to be entrusted with the care of a child: that the child was of weak mind from the effects of the ill treatment; and, from her youth, ill treatment and fear of her aunt, was not fit to judge for herself as to with whom she would prefer to remain. He contended that the father was legally entitled to the custody of the child, at all events as against a stranger, which, in the eye of the law, the aunt must be taken to be, and that an order should be made for the delivery of the child to the father: that the affidavits established improper treatment of the child generally, and several specific acts of personal violence towards the child of an outrageous kind: that the child should not be allowed to choose which she would prefer going to, being of such tender age, and not being of sufficient intelligence to exercise a reasonable judgment; and, that even if so very intelligent as the aunt contended, such precocity itself might be required to be guarded against: that being under fourteen years of age, she would in law be deemed incapable of exercising an election; that she was in fear and dread of her aunt, and would act under the influence of that fear, and that the aunt had taught the child to dislike her father: that it would be improper in every way, and contrary to the law of nature that a father should be deprived of his child whom he had not abandoned and was willing to support, and whom he had evinced his determination to protect by coming the great distance he had, upon hearing the reports of her ill treatment by her aunt, and that it would be great cruelty to the father to let him return home believing that his child was ill treated, and induced to dislike him.

J. B. Read, in reply, filed affidavits stating that the child was, when about seventeen months old, taken by its aunt, then unmarried, to bring up, with the consent of her father and mother: that the aunt had continued to have the care of the child until its mother's death: that after that event, with the consent of the father, the child continued to remain with the aunt: that with the same consent and permission the child was brought to the Province of Ontario from New Brunswick, where all the parties resided: and that the child had ever since remained with the aunt. The charges of cruelty, both general and specific, were denied by Keever and his wife, and their statements were corroborated by others. It was also stated that the child was sent to school and well taken care of: that there were feelings of hostility between Mrs. Keever and the relatives of her husband, who were said to be afraid that Keever, who was well off, would leave his property to the child: that the child's father had no house of his own but boarded out, and that the future welfare of the child rquired that she should remain with her aunt.

He urged that in addition to the evidence in the affidavits, that the very appearance of the child refuted the charges of neglect of her bodily wants or mental culture: that the child was resolved not to go with her father, but to remain with her aunt: that if the Judge was satisfied that the case was met on the affidavits, the father could not complain, as he had suffered the child to grow up from infancy with the aunt, who had all the care and trouble of training and providing for her, and was attached to her: that in law the father was not legally entitled to the custody of the child under the circumstances: that all the court or a judge could do would be to order that the child should be removed from any restraint on the part of her aunt, and be given to understand that she was free to go with whom she pleased, without fear of the consequences: that if she preferred to go with the father she should be allowed to go with him, if with the aunt, then to go with her.

The following cases were cited: *Rex* v. *Smith*, 2 Strange, 982; *Rex* v. *Greenhill*, 4 A. & E. 624; *Rex.* v. *Isley*, 5 A. & E. 441; *Reg.* v. *Smith*, 22 L. J. Q. B. 116; *Ex parte Barford*, 3 L. T. N. S. 467; *Reg.* v. *Howes*, 17 Jur. N. S. 22.

The case was argued before the Chief Justice of the Common Pleas and Mr. Justice Gwynne, who examined the child for some time apart from her father and aunt, to ascertain the degree of intelligence she had attained, and explained to her fully that she was free from all restraint of her aunt, and was then under their protection.

Judgment was thereupon given by

HAGARTY, C. J., C. P.—We have carefully examined this child and explained to her her position. We have also read with much care the affidavits filed on both sides. We think that the

father, upon hearing the reports of the alleged cruelty, acted very properly in making this application, and did what we should expect a parent to do in such a case, but we do not think he can succeed in his present contention.

