DIARY FOR JUNE.

2. SUN... 1*st Sunday after Ascension.*
3. Mon... Last day for notice of trial for County Court. Recorder's Court sits.
6. Thurs. Chancery Re-hearing Term begins.
8. Sat. ... Easter Term ends.
9. SUN... *Whit Sunday.*
11. Tues... *St. Barnabas.* Quarter Sessions and County Court Sittings in each County.
16. SUN... *Trinity Sunday.*
20. Thurs. Accession of Queen Victoria, 1837.
21. Friday Longest day.
23. SUN... 1*st Sunday after Trinity.*
24. Mon... *St. John Baptist.*
26. Wed... Appeals from Chancery Chambers.
29. Sat. ... *St. Peter and St. Paul.*
30. SUN... 2*nd Sunday after Trinity.* Half-yearly School return to be made. Deputy Registrars in Chancery to make returns and pay over fees.

The Local Courts'

AND

MUNICIPAL GAZETTE.

JUNE, 1867.

CLERKS OF THE PEACE—INCREASE OF FEES.

A question interesting principally to Clerks of the Peace, and incidentally to all persons who are paid by fees for services rendered, was decided in the Court of Queen's Bench during last Term, on an application on behalf of the Clerk of the Peace for the United Counties of Prescott and Russell, for a mandamus upon the Court of Quarter Sessions for those counties to compel them to audit and allow to the applicant as Clerk of the Peace and County Attorney a number of items which appeared not to be chargeable under the tariff, as settled by the Superior Court judges, or any Act of Parliament.

Under the statute of 8 Vic., ch. 38, the Justices in General Quarter Sessions had framed a table of fees for all services rendered in the administration of justice, and for other District purposes, by (among other officers) the Clerk of the Peace, which services were not then remunerated. Under the same statutes the Court of Queen's Bench, in the same year, having this and similar tables of fees furnished by the other Courts of Quarter Sessions in Upper Canada before it, framed a table of fees for the use and direction of all these courts, as to the allowances to be made to the different officers named in the statute.

By the Consolidated Statutes U. C., ch. 119, sec. 2, the table of fees theretofore framed by the Justices of the Peace, and confirmed by the Queen's Bench, was continued until otherwise appointed; and the Superior Courts of Common Law were authorised from time to time, as occasion might require, to appoint the the fees, as they had done before. Both acts contained a provision that nothing therein contained should deprive any of the officers named of any fees that were allowed by any act of parliament for other services not provided for under those enactments.

In the year 1862, the Judges of the Superior Courts made a rule substituting a new table of fees for the Clerks of the Peace, in lieu of that established by the Queen's Bench in 1845.

All the charges made by the applicant were for services rendered since this last table of fees was promulgated.

A large part of the claim advanced upon this application was rested upon the authority of what was called the local tariff, and upon user, either before or since that tariff was prepared, which, as stated in the applicants affidavit, was made on 1st July, 1845, in compliance with the statute 8 Vic., "and which," as he affirmed, "was ordered to be established and to come into force from and after those sessions." It was also stated that this table of fees appeared to have been since hitherto acted upon in these counties in certain matters where its provisions have not been varied by the Judge's table or by statutes.

The court were, however, of opinion that "the table of fees established and promuglated by the Courts contains all the service for which the applicant as Clerk of the Peace is entitled to charge, in addition to such as are specially authorised and provided for by any statute; and that neither the tariff spoken of, nor any usage that is proved, give any additional right."

One of the objects of the act referred to was, in the opinion of the court, to introduce a uniformity of system as to the different services for which fees were chargeable, and as to the amount, and that when the Court of Queen's Bench established a table, such table superseded that framed by the several Courts of Quarter Sessions.

It is a fact which those concerned are well aware of that there are a variety of services required from Clerks of the Peace for which there is absolutely no remuneration provided. To use the words of one of the learned judges in the case under consideration, "The difficulty is, that much of the routine business which formerly made the office remunerative

has been done away with, and most of it given to other officers by the municipal acts, and this has made the office of Clerk of the Peace in some counties hardly remunerative to a man of education and intelligence."

Whilst the court could not upon the case before them afford any relief in the premises, they intimated a willingness to take the matter into consideration if properly brought before them—if it should be shewn, firstly, that there are services for which it would be right to allow fees, and which are not now provided for; and, secondly, if the different Courts of Quarter Sessions, or a considerable part of them, should concur in recommending the formation of a new table by the Superior Courts in order to include such services.

