DIARY FOR DECEMBER.

3. SUN.. 1*st Sunday in Advent.*
2. Mon.. Last day for notice of trial for County Court. Audit of School section account. Clerk of every Municipality except Counties to return number of resident ratepayers to Receiver General
5. Thur.. Chancery re-hearing Term begins.
7. Sat.. Michaelmas Term ends.
8. SUN.. *2nd Sunday in Advent.*
10. Tues.. Quarter Sessions and County Court sittings in each County.
14. Sat.. Grammar and Common School assessments payable. Collectors roll to be returned unless time extended.
15. SUN.. *3rd Sunday in Advent.*
16. Mon.. Recorder's Court sits.
21. Sat.. *St. Thomas.*
22. SUN.. *4th Sunday in Advent.*
23. Mon.. Nomination of Mayors in Towns, Aldermen, Reeves and Councillors, and Police Treas.
25. Wed.. *Christmas Day.* Alterations in school sections take effect.
26. Thur.. *St. Stephen.*
27. Friday *St. John Evangelist.*
28. Sat.. *Innocents.*
29. SUN.. 1*st Sunday after Christmas.*
30. Mon.. School returns to be made. Last day on which remaining half Grammar School Fund payable. End of Municipal year. Deputy Registrar in Chancery to make returns and pay over fees. City of Toronto Assizes.

The Local Courts'

AND

MUNICIPAL GAZETTE.

DECEMBER, 1867.

ETECTORS AND THEIR TAXES.

The 75th section of the late Municipal act has been the cause of much thought and anxiety to painstaking officials, as well as to enterprising candidates for municipal honors at the next election.

Opinions are somewhat divided as to the benefit to be derived from this provision, if carried out, and it appears to be generally considered desirable in the abstract. But, admitting the abstract principle, it is quite evident that it is of no benefit if it is not acted upon or enforced. In fact it is a positive harm, as a matter of public morality, to leave an existing law disregarded, for that tends to bring all laws into contempt.

Now the law says that certain persons are qualified as electors, if, amongst other things, they "had paid all municipal taxes due by them on or before the sixteenth day of December next preceding the election." How is the fact of this payment to be ascertained in any manner that can legally satisfy the person who records the votes?

In the first place it has been said that the names of those who have not paid their taxes should not be put upon the voters list; but this depends upon two things—Firstly, whether the list has been made up before the 16th December. If it *has*, it would be illegal to leave out those who had not paid up to the time the roll was made up, for they have until the 16th December to pay their taxes, so as to entitle them to vote. If it has *not*, is the collector's roll to be taken as conclusive as to who have or have not paid their taxes. This surely would open the door to the possibility of frauds of the most gross kind. Partizan collectors would, particularly if in concert with other municipal officers, have an undue power in their hands, which might be used to control elections.

Secondly, has the clerk authority, either under sec. 100, sub-sec. 5, or sec. 101. sub-sec. 5, to leave out from the voters list the names of any persons "rated upon the then last revised assessment roll" to the "amount required to qualify" him to vote. Surely the word "rated" must include all without reference to anything that may transpire subsequent to the time the rating is made; at least the word "rated" must mean something different from *qualified.*

Again, it is obvious that if the voters lists are made up before the 16th December, they must include the names of *all*, whether they have at such time paid their taxes or not. If therefore a vote is tendered and the name appears on the roll, how is the Returning Officer to ascertain whether the intending voter has paid his taxes or not, unless the voter choose to admit the fact. He is not authorised to administer any oath to him as to this—the oath given by the act does not touch the case. The only other way he can ascertain the fact of payment is by the collector's roll, and then the dangers and difficulties already referred to immediately arise—even supposing the collector chooses, if he has not returned his roll, to let him inspect it for that purpose, which he does not appear to be bound to do.

Upon the whole, the person who introduced this provision into the Municipal Act does not seem to have taken the trouble to consider the effect of the provision, or how it was to be enforced, having only a general idea that it would be a good way of facilitating the prompt payment of taxes, or perhaps thinking that only those who paid for their privileges should have them. Both very proper theories, but as far as this act is concerned only theories.

THE MARRIAGE LAWS—No. IV.

In the interesting debates which preceded the passing of the Quebec Act, it was the opinion of the law officers of the Crown that the position of the Roman Catholic Church, as determined by that act, was a position of toleration only and not of establishment. Thurlow, the Attorney General, thought that thereby "the Roman Catholic religion was only tolerated, with provision for the continuance of that maintenance which the clergy had before from the whole population, but which by this act is restricted to such people only as choose to become or to remain Roman Catholics." And he remarked that nobody is thereunder compelled to be a Catholic. *Cavendish's Debates*, pp. 33, 34. Speaking with regard to the 5th section the Solicitor General Wedderborne says, "I can see by the article of this bill no more than a toleration. The toleration, such as it is, is subject to the King's supremacy, as declared and established by the act of the first of Queen Elizabeth." *Ib.* p. 54. This also appears to be the view subsequently taken by the highest Imperial authorities, and communicated to the Canadian Governors in the Royal Instructions. For instance, sect. 41 of the instructions sent to the Governor in 1818 is to this effect: "Whereas the establishment of proper regulations on matters of ecclesiastical concern is an object of very great importance, it will be your indispensable duty to take care that no arrangements in regard thereto be made, but such as may give full satisfaction to our new subjects in every point in which they have a right to any indulgence on that head, always remembering that it is a toleration of the free exercise of the religion of the Church of Rome only to which they are entitled, but not to the powers and privileges of it as an established church, that being a preference which belongs only to the Protestant Church of England."

With regard to the Bishop of that Church it is noticeable that for a long time he was called "the *superintendent* of the Romish Churches" (See Ord. L. C. 31 Geo. iii. c. 6). The title of "Bishop" first began to be commonly used about the year 1810, as appears from one of Sir James H. Craig's dispatches to the Colonial Minister, but not till 1818 was such title recognized by any official person in the government. In the debates we have already referred to, Lord North (the leader of the government) said, "With regard to the Bishop it is my opinion—an opinion founded in law—that if a Roman Catholic Bishop is professedly subject to the King's supremacy under the act of Queen Elizabeth, none of those powers can be exercised from which dangers are to be apprehended." (*Cavendish's Debates*, p. 222). It will be observed that by the articles of capitulation, the British commanders carefully abstain from giving any guarantee that the Episcopal office should be continued under English rule. And we do not find in all subsequent Imperial or Colonial legislation that there has been any institution or restitution of the Roman Catholic episcopal office in Canada. True, in some of the later statutes reference is made to the Roman Catholic Bishop, but this is out of mere courtesy, and the employment of the name "Bishop" can never be taken to import into our system a sanction to all or any of the episcopal functions pertaining to that office as legally constituted.

Practically the right of the British Sovereign to nominate Bishops for the Roman Catholic Churches in Canada is ignored; these ecclesiastics receive the investiture of office from the hands of the Pope; it is his act which makes, not the royal approval, which follows as a matter of course. Then, having regard to the Quebec Act and the Statute of First Elizabeth, can a bishop, deriving jurisdiction from such a source, dispense with any part of the statute law of England introduced into Canada by our own constitutional act (C. S. U. C. c. 9)?

Bishops in England have the right to dispense with some parts of the statute law (*e.g.* the proclamation of marriage banns), because their dispensing power is conferred upon and confirmed to them by statute likewise: see 25 Hen. VIII. c. 21, by which all bishops are allowed to dispense as they were wont to do. But what, according to the opinion of constitutional lawyers who have examined this matter, is the legal status of the Roman Catholic Bishop in Canada? Jonathan Sewell, Attorney General, and afterwards Chief Justice, of Lower Canada, about the year 1810, in a state paper uses the following language: "Since the titular Roman Catholic Bishop of Quebec, according to the original creation of the See of Quebec, holds of and is dependent upon the See of Rome, and at this moment, as heretofore, derives his entire authority from the Pope, without any commission or power

whatever from His Majesty, it is most clear that the Statute of Eliz., which is formally but unnecessarily recognized by the Stat. 14 Geo. III. c. 83, to be in force in Canada, has annihilated not only his power but his office, the 16th section having especially prohibited all exercise of the Pope's authority, and of every authority derived from him, not only in England, but in all the dominions which the Crown then possessed or might thereafter acquire." And he strengthens his opinion by a paragraph from the report of the Advocate General (Sir James Marriot) in 1773, upon the affairs of Canada, in which that eminent jurist observes that there is in Canada "no Bishop by law." The law officers of the Crown, consisting of Charles Robinson, Vicary Gibbs and Thomas Plumer, and being respectively His Majesty's Advocate, Attorney and Solicitor General, in reporting in 1811 upon the question as to the right of presentation to Roman Catholic livings in Lower Canada, make use of the following remarkable language: "If, however, this right be supposed to have originated from the Pope, we think the same consequence [*i. e.* that such right had devolved to His Majesty] would result from the extinction of the Papal authority in a British Province. For we are of opinion, that rights of this nature, from whichever source derived [*i. e.* whether from the Pope or the French King], must in law and of necessity be held to devolve on His Britannic Majesty as the legal successor to all rights of supremacy as well as of Sovereignty, when the Papal authority, together with the Episcopal office, became extinct at the conquest by the capitulation and treaty, and the statute, 1 Eliz. c. 1, sec. 16, as specially recognized in the Act for the government of Canada (14 Geo. III. c. 83)."