The affidavits are certainly conflicting, but there is a very satisfactory denial, well supported, of the alleged cruelty of the aunt; and the circumstances connected therewith are somewhat unusual, because it is seldom that parties are so fortunate as to be able to procure such strong corroboratory evidence in denial of such specific charges as is now produced. We consider the charge of want of intelligence of the child not in any way supported; her manners and answers establish to our satisfaction that the child is a peculiarly intelligent one, and fully understands her position.

The only order we can make is, that the child is free to go with whom she chooses. It is perhaps only natural that having lived nearly all her life with her aunt and not knowing her father, she will, if the latter has treated her well, prefer to remain with her aunt than go with her father; and it is important to be remembered that the aunt and her husband have, since the child was an infant, taken care of her and provided for her, at their own expense, and the father has not, until now, made any effort to get the child to return to him, and has paid no part of the expense of maintaining her. If she has not been well treated she has now an opportunity of leaving her aunt and going to her father and other relatives in New Brunswick.

We should regard the case very differently if this girl had recently left or been taken away from her father. In such a case the law apparently orders her to return to her father, without reference to her own choice, at all events until she attain the age of sixteen.

The case of *Reg.* v. *Howes*, *ante*, cited by Mr. O'Brien, is very strong as to the general rule. Our Statute, Con. Stat. Can. ch. 91, sec. 26, supports that general view.

We decide this case on its particular circumstances without infringing, as we believe, on the principles laid down in *Reg.* v. *Howes*.

Upon the child electing with whom she will go, the disappointed party must be careful not to resort to any improper means to deprive the other of the child.

The learned Chief Justice then told the child that she might go away either with her father or her aunt, and she at once with apparent willingness went to the latter.

CORRESPONDENCE.

Division Court—Defended Hearing Fee.

To the Editors of the Local Courts Gazette.

Gentlemen,—Your opinion on the following question will much oblige me and many other Division Court Clerks:—

Where a defendant gives notice of defence, but *does not* appear *nor defend* the suit at the trial, should a *defended* hearing fee be charged? Your obedient servant,

A. J. Peterson.

[A defended hearing should in such case be charged. The defendant by giving notice that he disputed the demand enters a defence to the whole or part according to the terms of his notice. The case when taken up by the Judge cannot be said to be an undefended one, for the best possible reason that there is the defendant's statement to the contrary. The position of the case is somewhat analogous to a defended issue in the Superior Courts, although, as in the Division Courts, the defence raised by the plea is not always intended to be supported by evidence, but in many cases is merely for time.—Eds. L. C. G.]

Bailiffs Fees—Mileage—Arrest.

To the Editors of the Local Courts Gazette.

Gentlemen—There are differences of opinion amongst the bailiffs and clerks of the County as to the construction to put on bailiff's fees in going to arrest under warrant from Division Court. The tariff says, mileage to arrest delinquent under warrant, 10cts. per mile, but for carrying delinquent to prison, 20cts. per mile—if the case is settled of course the bailiff gets but 10cts. per mile; but if he has to carry to prison is he allowed 10cts. in going to arrest, also 20cts. per mile from where the arrest is made, to prison? If not, there would be a great injustice to bailiffs in many instances. Suppose a man lived 10 miles from Stratford; the bailiff goes to arrest, and on getting there finds defendant had left, and the bailiff finds him say 10 miles away from there, but still within six miles from the gaol,—the bailiff would have travelled 20 miles to make arrest, but would be only entitled to 6 miles in bringing to gaol, so that he would have $1 20 for 26 miles travel.

By answering the above you will confer a favor upon Yours, &c.,

Thos. Tobin,
Bailiff No. 1, Perth.

[The item in the schedule of bailiff's fees is quite clear on the point. The officer is allowed 10cts. per mile till he arrests the delinquent. After the arrest is made, then for bringing him to prison 20cts. per mile. Thus if a party is arrested at his residence, say 10 miles off and is brought from there to gaol 10 miles, the fees would be $3 00. In the case put by our Correspondent the bailiff is entitled to mileage to arrest delinquent: Ten miles, $1; Carrying delinquent to prison, &c., six miles, $1 20; total, $2 20. If the case stated has actually

occured, we recommend an appeal to the County Judge, whose duty it would be at once to set the matter right.—Eds. L. C. G.]