The first could, we think, be shewn without any difficulty, and it was in fact admitted in a certain manner by the court; the latter only requires a little energetic action on the part of those concurred; and now that the subject is brought publicly before them there will be the less difficulty in the matter.

Every one must see in these days of expensive living that those who are paid by fees or stated salaries regulated according to a scale now no longer equitable, are in a false position, and have a perfect right to demand that a charge for their benefit should be made.

FEES ON REFERENCES.

A decision was given a short time ago in Chambers, by Mr. Justice Adam Wilson, that the fees payable for references, &c., should not be paid to the Clerks of the Crown and their deputies in money, but should be paid in Consolidated Revenue Fund Stamps.

In the case which incidentally led to the decision referred to, *Waddell* v. *Anglin*,* an application had been made for an order to commit the defendant for unsatisfactory answers on an examination before the Deputy Clerk of the Crown and Pleas at Kingston. The examination papers produced on the application were not stamped, the fees having been paid to the Deputy Clerk of the Crown, in money. His Lordship, however, was of opinion that the Deputy Clerk of the Crown had no right to retain the fees for examination to his own use, and that the examination papers must bear the necessary stamps.

* This case was by mistake referred to in the *Law Journal* for this month as *Jordan* v. *Gildersleeve*.—EDS. L. C. G.

We publish a case of *Regina* v. *Conolly*, for the purpose of drawing attention to the unsatisfactory state of the law upon a most unpleasant subject, which occasionally forces itself upon our notice. The ruling of the learned judge in the Court below, though not perhaps strictly in accordance with the weight of authority, appears to be more in accordance with the humane instincts of our nature, and would tend to give greater protection to an unfortunate class of beings, too much at the mercy of heartless and dissolute scoundrels.

SELECTIONS.

THE RESPONSIBILITY OF PRIVATE SOLDIERS.

We lately printed a letter on the above subject, signed with the well-known initials, J. F. S., which appeared in the *Pall Mall Gazette*. The doctrine there laid down, and so ably stated and illustrated by the learned writer, is not a new one, and will be found expressly recognized in the early authorities of the common law, before the modern notions of military privilege, derived apparently from the practice of the military monarchies of Europe, had gained a footing in this country. It is remarkable that the leading case on the subject should have taken place under a regime when the powers of the executive, as opposed to the common law, were infinitely greater than at the present time, and when, by a strange chance, the sympathies of the ruling faction were not, as is now generally the case, in favour of the soldier, but against him.

The case we refer to is that of Colonel Axtell, an officer in the parliamentary army, who commanded the guards at the trial and execution of Charles the First. At the restoration Colonel Axtell, with many others, was arraigned on a charge of high treason for having aided and abetted in the death of the king. The only overt acts proved against him were that he had commanded the guards on the above occasions, for though attempts were made to show that he had made use of violent expressions at the trial, there was no proof that he had in any way exceeded his ordinary duty as a soldier.

His defence was, in substance, that he was a soldier in the service of the existing government of the country, and that he merely obeyed the orders of his general. "He justified," says Chief Justice Kelynge, at p. 13 of his Reports, "that all that he did was as a soldier, by the command of his superior officer, whom he must obey, or die." Nevertheless, "it was resolved that that was no excuse, for

his superior was a traitor, and all that joined with him in that act were traitors, and did by that approve the treason; and where the command is traitorous, there the obedience to that command is also traitorous;" and in pursuance of the above judgment, Colonel Axtell was hanged.

The trial and execution of Colonel Axtell, and many others of the so-called regicides, whose participation in the king's death had only been of a ministerial character, was unquestionably a proceeding which most persons in these days will deplore and condemn, as the death of these men was not required by justice or even by "political expediency," but was the result of an insatiable craving for political vengeance and retaliation. There is, however, no doubt that, whatever may be thought of the policy and humanity of the proceedings, the trial and execution of these men were not only strictly, but even technically, legal. Our ancestors did not try their political antagonists by courts-martial; they did not shrink from or evade a trial by jury, and if British subjects were, as has been, alas! too often the case, sacrificed to political vengeance, they at least had the lawful judgment of their peers, and the protection, such as it was, of the law of the land. Hence it is that the case we have referred to is of peculiar value. It is plain that, whatever may be the case under the military institutions of foreign countries, the immunity of soldiers formed no part of the ancient institutions of this country, either in feudal times or in the days of arbitrary power; and unless it is to be contended that the execution of Colonel Axtell was not only a vindictive act (which it undoubtedly was), but also positively illegal, the civil liability of officers and soldiers for all their actions, whether done in pursuance of orders or not, must be considered as beyond doubt.