It remains further to be observed that the expression "*Ecclesiastical rights or dues*," perpetuated in our constitutional act, C. S. U. C. c. 9, s. 6, from the 5th sec. of the Quebec Act, applies simply to parochial dues and tithes, and cannot be construed to embrace any right or privilege of dispensation. In fact a quasi-legislative interpretation to this effect has been given to the words by the note appended to the 35th section of I. S. 31 Geo. III. c. 31, as it appears in the Con. Stat. Can. p. xvii. This is also abundantly evident from the tenor of the debates upon the passing of the Quebec Act, as reported in Hansard and by Cavendish. And the same view is expressly maintained by Lafontaine, C. J., in *Wilcox* v. *Wilcox*, 2 L. C. Jur. pp. 11, 21, &c., and by Mondelet, J., in *Stuart* v. *Bowman*, 2 L. C. R. 405.

By the Capitulation, the Treaty, the Quebec Act, and our own Constitutional Act, there was and is the clear right to Roman Catholics in Ontario to contract marriage, as one of their sacraments, according to one usages of their church, but subject to the Queen's supremacy. In other words, their clergy had and have the power to celebrate marriage after due proclamation of banns, in the same manner as we have seen that ministers of the then dissenting churches had that privilege by virtue of special legislation interposed on their behalf, during the time that the Church of England was the State Church. But the onus is on the Roman Catholic Bishops to shew that they have any larger authority or more extensive rights, or that they occupy any more privileged position, than the officers of the other churches in this Province. If the marriage law of England became our marriage law by the first legislative act of Upper Canada, was not the Roman Catholic Church subject thereto in common with the so-called dissenting churches, save where relief was given by the earlier legislation we have referred to? If under the Consolidated Statutes, and now that all connection between Church and State is abolished, the English marriage law, modified in some respects as we have seen, be our marriage law, is not the Roman Catholic Church on the same footing as all the other churches, and bound to invoke the aid of the Governor's license, where any dispensation of the statute law is contemplated?

Much more might be said as to these many questions we have dealt with, but it is time to draw to a close.

In view of what has been written it would seem that there are two matters in the marriage laws to which legislative attention may well be given:

I. To provide that any departure from the ceremonies prescribed by law in the celebration of marriage should be irregularities merely, not operating to the annulment of the marriage tie, but only exposing the officiating clergyman or officer to certain penalties.

II. To define the position of the Roman Catholic Church in this respect, and to place the adherents of that church in express terms

upon an equality with the rest of the population.

We shall on a future occasion refer to a very interesting decision in Lower Canada, as to the validity of a marriage between a Christian and an Indian woman, a pagan, according to the rites or custom of the tribe to which she belonged.

SELECTIONS.

THE LAW OF LIBEL.

By far the most important branch of the law of libel is that which relates to publications defamatory of indididuals. Blasphemous or obscene books are comparatively rare, and the harm they are likely to do is generally remote and diffused. But words or writing affecting men's reputations are necessarily of daily occurrence, and the injury inflicted by them is obviously in modern times one of the gravest of all injuries. Unfortunately, however, though the law as to libels of a public character is unsatisfactory, the law of defamation is incomparably more so: in fact there is perhaps no single branch of our law in so utterly indefensible a condition; it is theoretically absurd, and practically mischievous.

In every libel, as we have seen, three elements may have to be considered, the form of the publication, the character of the matter published, and the motive with which it is published. In dealing with libels injurious to the public only, such as blasphemy for instance, the law, with a correct instinct, looks mainly to substance and motive, and pays very little regard to form. And yet if there be any case in which it might be permissible to lay stress upon form, and distinguish broadly between words that perish and writings that endure, it is this case, for the liklihood of injury is materially affected by the form. But defamation of individuals is very different. The character of the charges made, the degree of publicity given to them, the number of times they are repeated, may all affect both the moral guilt of the slanderer and the injury to the slandered. But men's lives are short, and their memories shorter, the causes of a prejudice are soon forgotten, though the prejudice survives, and if a man's reputation has suffered it makes no difference to him whether the attack which injured him is preserved in the back files of a newspaper or not. Yet, strangely and perversely, it is just when it has to deal with defamation of individuals that the law makes everything of form, and treats all questions of substance as quite subsidiary.

The first broad rule of law on the subject is one founded entirely upon form. A defamatory publication (and anything tending to injure the reputation of another may be said to be defamatory) is in general both an indictable offence and an actionable wrong. But if the same matter be published by word of mouth it is in no case a criminal offence, nor is it, except in a few instances, to be mentioned shortly, any ground for a civil action.

The rule that written libels are indictable and oral slanders are not, is universal, yet it is utterly unreasonable. The ground on which libels are treated as offences against the State, is, in the words of Blackstone, because "every libel has a tendency to the breach of the peace, by provoking the person libelled to break it." But in the present day, at least, a libel published in a tangible form is exactly the kind of defamation which is not likely to lead, and in fact does not lead to breaches of the peace, for there are other and better remedies open. An attack in a book, or phamphlet, or newspaper, may be met with the same weapons. It is the whispered slander which never takes a tangible form, and therefore can never be contradicted, that really leads to horsewhippings.

The remaining branch of the rule, which says that oral slander shall not be actionable is, and always has been, subject to certain exceptions, founded either upon the substance of the slander, or the consequences arising from it. The exceptions which make defamatory words actionable on the ground of their substance, are, to adopt the order of Bacon's Abridgment, "words which import the charge of a crime" (and this includes anything which would subject a man to penal consequences); "words which are disgraceful to a person in an office;" and words which are disgraceful to a person of a profession or trade," by imputing to him incapacity or impropriety in the way of his business. The other exception is founded upon consequences, and provides that a person slandered may maintain an action for the slander if he has suffered any special damage in consequence of it. This last exception might seem at first sight to remove the hardship of the general rule it qualifies, by giving an action to any one really injured by a slander; but, as we shall see, it has unfortunately been rendered comparatively useles by the narrow view taken of the meaning of special damage.

The exceptions founded on the substance of the slander—imputation of crime, disease, official or professional misconduct—are even more arbitrary than the general rule itself. The difficulty, at first sight, is to imagine on what possible ground these particular slanders were chosen and all others omitted. But it appears to us that in our old books traces may be found which show that the earlier judges had a tolerably reasonable principle more or less distinctly present in their minds when they decided the cases from which the above rules are drawn, that they regarded such cases as that of a contagious disorder as only examples of a wider law, and never meant *expressio unius* to be *exclusio alterius*. Anyone who goes through the cases collected in such a book as Rolle's Abridgement will, we think, have no doubt that the older judges considered defamation to be actionable, if it either in fact did, or in the natural course of things must, injure the person defamed, by affecting him in purse or per-

son, or by excluding him from intercourse on equal terms with his fellows. And they held written libels to be always actionable, because in those days writing was so rare an accomplishment, so much weight and importance was attached to anything written, that written defamation could hardly help affecting a man's reputation very seriously. But an English lawyer instinctively *hæret in cortice*; and thus the detailed rules became stereotyped as part of the law, while all idea of any broader principle was forgotten. So entirely has all reason been lost sight of that in the present day to charge a man with having a contagious disease is actionable, because it is *likely* to exclude him from society; yet if you show that other slanderous words have *in fact* excluded him from society, this does not make them actionable, for the law takes no note of such damage.

But its utter want of principle is not the worst defect of the law on this subject. Its practical working is infinitely worse. A moment's reflection will be sufficient to shew anybody that the class of slanders which people practically have to dread most, which inflict the greatest amount of pain, which occur most frequently, and which are most likely to lead to breaches of the peace and other evils abhorred by the law, are those which charge not transgressions of the criminal law, but of the social code, the code of honour– imputations of untruthfulness, cowardice, treachery, unchastity, and the like. And yet for such slanders the law provides no redress whatever, for they are not within the list of words actionable *per se*, nor are they likely to lead to such consequences as the law contemplates under the term special damage. A very few examples will be sufficient to illustrate the working of the present law. It is actionable to say of a man that he has the measles; it is not so to say he is a liar. It is actionable to say of an officer that he does not know his drill; but if you only say that he is in the habit of racing horses and does not run them fair, that he does not pay his losses at cards, and is guilty of other dishonourable practices, he has no redress. You must not say of a country gentleman that he has omitted to repair a bridge which he was bound to repair, for that is an indictable offence and you must not say that when sitting as a magistrate he leans against poachers, for that is slander of him in his office; but you may go about telling that he owes money to every tradesman in the parish, that he is a cruelly oppressive landlord, that he starves his servants, and is an unkind husband. You must not say of a surgeon that he is a bad operator; but you may tell any stories you please about his private life and to the discredit of his private character. And what is most scandalous of all, any one is at liberty to slander a women by imputations upon her chastity to any extent he pleases, the law provides no means for preventing him from doing so, for punishing him for his offence, or for giving compensation to his victim. Lord Campbell certainly did not exaggerate when he spoke (9 H. L. C. 593) of "the unsatisfactory state of our law, according to which the imputation, by words however gross, on any occassion, however public, upon the chastity of a modest matron or a pure virgin is not actionable without proof of special temporal damage to her;" nor Lord Brougham when he said that "such a state of thing can only be described as a barbarous state of our law."