Foreign Summonses—Collection of Fees.

To the Editors of the Local Courts Gazette.

Gentlemen,—During my experience as a Division Court clerk, I have found a serious difficulty in one particular branch of the practice, and if other officers have not experienced the same trouble, then I can only say that I am the exception; as I have never seen any complaints published on the matter, perhaps the evil does not exist generally; but I shall, notwithstanding, tell my experience, and how I propose to remedy the evil, whether it meets with general favor or not. If my discovery is valuable after a fair test, then I shall have it patented and endeavour to get a reward for my cogitations; if it will not work, then I must loose my labour, and let the idea be forgotten as impracticable and no good. I will commence my grievances without further comment.

In the course of my practice, I have had occasion to receive a great many foreign summonses from all parts of the country for service. I get those papers from the Post Office, enter them in full in foreign procedure book, give them to my bailiff, who serves the copy and makes his return; I swear him, fill up the jurat, pay him one, two or three dollars, and mail the original summons back to the clerk that sent it to me, with a bill of the costs, with the remark "please remit," for all this I only get about forty-five or fifty cents; the principal cost on foreign service is the bailiff's fees for service. I have found that on an average, about two-thirds of the clerks will probably remit me my costs, the other third are perfectly indifferent, will stand any amount of dunning, and will not even reply to let me know that they are living. Finally, I become disgusted, and give it up as lost. I got so disgusted a few years ago with those delinquents, that I resolved not to give my bailiffs any other foreign summonses until I got all the costs to cover first. Not long after forming this resolution, I received a foreign summons for service without any "needful" accompanying it. I at once wrote back to the clerk, telling him of my change of sentiment; I soon received an elaborate report of four or five pages, calling me anything but a decent fellow, saying that during all his long experience as clerk, he had not been treated as I had treated him. This frightened me, and I at once gave up my idea of demanding costs in advance, thinking that if I stuck to that idea long, I should have to fight a duel or leave the country. I now find quite a large sum due me in this way distributed all over the country, and I should very much like to know how to get my pay. I suppose I might write to the judges of the various counties about it, but who wants to bother a judge about two or three dollars. These officials have now twice the work to do for their pay; every session of the Legislature imposes new duties upon them without an increase of pay—anybody who would trouble a county judge under these circumstances, must be a heartless wretch. Now for the remedy—I propose that after a clerk has been dunned, say six times, by registered letters, and refuses to take notice of it, that his name be sent to the *Local Courts Gazette*, and at the end of the year have all the names published in one list; these lists can be cut out and posted up in each Division Court office, so that each clerk can see at a glance "who is who," and then they will have a list and know who to demand a deposit from, that innocent clerks may not be punished for the guilty. It is very troublesome to have to exact the full fee in advance, because the amount required cannot be arrived at till the work is done. This is my cure for the evil; what do your readers think of it.

Clerk of the 6th Division Court,
County of Norfolk.

[We insert with pleasure the above letter. The plan suggested to shame delinquent officers is worthy of consideration. We have ourselves serious thoughts of publishing at length the names of the many subscribers to *Law Journal* and *Local Courts Gazette* who are in arrears, and shewing the amount of indebtedness.

The publishers of the *Law Times*, one of the best regulated legal periodicals in England, give to the editor for publication and remark, the names of subscribers long in arrear, and who disregard the ordinary method of dunning, and the same plan might well answer in Canada.—Eds. L. C. G.]

TO CORRESPONDENTS.

Otto Klotz.—Your letter discussing the question of what fees clerks of the peace are entitled to on attending at adjourned sessions is received, but too late for us to find room for it in this number. It will, however, appear in next issue.