The position of a soldier may be stated in a few words. He is the Queen's hired servant, and is bound like other servants by the terms of his engagement to obey the orders of his employer, under pain, in any case, of losing his situation, and, in some special cases, of severer punishment. In this his position is much the same as that of the servant of a railway company. It is one of the contingencies of every service, that the servant is liable to be ordered by his employer to do an illegal act, and that a refusal to do so, even if not punishable by law, may ultimately lead to the loss of his situation, and much consequent injury or inconvenience. It is doubtless a great misfortune to a servant to be placed in a position where he has to choose between his duty and his interest. There cannot, however, be a shadow of a doubt as to which he ought to prefer. If, by refusing to obey an illegal command, he suffers loss, he will have the sympathy of all good men, and must hope that the performance of his duty will ultimately obtain its reward; if, on the other hand, he violates the law to save himself from present inconvenience or loss, he does so at his own risk, and under the same responsibilities as any other subject of the realm. He may, if he is fortunate enough to obtain the active support of the authorities, escape or evade punishment; but such escape or evasion can never amount either to a legal immunity or to a justification for similar acts.—*Solicitors' Journal.*

IMPLIED COVENANT FOR TITLE BY LESSOR.

Stranks v. *St. John*, C P., 15 W. R. 678.

In the recent case of *Stranks* v. *St. John*, the Court of Common Pleas has cleared up a point of law which was involved in some obscurity, but yet must have been of almost every day occurrence.

The declaration was on an agreement, not under seal, by which the defendant was to let, and the plaintiff to take, a farm of the defendant, for a term of seven years, to commence *in futuro*, and the breach laid was "that the defendant never had any right or title to let the said farm to the plaintiff for the said term."

To this breach there was a demurrer, which raised the important question whether on a parol agreement to grant a lease the intended lessor impliedly stipulates for title. The agreement not being under seal was void as a lease by the operation of 8 & 9 Vict. c. 106, s. 3. but it might still enure as an agreement: *Tidey* v. *Mollett*, 12 W. R. 802, 16 C. B. N. S. 298. The defendant contended that on such an agreement the plaintiff could only sue for not granting the lease, and that if damages could be recovered against him for not having title to lease for seven years, it would in effect be treating the parol agreement as a lease, and so rendering nugatory the provisions of the statute. On the other hand it was argued that on a contract for the sale of an existing lease there was an implied stipulation for title, *Souter* v. *Drake*, 5 B. & Ad. 992; and that there was no difference in principle between the two cases. The real question was, as put by Mr. Justice Willes, whether the agreement was to execute what purported to be a lease, or to grant a good and valid lease, and we cannot doubt that common sense, with which the law should, as far as possible, accord, would lead the unprofessional mind to the latter conclusion. The case of *Gwillim* v. *Stone*, 3 Taunt. 433, says his Lordship, by no means bears out the marginal note, which would seem an express authority against the plaintiff, for Lord Mansfield in that case only decided that the plaintiff could not recover the money he had spent in building operations on the defendants land by his permission before the lease was granted; and the *dictum* of Mr. Justice Lawrence, that in purchases of land the rule is *caveat emptor*, was an error of the reporter. Then, as now, judges sometimes uttered hasty and inaccurate *dicta*, and it is no doubt an obvious course when such inaccuracies are subsequently brought to light, to make a scapegoat of the reporter, and say that he must

have misreported the case. In most instances we believe the fault of the reporter would turn out to be this; not that he inaccurateley recorded what fell from the lips of the judge, but that he has given permanence and publicity to loose and ill-considered observations that were never meant to be so embalmed, and that he has not, before committing them to print, ascertained that they were not in conflict with the known law. In the present case, however, the *dictum* of Lawrence, J., occurs in the course of his judgement, and it is certain ly a fair criticism on Mr. Taunton that his marginal note is not borne out by his report. *Gwillim* v. *Stone* was decided in 1811, and four years later the Court of King's Bench, in *Temple* v. *Brown*, 6 Taunt. 60, expressly left undecided "the momentous question" whether there is an implied stipulation for title in an agreement for a lease, thereby cleary showing that *Gwillim* v. *Stone* was not considered to have decided the point. The passages cited by Mr. Justice Willes from Sugden's Vendors and Purchasers, are not to be found in the recent and more compendious editions of that work, but are taken from the 11th ed. vol. 1, pp. 488, *et. seq.* They show clearly that in the opinion of Lord St. Leonards a contract to sell a lease and a contract to grant a lease are on the same footing, and that *Souter* v. *Drake* established that in the former case there was a stipulation for title. Mr. Justice Willes intimated that if the point had not been involved in previous authorities, the Court (himself and Keating, J.) would have taken time to consider its judgment; the word "involved" was well chosen, for though it cannot be said that the present establishes any really new point of law, it does disentangle a point of constant occurrence and of great importance, and places it on a clear and intelligible footing.—*Solicitors' Journal.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