Nor is the hardship of this state of the law very materially mitigated by the rule that slander becomes actionable if followed by special damage; for the law is clear that no special damage is sufficient for this purpose unless it be actual pecuniary injury, like the loss of custom by a tradesman, or at least the loss of some temporal and worldly advantage capable of being estimated in money, as the loss of a marriage by a lady has been said to be. The mental suffering caused by a slander and the loss of the world's respect and regard is no ground of action. In fact, so far has this doctrine been carried, that in *Lynch* v. *Knight*, 9 H. L. C. 577, first the Irish Exchequer Chamber, and afterwards the House of Lords, were divided upon the question, whether, if a person accused a wife of adultery, and in consequence of the accusation her husband turned her out of doors, this would be sufficient special damage to sustain an action. Several very learned judges in Ireland, and Lord Wensleydale in the House of Lords, thought it would not; for that the wife would only lose the pleasure of her husband's society; he would still be bound to support her, and therefore she would have suffered no loss which could be expressed in money.—*Solicitors' Journal.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW

NOTES OF NEW DECISIONS AND LEADING CASES.

Fi Fa against Reeve returned nulla bona—Application for quo warranto—Evidence.—An application for an injunction in the nature of a *quo warranto* against a reeve for usurping the office, on the ground that a *fi. fa.* against him had been returned *nulla bona*, was founded only on an affidavit that one D. had recovered judg- against him, on which a *fi. fa.* issued and was placed in the sheriff's hands, and returned by him *nulla bona*. *Held* insufficient, for it should have been shown how and to whom the return had been made, and the writ and return should have been produced or proved. The rule *nisi* was therefore discharged with costs.—*In re Wood*, 26 Q. B., E. T. 513.

Summary Conviction—Appeal.—Under Con. Stat. U. C., cap. 114, an appeal from a conviction must be heard at the Court of Quarter

Sessions appealed to. There is no power of adjournment. Where therefore such Court, after proof of entry and notice of the appeal, adjourned the further hearing, by order, until the next sittings, and then made an order quashing the conviction, the orders were quashed. No costs were given, as no objection had been made at the time of adjournment.—*In re McCumber and Doyle*, 26 Q. B, E. T. 516.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

MISREPRESENTATION—ACTION FOR—PLEADING—UNCERTAINTY—Declaration, that the defendants owning the land upon which the Provincial Exhibition was to be held, advertised that certain portions would be let by auction for the purpose of refreshment booths; that the plaintiff attended and leased one of such portions; that at the said auction the defendants made certain statements and representations as to the positions of the gates and entrances to the Fair Grounds, the number of persons to be allowed to sell refreshments, and the relative positions of the booths, on which the value of the plaintiff's letting was estimated and depended, and reylying on which the plaintiff purchased and erected a booth; but that the defendants deviated and departed from such representations, and so changed the position of the gates, and the number of the booths, that the plaintiff's letting became useless to him.

Held, that no cause of action was shewn, for the declaration was for a wrong, and the statements were not alleged to have been false when made, or to have been made in order to induce the plaintiff to contract.

Semble, that the declaration was also bad, in not stating what the representations were, and how departed from.—*Reid* v. *The Board of Agriculture for Upper Canada*, 26 Q. B., E. T. 565.

REPLEVIN—EVIDENCE OF TAKING—DAMAGES.—Replevin will lie in this country, though there has been no wrongful taking, but a detention is alone complained of, and this though the writ and declaration charges both, for every detention is a new taking.

The title of an administrator relates back to the death of the intestate, so as to enable him to replevy goods taken before the grant of administration.

In this case the defendants were the widow of the intestate and her second husband. It was shewn that she had taken possession of and appropriated to her own use the intestate's property, and acts and declarations of both defendants established that the held it together after her second marriage. *Held*, sufficient evidence of a joint taking

Held, also, that the plaintiff might recover as damages the value of any of the property in the defendants' hands at the time of issuing the writ, though not actually replevied.

Semble, if it had been shewn that the widow had paid funeral expenses or debts of the intestate, this might have been allowed in mitigation of damages.—*Henry Deal, Administrator of S. Deal* v. *Catherine and Daniel Porter*, 26 Q. B., E. T. 578.

EXECUTORS—SALE OF MORTGAGE BY—An executor holding a mortgage given to the testator, sold and assigned it, taking the purchaser's promissory notes payable to himself or order.

Held, upon an issue of *plene administavit*, that this in law amounted to a receipt of the original debt, making the executor chargeable with the mortgage as an asset in possession—*Thomas Macbeth* v. *Mary Macbeth, Executrix of Thomas Macbeth*, 26 Q. B, E. T. 549.

PUBLIC FOOTWAY—OBSTRUCTION—DEDICATION—USER.—An action for the obstruction of a public way is not maintainable, unless the plaintiff has sustained some particular damage peculiar to himself and in excess of that suffered by the public.

The plaintiff showed no other damage than that on several occasions he, in common with all persons who then made use of the footway, had been obliged, owing to his not being able to pass the obstruction, to turn back and proceed by a less convenient road; and that on other occasions he had been delayed while he removed the obstruction before he could proceed.

Held, that he was not entitled to maintain an action for the obstruction of the footway.

Evidence was given of the public user of the footway for nearly seventy years, during the whole of which time however, the land over which the footway passed had been on lease.

Held, that the judge had rightly directed the jury in telling them that they were at liberty to infer a dedication to the public at any time prior to the lease being granted.

Although leave only to enter a non-suit is reserved at the trial, the Court will, when the plaintiff has obtained a verdict on a material issue, order a verdict to be entered for the defendant on another issue, and will not enter a non-suit if they consider such a course most conducive to the interests of justice.—*Winterbottom* v. *Lord Derby*, 16 W. R. 15.

LIBEL—FAIR COMMENT ON PUBLIC ACTS.—The alleged libel purported to be founded on information given to the defendant by "a resident of this city, yesterday" (meaning the day before the publication). One of the pleas sought to be pleaded, alleged that the gravemen of the charge was matter of "public notoriety and discussion" and that the words used were a fair comment, &c., and making other statements which, it was alleged, would enable defendant to introduce evidence of irrelevant matters.

Held, that a general plea that the publication was a fair *bona fide* comment, &c., might be pleaded, but the plea as now framed, was inconsistent with the words used in the alleged libel, and could not be allowed.—*Devlin* v. *Moylan*, 3 U. C. L. J. N. S. 317.

SURETY AS MAKER OF JOINT PROMISSORY NOTE.—To an action on a joint promissory note of three persons payable one month after demand, one of the makers pleaded on equitable grounds that he made the note as surety for another of the makers without consideration, of which the holders had notice, and that the holders did not make any demand from any of the joint makers of the note within a reasonable time, but delayed for an unreasonable time, to wit, ten years.

Held, a bad plea.—*Belfast Banking Co.* v. *Stanley*, 15 W. R. 989.

NUISANCE—FOULING OF A STREAM—PRESCRIPTIVE RIGHT.—The defendant occupied paper mills on the banks of a stream, into which he discharged the refuse of his manufacture. A prescriptive right to foul the stream had been acquired by the defendant's predecessors in the occupation of the mills. Those predecessors used rags in the manufacture of paper. Soon after the defendant came into occupation of the mills he introduced into, and employed in the manufacture a new raw material called *esparto grass*. Upon a suit by a neighbouring occupier to restrain the defendant from fouling the stream to the plaintiff's injury, it was contended that, independently of any increased fouling of the stream, the plaintiff had a right to an injunction by reason of the nuisance caused by the use of *esparto grass* being a new kind of nuisance in respect of which no prescriptive right had been acquired by the defendant.

Held, that it was not sufficient for the plaintiff to show that the defendant used in his manufacture a new raw material, but that he must show further a greater amount of pollution and injury arising from its use, and that the *onus* of showing this lay on the plaintiff. The plaintiff not having shown this, his bill was dismissed with costs.—*Baxendale* v. *McMurray*, 16 W. R. 32.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

PAYNE v. GOODYEAR ET AL.

Sale for taxes—Redemption of part—C. S. U. C., ch. 55, sec. 113.

An entire lot having been sold, one C. paid the redemption money on the east half, and one P. on the west half, but it was afterwards represented to the council that P.'s payment had been made by mistake, and the Treasurer being ordered to refund, applied the money by P.'s authority to another lot.

Held, that under Consolidated Stat. U. C. ch. 55, sec. 113, the owner of part of a whole lot sold for taxes might redeem such part on paying the proportionate amount chargeable against it: and that the clause did not merely allow such payment before sale. The east half was therefore held have been properly redeemed, but.

Quære, if redemption of the whole had been necessary, as to the effect of P.'s payment by mistake.

Trespass for breaking and entering the plaintiff's land, being the east half of lot No. 18, on Water street, in the town of Chatham, destroying plaintiff's crops, sowing seed, digging holes, planting blocks of wood, erecting a wooden building, and with weapons and a vicious dog, assaulting the plaintiff, and driving him and his servants off the land—*per quod*, &c., &c.

Second count, for breaking and entering plaintiff's land, being the east half of lot 13 on Water street, in the town of Chatham, throwing open gates, and ploughing up the plaintiff's potatoes, and the plaintiff claimed a writ of injunction.

Pleas.—1. Not guilty. 2nd. To the first count, land not the plaintiff's. 3rd, To the first count, that at the time of the alleged trespass the land belonged to John Hooper, one of the defendants, and the defendants Watson, Holmes, and Longwell entered as his servants by his command.

Similar plea to the second count.

The trial took place in October, 1866, at Chatham, before Hagarty, J.

There was proof of the alleged trespass against four of the five defendants, but none against Goodyear. The plaintiff to prove his title put in three deeds, the execution of which was admitted.

1. A deed from John Mercer, Esq., Sheriff of the County of Kent, dated the 26th of August, 1861, witnessing that in consideration of $20 57, paid by Charles Greenwood at public auction, on the 17th of December, 1858, under the Assessment Act, 16 Vic., for arrears of taxes, under a writ to him directed, he sold and conveyed to Charles Greenwood, his heirs and assigns, the lot No. 13, on the south side of Water street, in the town of Chatham, containing one acre; *habendum* in fee.

2. A deed from Charles Greenwood to John Miller, consideration $200, for the east half of the same lot, containing half an acre; *habendum* in fee.

3. A deed from John Miller to the plaintiff, consideration $250, for the east half of the same lot; *habendum* in fee.

The Treasurer proved that this lot was sold in October, 1858. The amount of taxes in arrear was $16 87. The taxes had not been paid for the years, 1851 and 1857; for the intermediate years they had been paid. The sale actually

took place on the 9th October, 1858. On the 30th of September, 1859, Thomas Crowe redeemed the east half, and it was entered as redeemed. He paid the money, which was garnished as the money of Greenwood, the purchaser, on a judgment in favor of an execution creditor.

The lot had been assessed and sold as one entire lot. The redemption money was paid by Crowe only on the east half, but the other half was redeemed by Mr. Prince on the 8th of October, 1859, who paid the money to the Treasurer. These two payments each included the ten per cent. Sometime afterwards it was represented to the council that Mr. Prince's payment was a mistake, and the Treasurer was ordered to refund, and he, by Mr. Prince's authority, applied the payment to another lot. This lot had been returned as vacant in 1851, and was assessed to one Vosburgh in 1857, and a warrant issued to levy, the taxes from him was returned *nulla bona*.

The Treasurer's return of lands redeemed within twelve months from the day of sale was proved. It stated that on the 30th of September, 1859, Thomas Crowe redeemed the east half by paying $11 86; and on the 8th of October, 1859, Albert Prince redeemed the west half by paying a like sum. The Treasurer afterwards notified the Sheriff of the mistake about the redemption by Mr. Prince, and then the Sheriff conveyed the whole lot to Greenwood, but this he explained was a mistake, that it should only have been for the west half.

On the defence it was objected that the lot was redeemed within the year in fact, and the subsequent disposition of the money could not undo it.

It was answered that the redemption of one half was nugatory, and that a payment made in error and mistake as to the other half was no redemption.

Leave was reserved to move on this objection.

Thomas Crowe proved the payment on the east half, and that afterwards, and within the year, he went to inquire if he had a right to pay the whole, and was informed that Mr. Prince had paid the other half. He said he did not know whether he was not liable to pay the whole.

A verdict was entered for the defendants, with leave reserved to the plaintiff to move to enter a verdict for $10 against all the defendants except Goodyear.

In Michaelmas Term *Atkinson* obtained a rule calling on the defendants, except Goodyear, to shew cause why the verdict as to them should not be set aside, and a verdict entered for the plaintiff on all the issues, with $10 damages, pursuant to leave reserved, on the ground that the plaintiff shewed a good title to the land, and that there was no redemption properly proved.

In this Term *Robt. A. Harrison* shewed cause, citing Consol. Stat., U. C., ch 155, secs. 140, 141, 142, 148, 149, 150; *Buchanan* v. *Poppleton*, 4 Jur. N. S. 414, S. C. 27 L. J. C P. 210; *Boulton* v. *Ruttan*, 2 O. S. 362; *Mair* v. *Holton*, 4 U. C. R. 505; *Allan* v. *Hamilton*, 23 U. C. R. 109.

Atkinson supported the rule.

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

There seems no doubt that the rodemptien money was actually paid on the east half of this lot number thirteen, within a year from the sale; that the Treasurer received it expressly on account of the sum charged upon that part of the lot, and that the money so paid, though not paid over to the purchaser, was taken through legal process, and received by an execution creditor of the purchaser, and *pro tanto* discharged a debt due by him. If this payment to the Treasurer was a legal discharge of the taxes due on the east half, then the plaintiff has no right to recover, for his title and ownership, and consequently his claim to damages for trespass on that piece of land, are dependent on the sale for taxes (which is not disputed), and on the non-redemption of that land in the manner authorized by the statute.

It appears to us that under the 113th section of the Assessment Act, whenever satisfactory proof is adduced to the Treasurer that an entire lot has been sub-divided, that officer must adjudge the question of sub-division, and finding the fact established he has a right to receive the proportionate sum of the taxes due on the whole in discharge of the particular sub-division so ascertained. When he has in good faith determined that the lot has been sub-divided, and then receives the due proportion of the taxes, the subdivision is as much discharged from the incumbrance as if the taxes on the entire lot had been paid.

But the 113th section refers only to *taxes*, and is not in its express terms applicable to redemption money with regard to which there are the rights of the purchaser to be considered, as well as those of the owner of the land or of the municipality entitled to the tax.

The contention of the defendants is, that the power of the Treasurer under the 113th section extends to lands sold for taxes so long as the right to redeem remains in the owner, and after the best consideration we can give, we have adopted that conclusion.

The primary, it may be said the sole, object of the Legislature in authorizing the sale of land for arrears of taxes, was the collection of the tax. The Statutes were not passed to take away lands from their legal owners, but to compel those owners who neglected to pay their taxes, and from whom payment could not be enforced by the other methods authorized, to pay by a sale of a sufficient portion of their lands.

All lands which had been described as granted by the Crown were subject to a tax for local purposes, and when unoccupied, and no distress to be found upon them, the lands themselves, after the taxes had been in arrear a fixed number of years, were liable to sale. Primarily each lot as granted by the Crown was charged, but as the grantees might in various ways have parted with their rights in severalty to different persons who accquired portions less than the whole, the 113th section was passed for the relief of such persons, to enable them by the payment of the tax due on the part they owned to acquit themselves and their estate, leaving the remainder of the lot chargeable with its due proportion also. The power to sell land was created in order to collect the tax, and the same reason that influenced the Legislature to enable the true owner of a part to pay his proper part of the taxes on the whole lot, would exist in his favour to permit him to redeem.

Now, in treating the 113th section as extending to the later case, no violence whatever is done to its language. The Treasurer is, under the 148th section, the officer to receive the re-

demption money, which in fact is the amount of the taxes in arrear, plus the charges of sale and ten per cent., to which the purchaser is entitled as a recompense for having advanced his money. The spirit of the 113th section is satisfied by the payment of the tax, on the sub-division of which satisfactory proof has been given; the spirit of both sections is fulfilled by the collection of the tax on the sub-division, and the redemption by the owner on the terms imposed by the 148th section.

And the principle of section 113 is remedial. A man purchases an acre of an unoccupied 200 acre lot. At the time of his purchase the tax for some preceding year has been suffered to fall into arrear. He erects a dwelling on his purchase, and then finds that the tax for that year is due; and but for the 113th section he must pay the tax on the other 199 acres, or his one acre may be sold. If it has been sold, and the 113th section does not help him, to save his acre he must pay the taxes on the whole 200, with the costs and the additional ten per cent. And if the 148th section were strictly and literally construed, he would have no legal right to redeem the 199 acres, because he was not the owner of them, but only of the one acre.

We think it more in accordance with the spirit and intention of the act to hold that the benefit conferred on owners of land, under the circumstances stated in the 113th section, should be treated as extended to owners similarly circumstanced, as owning a sub-division of a lot, and to enable them to redeem it on adducing satisfactory proof to the Treasurer of the sub-division.

In our opinion, therefore, the payment received by the Treasurer of the proportion of the arrears of taxes for which lot 13 was sold, which would be and in fact were due in respect to the east half only, was an effectual redemption of that half lot. And we prefer to rest our conclusion in favour of the defendants on this ground to entering upon the (to my apprehension) more doubtful question on the payment made by mistake by Mr. Prince on the west half of the lot, a payment which at first glance can hardly be said to have redeemed the lot, without holding that the form not the substance is to be considered by the Court. The municipal council as it seems, have treated the payment by mistake as not incapable of correction, by making a transfer of it to the proper lot.

However, I do not desire to bind myself to any opinion as to the legal effect of the payment by Mr. Prince. On a merely superficial view it seems open to objection, but a careful consideration might lead to a conviction that it should prevail to prevent forfeiture.

We think the rule should be discharged.

Rule discharged.

The Queen v. Faulkner.

Sale of Liquors—License—29 & 30 vic. Secs. 249, 254.

Under the Municipal Institutions Act of 1866, secs. 249, 254, a person holding a shop license for the sale of liquors, is punishable, under sec. 254, for selling liquor at his shop in quantities less than a quart.

Robert A. Harrison obtained a rule *nisi*, calling upon Alexander McNabb, Esq., Police Magistrate of the City of Toronto, and George Albert Mason, the Informant, to shew cause why the conviction by the Police Magistrate of the defendant Faulkner, a shopkeeper licensed to sell spirituous liquors at his shop in the said city, for having sold at his shop whiskey in less quantities than a quart, namely, in the quantity of a pint, should not be quashed for irregularity, on the following grounds: 1st. That the defendant was not by law restricted to sales of spirituous liquors in quantities less than a quart. 2nd That if so restricted, he was not liable to summary conviction for any such sales. 3rd. That so long as in fact licensed, he could not, in the absence of express statutory provision or by-law of the Police Commissioners, be summarily convicted of selling spirituous liquors without license, in excess of or contrary to the license. 4th. That there is no such statutory provision, and no such by-law. 5th. That the latter part of sec. 254 of the new municipal act applies only to the case of persons making sales of spirituous liquors without license, and sec. 255 of the same act, which applies to shopkeepers, creates no offence such as that charged against the defendant.

The rule was drawn up on reading the *certiorari* and the return thereto, the conviction, and the papers annexed. The conviction was as follows:

Province of Canada, City of Toronto, *To wit*: } Be it remembered that on the twenty-second day of May, in the year of our Lord one thousand eight hundred and sixty-seven, at the said City of Toronto, M. B. Faulkner, of the said city, shopkeeper, is convicted before me, Alexander McNabb, Esquire, Police Magistrate for the said City of Toronto, for that he, the said M. B. Faulkner, on the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, at the said City of Toronto, while holding a shop license for the retail of spirituous liquors duly granted to him on the ninth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, and which is in the words and figures following, namely:

Class 3rd. Amount $40.
No. 38. Shop Licensa.

This is to certify that a License was this day granted to M. B. Faulkner, of No. 342 Yonge Street, in the Ward of St. John, in the City of Toronto, Shopkeeper, authorizing him, the said M. B. Faulkner, to sell, by retail, spirituous, fermented, or manufactured liquors, in his shop at No. 342 Yonge Street, as aforesaid; but not to allow any such liquors to be consumed within his shop, or within the building or premises of which such shop is part, either by the purchaser thereof or by any other person not usually resident within such building. Provided, nevertheless, that the said M. B. Faulkner shall observe and keep all such laws, by-laws, rules, and regulations as are now or may hereafter be lawfully in force in the City of Toronto, in reference to shop licenses, and to shopkeepers, and in respect to the keeping or selling of any such liquors as aforesaid.

As witness my hand and seal, at Toronto, this 9th day of April, A. D. 1867.

Ogle R. Gowan,
Inspector of Licenses.

Did sell at his shop in the City of Toronto spirituous liquors, to wit, whiskey, in less quantities than a quart, namely, in the quantity of a

pint, without the license therefor by law required.

And I do further find that no by-law has ever been passed relative to shop or tavern licenses or otherwise by the Commissioners of Police of the City of Toronto, under section one hundred and forty-nine (149) of the Statute twenty-nine and thirty (29 & 30) Victoria, chapter fifty-one (51)

And I adjudge the said M. B. Faulkner, for his said offence, to forfeit and pay the sum of twenty dollars, to be paid and applied according to law, and also to pay to the said George Albert Mason the sum of two dollars and eighty-five cents for his costs in this behalf; and if the said several sums be not paid forthwith, I order that that the same be levied by distress and sale of the goods and chattels of the said M B. Faulkner, and in default of sufficient distres, I adjudge the said M. B. Faulkner to be imprisoned in the common gaol, of the City of Toronto for the space of thirty days, unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying of the said M. B. Faulkner to the said goal, shall be sooner paid.

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

(Signed,) A. McNABB,
P. M. [L.S]

McMichael shewed cause, and *Harrison* supported his rule, citing *Regina* v. *Lennox*, 26 U. C. Q B, 41. The clauses of the Statute bearingon the on the question are cited in the judgment.

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

The Municipal Act of 1865 has altered the provisions of the aw with respect to shop licenses, and with regard to penalties for selling intoxicating liquors without license. By the 249th section, a shop license is defined to be a license for the retail of liquors in quantities not less than one quart, while the latter part of the 254th section enacts, "but no person shall sell or barter intoxicating liquor of any kind, without the license therefor by law required, under a penalty of not less than $20," &c. Neither of these provisions s to be found in the repealed municipal act.

It appears on the face of the conviction that the defendant received a shop license for the current year, and it further appears that he did sell at his shop spirituous liquors in less quantities than a quart, without the license therefor by law required.

It was contended, however, that notwithstanding the limitation in the 249th section, as to shopkeepers selling in quantities not less than a quart, that there were no express words in the statute making it an offence for a perso holding a shop license to sell less than a quart, or for inflicting a penalty in the event of a shopkeeper doing so; and it was further contended that the defendant did not exceed the authority granted him by the license itself, as it did not restrict him to selling in any quantity.

As to the latter point, the license contains a proviso that the defendant should observe and keep all such laws, by-laws &c., as were then or might thereafter be lawfully in force in the city, in reference to shop licenses, and to shopkeepers, and in respect to the keeping or selling of any such liquors. By the statute it is provided that a shop license can only be granted to sell liquors in quanties not less than a quart. It can hardly be said that this is not one of the laws which his license provides he should observe and keep. It is not pretended that the defendant had a tavern license, the only license that could authorize him him to sell in so small a quantity as a pint, so that in fact he was doing that which neither the law nor his license authorized him to do.

The question we have now to determine, however, is whether selling intoxicating liquors under the circumstances charged against this defendant is an offence, and is punishable under the provisions of sec. 254. and we are of opinion that it is. We may assume that the Legislature had some object in amending the law and restricting a licensed shopkeeper to selling in quantities of a quart and upwards, with a view to revenue or to remedy some defect in the previous law. We take it that when a statute, as in the present instance, defines what a shop license is, and the authority it gives, if it would be an offence or infraction of law for a shopkeeper to sell without any license whatever, it would be no less an offence for him, having such a license, to sell contrary to it, and beyond the authorized limit; or, to put it in another light, if the legislature by the municipal act had so amended the law as to declare tha no shop license should be granted, and that it would be lawful for shopkeepers to sell intoxicating liquors in quantities of a quart and upwards, it would hardly be contended that the selling in less quantities without a license would not be an offence punishable under the provisions of the 254th section. As well might it be argued that because under sec 252 no tavern or shop license shall be necessary for selling any liquors in the original packages, provided they contain not less than five gallons or one dozen bottles, that it would not be an offence to sell packages containing one gallon or half-a-dozen bottles.

We are, therefore, of opinion that the defendant was properly convicted, and that the rule be discharged with costs.

Rule discharged

COMMON LAW CHAMBERS.

(*Reported by* HENRY O'BRIEN, ESQ., *Barrister-at-Law, Reporter in Practice Court and Chambers.*)

RE DAVIDSON.

Insolvent act—Allowance of appeal—Notice—Amendment.

An application of an insolvent for a discharge was dismissed by the County Judge on 16th September. On the 23rd September the insolvent gave notice of an intended application on the 24th September to a judge at Osgoode Hall, for leave to appeal. *Held* that this notice was clearly insufficient, but on the authority of *Re Owen*, 12 Grant. 446, and in favor of the liberty of a subject, the notice was amended.

Quære as to the materials that should be before the judge on such an application.

[Chambers, Sept. 30, 1867.]

The Judge of the County Court of the County of Wentworth, on the 16th day of September last, made an order discharging the insolvent's application to be relieved from custody on a warrant for his arrest for contempt in not obeying an order of the judge.

Notice of appeal was served on the 20th of September, to the effect that an application would be made to a judge of one of the Superior Courts of Common Law at Osgoode Hall, on the 23rd

day of the same month, for leave to appeal against the above order.

This did not arrive in time, and another notice was served on the 23rd of September, that a motion would be made before a judge at Osgoode Hall on the following day.

This last notice was the one which was relied upon as the effective one between the parties.

W. Sidney Smith, for the plaintiff, objected that this notice was irregular, inasmuch as one clear day's notice had not been given according to sec 11. sub-sec. 9 of Insolvent Act of 1864. That the eight days allowed to apply to appeal by the Act of 1865, sec. 15, if computed from the service on the 16th September, expired on the 24th, and then the notice should have been served on the 22nd for the 24th, and so the service on the 23rd did not afford the creditor the time he was entitled to after notice and before the motion was made; and that the material upon which the appeal was asked was insufficient. He cited *Re Sharpe*, 2 Chan. Cham. 75; and distinguished *Re Owen*, 12 Grant. 446; 3 U. C. L. J. N. S. 22.

Curran, for the defendant

ADAM WILSON, J —The question argued before me was whether the petitioner was in a position to entitle him to the allowance of his appeal?

By the act of 1865, sec 15, the right of appeal is given against any order of a judge made upon any of the matters or things upon which he is authorised to adjudicate or to make any order by the acts of 1864 or 1865, and the delay for applying for the allowance of an appeal is, by the act of 1865, extended to eight days—which period is by sec. 7, sub-sec. 3, of the act of 1864, to be eight days "from the day on which the judgment of the judge is rendered."

By the act of 1864, sec 11, sub-sec. 9, it is provided, under the head "Of procedure generally," that one clear day's notice of any petition, motion or rule shall be sufficient, if the party notified resides within fifteen miles of the place where the proceeding is to be taken, &c"

This service was made in Toronto on the 23rd, the one day's *clear* notice must therefore exclude the day of service and the day of hearing, so that either the service should have been on the 22nd for the 24th, or the motion on the 25th upon a service on the 23rd; but the service on the 23rd and the motion on the 24th do not give the one clear day's notice

Then it is said that I can amend the notice, and *Re Owen*, 12 Grant 446, is referred to for that purpose. That case goes the full length for which it was cited, and although I am not satisfied with the decision of the learned Vice-Chancellor, I am content to follow it on the present occasion.

It was also argued that the case was not complete without all the papers which were before the judge below. I conceive it is only necessary that I should have before me such materials as will enable me to say whether the learned judge in the court below came to such a decision as should fairly and justly be reviewed, and I perceive in the petition before me, that after the order for the alleged contempt or disobedience of which the prisoner has been arrested, it is stated that the prisoner "was not asked for said books and documents, but nevertheless on the 17th of August, without any notice to me or any opportunity to shew cause against it, a warrant was issued by the County Court Judge on the *ex-parte* application of the plaintiff, ordering me to be imprisoned for six months, on which I was arrested in Montreal and conveyed thereon to Hamilton and lodged in the Common Gaol, where I am now incarcerated under the said warrant." Here there is a plain ground of complaint, for I think the debtor should have been called upon to shew cause why he did not obey the order, before he could be imprisoned for disobedience of it. I think there are other grounds stated which should not, in a case of personal liberty, be too severely scrutinised.

I shall allow the notice to be amended and on the return of it, if no other cause be shown, I shall allow the appeal.

Upon this intimation probably the other side may consent to the allowance being now made.

INSOLVENCY CASE.

(Reported by HUGH MCMAHON, *Esq., Barrister-at-Law.)*

Before STEPHEN J. JONES, Esq., Judge County Court, Brant

IN THE MATTER OF WM BEARE, AN INSOLVENT.

Giving up part of stock to a creditor—Evidence of fraudulent preference—Discharge refused—Conditional discharge—Effect of insolvent not keeping proper books of account.

[Brantford, 9th September, 1867.]

The insolvent made a voluntary assignment to the official assignee of the county of Brant; and on his examination before His Honor the Judge of the County Court, on his application for discharge, it appeared that up to September, 1864, he had carried on business as a general merchant, at Widder station, in the county of Lambton, at which time he removed to Walsingham, in the county of Norfolk. He was then solvent. He owned a house and lot at Widder. The house was insured. The property was mortgaged to Kerr, McKenzie & Co., of London. At that time he was owing Kerr, McKenzie & Co. over $3,000. The buildings were, subsequent to Beare's removal from Widder, destroyed by fire, and Kerr, McKenzie & Co got $900 for insurance, and sold the lot under the mortgage for $400 more.

In January, 1865, the insolvent being behind in his payments to Kerr, McKenzie & Co., they sent their book-keeper to the insolvent's place of business at Walsingham, and advised him to confine himself to groceries, taking away all his dry goods, which had been purchased from Kerr, McKenzie & Co. No account was kept by the insolvent of the amount of goods delivered to Kerr, McKenzie & Co., they promising to send him an account. At the time Kerr, McKenzie & Co. got these dry goods, three or four other creditors had overdue accounts against insolvent. About this time Childs & Co. sued insolvent for a claim of $300, and the sheriff sold the stock, amounting to $800 or $900, to satisfy the executions in Child's case. Beare kept no books while at Walsingham, and kept no account of the cash. The daily sales were not large.

West Brothers' debt was contracted in August, 1863, on four months' credit, and were shipped to insolvent while at Widder, addressed to William Bruce, and taken from the railway station by insolvent, who paid the freight. Some letters were addressed to William Bruce. One was from a lawyer, and had reference to these

goods, addresed to the William Bruce, which insolvent opened and returned to the post office.

The insolvent's liabilities for which he sought a discharge amounted to $1,529 20.

Fitch, for the insolvent, applied for an order for his discharge.

McMahon, contra. The discharge should be conditional, on payment of West Brothers' claim. The goods were got in 1863, addressed "William Bruce." Beare was then solvent, but concealed from West Brothers that he had these goods. They could then have collected their claim. The goods given to Kerr, McKenzie & Co. was a fraudulent preference. Insolvent said he thought he was satisfying the whole of their claim. He gave them more than half of his assets. After he gave Kerr, McKenzie & Co these goods, he owed several other creditors claims His whole estate left only realized $400. *Re Lamb*, 3 L. J. N. S. 18. He did not keep books at Walsingham. *Ib.*

Fitch, in reply. The goods sent by mistake do not show any fraud, but a mistake on Beare's part, through the fault of West. As to fraudulent preference, see Insolvent Act, 1864, sec. 9, sub-sec. 6, and sec. 8, sub-sec. 4. He gave the goods back to the person from whom he purchased them.

JONES, Co J.—I think the transaction of the insolvent with McKenzie & Co., in January, 1865, was a fraudulent preference, and as such would afford grounds under the act for the creditors of the insolvent to oppose his discharge; also the fact that he kept no account book of his cash receipts and payments, or other books of account suitable for his trade, while he carried on business in the county of Norfolk, where he was in business from September, 1864, up to the time he failed, in the spring of 1865, would entitle the creditors successfully to oppose his discharge. The importance of having such books of account is evident; for the insolvent swears he was solvent when he removed to the county of Norfolk, and it was while he was there, and while he kept no books, that he became insolvent; and there is therefore no way of tracing his transactions, to show how he became insolvent, because no record of his business transactions or of his cash receipts or payments has been kept. The Insolvent Act provides that the neglect in keeping such books after the passing of the act (30th June, 1864), shall be a sufficient ground for opposing the insolvent's discharge; and it was about three months after that date that he commenced business in Norfolk.

The turning over of all his dry goods to Kerr, McKenzie & Co., besides being, I think, a fraudulent preference under the act, was a transaction showing on the part of the insolvent a complete recklessness as to what he did, and a total disregard of the interests of his other creditors. The agent of Kerr, McKenzie & Co. came to the insolvent and stated, without any previous intimation, the steps they intended to take; that it would be for his interest to go out of the dry goods business, and deal only in groceries; to which he at once assented; and they then proceed to take, without any objection on his part, the whole of the dry goods stock, which was the bulk of the whole stock, and remove it to London. He did not even keep any account of the quantity or value of the goods they took: they promised, he said, to send him an account, which they never did.

This transfer of so large a portion of his goods, in my opinion, reduced Mr. Beare to a state of insolvency, and in two months thereafter he gave notice of insolvency; and the whole transaction showed such an utter disregard of the interests of his other creditors, as can only be reconciled, in my opinion, with the fact that he intended to give his creditors Kerr, McKenzie & Co. a fraudulent preference.

I also think that under the circumstances which West's debt was contracted are such, that if I had granted a discharge, it would only have been conditional on the insolvent's paying that debt. Although Mr. Beare was well aware that these goods were wrongfully addressed, and from the letters received at the post office to the same address, one of which he (Beare) opened, he must have known that West Brothers were not aware that he (Beare) had got these goods, yet he concealed that fact from them, and this at a time when, had they known that he got the goods, they could have obtained payment, for Beare was at that time quite solvent. Nor did he admit that he received these goods until afterwards, when they had otherwise ascertained the fact, and were suing him for the amount of their claim.

I think, from the above considerations, and from the observations of the court *In re Lamb* 3 U. C. L. J. N. S. 18, that it is my duty, in this case, to make an order refusing the discharge of the insolvent absolutely.

ENGLISH REPORTS.

CROWN CASES RESERVED.

REG. v. THOMAS MORRIS AND ANOTHER.

Manslaughter—Death subsequent to a conviction by a magistrate for the assault—Prior conviction for the assault no bar to indictment—24 & 25 Vict. cap. 100, sec. 45.

Where, upon indictment for manslaughter, it appeared that the prisoner had, in the lifetime of the deceased, been summoned before magistrates and convicted and sentenced to imprisonment with hard labour for the assaults which subsequently caused the death, and that he had undergone that sentence, it was

Held (Kelly, C. B., dissentiente) that under 24 & 25 Vic. cap. 100, sec. 45, such conviction and punishment was no defence to an indictment for manslaughter.

[C. C. R., May 4; June 1.—15 W. R. 999.]

Case reserved by Pigott, B.

Thomas Morris was tried before me at the Stafford Spring Assizes upon an indictment for the manslaughter of Timothy Lymer, by inflicting bodily injuries on him on the 25th of June.

It was proved in evidence that the prisoner had been summoned before the magistrates at the instance of the said Timothy Lymer for the assaults which caused the death, and was convicted and sentenced to imprisonment with hard labour. He underwent that punishment.

Timothy Lymer died on the 1st of September from the injuries resulting from the above-mentioned assaults It was contended under section 45 of 24 & 25 Vic. cap. 100, that the conviction for the assaults afforded a defence to the present indictment for manslaughter (see *Reg.* v. *Elrington*, 9 Cox C. C. 86; 10 W. R. 13.) There was a substantial question raised by the evidence whether the manslaughter was the result of injuries inflicted by the prisoner Morris or the

other prisoner Gibbons, joined in the present indictment, and whether they were acting in concert. I thought it desirable to let the prisoner Morris have the benefit of either of the defences, and for that purpose to let the questions of fact go to the jury upon the plea of not guilty, and to reserve the question of law, under the aforesaid section 45, for the opinion of this Court. The prisoner Gibbons was acquitted and the prisoner Morris was convicted.

If the Court should be of opinion that a conviction for the assault, at the instance of the injured person, under sec. 45, affords a defence in law to an indictment for manslaughter resulting from that assault, then a plea of not guilty to be entered, otherwise the prisoner Morris to be called up for judgment at the next assizes.

G. Browne for the prisoner. No counsel appeared on the other side.

[MARTIN, B., mentioned *Salvi's case*, reported in the Old Bailey Sessions Papers, 1857, vol. 46, p. 884, the nature of which is stated in the following judgment; and KELLY, C.B., said the question turned on the meaning of the words "for the same cause," in 24 & 25 Vic. cap. 100, sec. 45.] *Reg.* v. *Walker*, 2 Moo. & Ry. 44; *Reg.* v. *Elrington*, 1 B. & S. 688, 10 W. R. 13; and *Reg.* v. *Stanton*, 5 Cox, C. C. 324, were referred to.

Cur. adv. vult.

KELLY, C.B.—In this case I have the misfortune to differ with my learned brethren, who are of opinion that the conviction ought to be affirmed. The prisoner was charged before the magistrates with an assault, under the 24 & 25 Vict. cap. 100, at the instance of the party aggrieved, and now deceased. Timothy Lymer was convicted and sentenced to imprisonment with hard labour, and has undergone that sentence. The assault, the unlawful act with which he was charged, is the same assault, and one and the same act as that which caused the death of Lymer, and of which he has been convicted under the present indictment. I think therefore that the case comes within the precise words of section 45 of the 24 & 25 Vic. cap. 100, which provides that in such a case "he shall be released from all further or other proceedings civil or criminal for the same cause." It is true that the offence is now charged in other language, and that which before the magistrates was described as an assault is now described as manslaughter; but it is one and the same act, and the cause of the prosecution before the magistrates and the cause of this prosecution are one and the same cause. The case therefore comes within the letter as well as the spirit of the Act of Parliament, and I think that to sustain this conviction would be directly to violate the maxim or principle of the law, "*nomo debet vis vexari* (here we might say *puniri*) *pro eâdem causâ*." Cases may indeed be suggested in which there might be a failure of justice, as where an assault should have been treated lightly by a magistrate and upon conviction a slight sentence passed, and yet, from the subsequent death of the party assaulted, the offence might amount to murder; but such a case must be rare and exceptional, and I think we ought to presume that the magistrates will in all cases under this or any other Act of Parliament do their duty, and as, where the charge is made at the instance of the party aggrieved, it may also be presumed that the whole of the evidence would be fully brought before the magistrates, and upon conviction an adequate punishment inflicted accordingly, I do not think it was the intention of the Legislature or consistent with natural justice, that the accident of the subsequent death of the party should subject the accused to a repetition of the trial and the punishment. *Salvi's case* is clearly distinguishable. There the prisonor was indicted for the murder of one Robertson, and pleaded a plea of *autrefois acquit*, the acquittal having been upon an indictment for wounding with intent to kill. It was clear that this acquittal might have been pronounced upon the ground of the jury having negatived the intent to kill, and yet that the prisoner might well be guilty of the murder without an intent to kill the individual murdered, as if he had shot at another man, but unintentionally killed Robertson. The plea therefore of *autrefois acquit* was in that case properly overruled. Here, however, the prisoner has been tried, convicted, and punished for the very same offence in all its parts, though under a new name, as that for which he is now indicted and again convicted; and it seems to me that to allow this conviction to stand, is to punish a man twice for the very same cause in violation of the before mentioned maxim, and of the express declaration of the Act of Parliament. I think therefore that the conviction ought to be quashed.

MARTIN, B., said the question was whether the suffering the imprisonment imposed by the justices was a defence to this indictment. He agreed that *Salvi's case* was not in point. The meaning of the words "the same cause," in the 45th section, was the same cause as that on which the justices had adjudicated; and, in his opinion, a new offence arose when this man died.

BYLES, J.—I am of opinion that under statute 24 & 25 Vic. cap. 100, sec. 45, the prior conviction of the assault affords no defence to the subsequent indictment of manslaughter, the death of the deceased having occurred after the conviction, but being a consequence of the assault. The form and intention of the common law pleas of *autrefois convict* and *autrefois acquit*, show that they apply only where there has been a former judicial decision on the same accusation in substance, and where the question in dispute has been already decided. There has, in the present case, been no judicial decision on the same accusation, and the whole question now in dispute could not have been decided; for at the time of the hearing before the magistrates, whether the assault would amount to culpable homicide or not, depended on the then future contingency whether it would cause death. The case of *Reg.* v. *Salvi*, argued before the Lord Chief Baron Pollock and my brothers Martin and Willes, if not precisely in point, is nevertheless a strong authority for this view of the law. But reliance is placed on the words of the statute (24 & 25 Vic. cap. 100, sec. 45) "for the same cause." It is to be observed that that statute does not say for the same act, but for the same cause. The word "cause" may undoubtedly mean act, but it is ambiguous, and it may also, perhaps with greater propriety, be held to mean "cause for the accusation." The cause for the present indictment comprehends more than the cause in the former summons before the magistrate, for

it comprehends the death of the party assaulted. It is, therefore, at least in one sense, not the same cause. But if these observations on the meaning of the word "cause," as used in the statute, should appear to savour too much of refinement, and to be used in support of a forced construction, it must be remembered that it is a sound rule to construe a statute in conformity with the common law rather than against it, except where or so far as the statute is plainly intended to alter the course of common law. An additional reason in this case for following the common law is the mischief which would result from a different construction. My brother Martin has already illustrated the mischief in civil cases by a reference to Lord Campbell's Act And in criminal cases the mischief might be much greater, a murderer, for example, by suffering or obtaining a previous conviction for an assault, might escape the due punishment of his crime.

KEATING and SHEE, JJ., concurred.

Conviction affirmed.

CORRESPONDENCE.

The Question of Costs in the Division Courts.

TO THE EDITORS OF THE LOCAL COURTS GAZETTE.

GENTLEMEN,—I find I have given your concealed "Communicator" a great advantage over me in publishing my name. He knows me it seems, and has "taken the weight of me," and is relieved of the fear that oppressed the Rajah, "fear of what he did *not know* of his enemy, not fear of what he did know." For anything *I know* to the contrary, "Communicator" may be the ghost of the Regicide Lawyer Coke, only I think even a demented ghost would fly at a higher quarry than Division Courts clerks and bailiffs.

Sirs, I have read carefully my letter of last September, and really I cannot see any ill-nature in it. I think all the ill-nature was in the letter that called forth mine. But "Communicator" can't see that. So I'll say no more about it.

"Communicator" can have the desired information by forwarding to my address (post-paid) *ten cents*, the fee allowed for a search made by a person who, having no business with the suit, asks for the increase of his knowledge. I will make no charge for writing paper, attending to post, &c., &c. And I leave the reader to consider what weight to allow to the opinion of one who not being himself a judge, apoly tells us that he differs from the *best judges* in regard to the matter in question.

I *did not make*, nor *do I now make* any "excuse for travelling out of the legal tariff, or for making one for myself." I deny that I have done either one or the other: for myself and my Bailiff I still hold that our charges are correct, and authorized by the existing tariff, and "Communicator" has *not proved* me to be wrong. Not being myself a thief I cannot question the truth or otherwise of "Communicator's" statement of the mode in which such persons argue; but if "Communicator" favours us with another letter I will be obliged by his putting his name to it, and giving his sense of the sentence in which he couples my name with the word "*thief*," for "it strikes me" very forcibly that the plain sense of that passage is that "Communicator" says that I am a thief.

"Communicator" says "the Division Court tariff was made when such courts as that at Brampton had some *four hundred* suits at EACH SITTING and Toronto, London, and Hamilton and many other courts, had *ten* times as many suits as they have now." This like most of the assertions made by "Communicator is incorrect. The tariff was framed *A.D.* 1855, in which year the total number of suits including Alias and Judgment Summons at Brampton was 742, an average of 124 (nearly) to each court, the next year the number was 795, or 132 (nearly) to each court. It was in 1857 two years after the tariff was formed, that the unfortunate state of things for the debtors of the country commenced; even that year there was only *one* court where the suits amounted to *four hundred*, (and about 70 of these were *alias*) and one other in the year 1858. And I am very certain that neither the Toronto nor any other court had *nearly or over* ELEVEN THOUSAND suits in one year.

Most of the other communications are equally unfounded, and made with a disingenuousness, that says much for the ill-nature that prompted them. I refer chiefly to the comparison between Division Court and County Court costs. "Communicator" ignores the fact that there are five rates of fees in the Division Court, so far as the clerks and bailiffs are concerned. He then unfairly contrasts the *highest sum* that he can sue for in the *County Court*, with costs for $60 00 the *lowest sum* for which Division Court fees of the *highest rate* can be charged. Why could he not as well compare the costs on a $100 suit in a Division Court with the costs on a $101 suit in the County Court? except that that would be

erring as far on the other side. Then to build up his bad argument he *understates* the *Sheriff's fees* 30c. and further compares the costs of County Court suits where there *is no mileage*, and where "*the debt is paid on service*," with the costs in a Division Court suit where the deposit of $4 he so bitterly complains of is meant to cover some mileage, and the fees for carrying the case through to judgment.

Now Sirs, the costs on suits, *paid on service and no mileage* in the Division Court will compare with County Court costs in this fashion:—

Division Court costs for Judge, Clerk and Bailiff, in suits not exceeding.....		$8 00	lawful amount		$0 92c.
"	"	20 00	"	"	95c.
"	"	40 00	"	"	1 45c.
"	"	60 00	"	"	1 55c.
"	from $60 00 to	100 00	"	"	2 05c.

County Court costs, (taking "Communicator's" fee for attorney as correct) would be $7 92, from $100 00 to $400 00. The same suit taken on to judgment in Division Court would be respectively, $1 17, $1 40, $2 15, $2 65, $3 30, and County Court costs under the same circumstances at the very least, when no defence made nor witness examined, would be *forty dollars*. "Communicator" also understates the sheriff's fees on an execution returned *nulla bona*, he says "they are 35c. or at most 60c." They are really always 85c. for any amount on a County Court execution! while a Division Court bailiff gets only 30c., 40c., 60c. and 75c., quite a sufficient distinction for the honourable office of sheriff.

To return to the question of a bailiffs right to a fee for enforcing an execution, when no goods are found on which to levy. We have been arguing the matter on wrong premises. The fee claimed is not what we have been calling it, a fee for making a return on an execution, whether *nulla bona* or anything else. There is no fee for making a return, the fee is claimed for *enforcing a warrant*; and the whole thing turns upon what is enforcing a warrant. I hold that going to the place where goods are said to be, and searching for them, is *enforcing a warrant*. It may not be a *successful enforcement* I allow; but will "Communicator" say that Lee and Jackson and other Southern heroes did not *fight* for their liberties, merely because they were beaten in the fight. Or—as he is so well up in *thiefly* reasonings and arguments,—Is the pickpocket who puts his hand into a man's pouch any the less a thief, or less deserving of his reward, because he happens to find the pocket empty, and so *cannot levy*? "Communicator" hops about so, from one thing to another, that 'tis difficult to give a connected reply to him. His saying "that he was well acquainted with Judge Harrison's law, and is acquainted with Judge Gowan's practice" does not prove me wrong as to my assertion about the one, or my deduction from the other. I cannot see that he has lessened the force of my argument at all. And if "Communicator" will refresh his memory a little, he may remember that the words he gives as Judge Harrison's (viz, "that he only allowed it under *peculiar* and *special* circumstances, when plaintiffs put bailiffs to *special or unnecessary or special* trouble, when upon *special* application to him by the bailiff he would allow the fee, or *some fee* on executions returned *nulla bona*,") were to the effect that under those *special* circumstances, he would allow (not the fee in question), but some *other special fee* for the *special and unnecessary* trouble. And in respect to his question, "if so, why did any bailiff apply to Judge Harrison?" I ask him, did he ever know a bailiff that did? I do not.

He says again "that Mr. Agar knows well that the rule of his late Judge, Mr. Boyd, was not to allow his bailiffs to make such charges." The incorrectness of this statement, is only equalled by the impertinence of it, if it were correct, as he there accuses me of continuing a practice that my judge condemned. During all the years that His Honour Judge Boyd, presided in the court of which I was clerk, I invariably allowed the fee to my bailiff, and His Honour never told me that I was wrong. Neither did I hear from any one else that he thought or said so. His Honour may not have been aware that I did it. I never asked his opinion on the subject, having already had Judge Harrison's. Sirs, we have again repeated the old story of the living *jackass* kicking the dead lion. "Communicator" has done well to wait until our honoured friend Judge Harrison, was gathered to his fathers, before he dared to accuse him of unfairness in his judicial capacity. Sir, I suspect who "Communicator" is, and tell him that if he wants to raise any unpleasant feeling towards himself in the breasts of the officers of Division Courts in the counties of York and Peel, to say a disrespectful word of the late Judge Harrison is the quickest and surest way he can do so.

"Communicator" wants us to copy Job of old, (Heaven knows we have great need of, and great opportunities for, the display of his peculiar virtue, and even Job grumbled). Even in this matter "Communicator" shows his usual want of accuracy, for Job's blessings and trouble, his good and bad did not come together, all his blessing were in a *lump* and *unalloyed*, and surely his trouble came in a troop and unmitigated, and not the least of them was the *remembrance of his past prosperity*. And certainly our pinched housekeeping and slenderly stocked woodsheds are not more pleasant to look at or bear, from the remembrance that six years ago we were able to provide things useful for our households. And 'tis not my fault, Gentlemen, that I do not read your most useful work, the *Local Courts' Gazette*, 'tis a luxury that my poverty prevents me from indulging in. If "Communicator" instead of proposing the establishment of another useless office (for himself to fill), useless because the County Court judges do all and more than any inspector could do,—would propose that the Government should supply every Division Court in the Province with a copy of your publications, and of the statutes every session, free of charge, he would propose something really useful and deserving the thanks of the public.

Having disagreed with "Communicator" on so many points, it gives me real pleasure to be able to agree with him in any, and I cordially agree with him on the following topics:—

"That the wrong doers among clerks and bailiffs are the exceptions."

"That we are a respectable set of men."

"That *Mr. Agar is a careful and efficient officer.*"

"That the courts at Burwick were never large."

"That the bailiffs endure great hardships."

"That the divisions are too numerous."

"That the tariff wants increasing and making plain."

As for resigning one's office, that mode of getting rid of injustice suffered, would be on a par with cutting off one's head to cure the toothache. It is not likely that men who have spent the best years of their lives at any trade or pursuit, and have patiently endured the wrong of working for half pay, because the half supplied their modest and reasonable wants can now, when it will do so no longer, give up the business they know, and join in the turmoil and strife of professions they know not, and when the young, vigorous and trained men of the day compete with them. I for one do not approve of giving up the plank that keeps my nose out of water, on the chance of swimming to a boat, that is not in sight; although, seeing that I am a *cork b(u)oy*, my floating powers may be supposed equal to that of other men.

Hoping that I have not trespassed too much your space and time.

I am Gentlemen, yours truly,

T. A. Agar,
Clerk 1st Division Court, Co. Peel.

REVIEWS.

The New Dominion Monthly—November and December 1867. Montreal: John Dougall & Son, 126 Great St. James St. $1 00 per annum in advance.

Many have been the attempts made to es stablish a Magazine of light reading for th British Provinces of North America. All, so far, have failed, though many were for a time at least supported by considerable talent and industry. It seems scarcely possible to hope, flooded as the country is with the many excellent serials of England, at very reasonable rates, that the present attempt will be more successful. Times however have somewhat changed—the daily increasing wealth and population of the provinces, their recent confederation giving us "a local habitation and a name," and the exceedingly low price at which this publication is published, may, and we hope will, combine to make it more successful than its predecessors.

This magazine is a combination, partly original and partly selected, with a corner reserved for the benefit of the younger portions of a family. The matter is of a sketchy, interesting character, and we are glad to see that the Hon. Thos. D'Arcy McGee, whose literary abilities are so well known, is one of the contributors to its pages.

We do not desire to criticise this enterprising and creditable attempt to supply from amongst ourselves that which we have had to seek from other sources. We wish it all success.

APPOINTMENTS TO OFFICE.

COUNTY JUDGE.

THOMAS MILLER, of the Town of Berlin, in the County of Waterloo, in the Province of Ontario, Barrister-at-Law, to be Judge of the County Court in and for the County of Halton, in the said Province, in the room of Joseph Davis, Esquire, deceased. (Gazetted 30th Nov., 1867.)

TO CORRESPONDENTS.

"Nelson Dodge, J. P." We could not from the statement of the case sent to us undertake to say that the learned Judge of the County Court, if he expressed the opinion attributed to him, was wrong in his view of the law.

"James Coleman" will be referred to in our next.

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