COUNTIES OF YORK AND PEEL—SEPARATION—JURY.—By proclamation published on the 15th Dec., 1866, the County of Peel was separated from York from and after the first of January, 1867. On the 23rd of November preceding, the usual precept had been sent to the Sheriff of the United Counties for the Winter Assizes of York, to be held on the 10th January, 1867, and the Sheriff returned his panel to that precept, containing 54 jurors from York and 30 from Peel. Only those from York however attended, and the prisoner was tried by a jury *de medietate*, including six of these jurors, upon an indictment found and pleaded to at the previous Assizes in October. On motion for a new trial, or *venire de novo*, because the precept and panel should have been for York only, not for the United Counties—

Held, per *Draper*, C. J., that the objection, if available at all, must be taken by writ of error.

Per *Hagarty*, J., no objection would lie.—*Regina* v. *Kennedy*, 26 U. C. Q. B.

NEGLIGENCE — LIABILITY OF CONTRACTOR OR MUNICIPALITY.—A contractor under the Metropolitan Board of Works constructed a sewer under a road which he reinstated. A hole was subsequently caused by natural subsidence, by means of which the plaintiff's horse was injured.

Held, that the liability of the contractor ceased when he had properly reinstated the land, and that the Metropolitan Local Management Acts did not extend that liability.—*Hyams* v. *Webster*, 15 W. R. 619.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

PRODUCTION OF DOCUMENTS.—Letters written to the defendants by a stranger to the suit, and marked "private and confidential," were in the possession of the defendants, who did not deny that they were material to the matters in issue in the suit, but objected to produce them, because the writer of the letters would not consent to their production.

Held, that the letters must be produced to the plaintiff, but that he must undertake not to use the information contained in them for any collateral purpose.—*Hopkinson* v. *Lord Burghleigh*, 15 W. R. 543.

SPECIFIC PERFORMANCE—DOUBTFUL TITLE.—The Court will not enforce specific performance of a contract for sale against a purchaser, where a question of title has to be determined, upon which the Court is not clearly in favour of the vendor.—*Burnell* v. *Firth*, 15 W. R. 546.

EVIDENCE—DECLARATIONS OF DECEASED PERSONS.—The rule as to receiving the declarations of deceased persons in questions of pedigree is that such declarations are admissible, if emanating from a deceased member of the family whose pedigree is in question, before any controversy has arisen touching the matter to which the declarations relate, and if the relationship of the declarant to the family be proved independently of the declaration itself.

This rule applies to the Court of Probate equally with Courts of Common Law.

Therefore, where the question was, whether the defendant was the lawful sister of a testatrix whose will was in question, a statement in a deed made by the testatrix, describing the defendant as her sister, is evidence of the fact, and (in the absence of anything to the contrary) it will be presumed that the word "sister" means "legitimate sister."—*Smith and Others* v. *Tebbitt*, 15 W. R. 562.

MORTGAGEE IN POSSESSION.—If a mortgagee in that character enters into the receipt of the rents and profits of the property mortgaged, he will be bound in a suit for redemption to account not only for what he has received, but for what, without wilful default, he might have received. But when a person becomes possessed of a property, under an erroneous supposition that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of the rule which charges him with wilful default. It is essential to that rule that the party taking possession must have known that he was in possession as mortgagee.

In order to set aside or open a stated and settled account, so as to have liberty to surcharge or falsify, it is necessary in the bill to charge specially some, at least one, definite and important error, and support that charge with evidence confirming it as laid. — *Parkinson* v. *Hanbury*, 15 W. R. 642.

LANDLORD AND TENANT.—Where a lease contains a general covenant to repair, and also a covenant to repair within three months after notice, with a condition of re-entry on the breach of any of the covenants, a notice given to the lessees to repair "in accordance with the covenants," is not a waiver of the forfeiture under the general covenant to repair, and does not deprive the landlord of his right of re-entry before the expiration of the three months from the date of the notice. — *Few* v. *Perkins and others*, 15 W. R. 713.

RAILWAY—NEGLIGENCE.—This was an action brought by a passenger on the defendants' railway, to recover damages for an injury he had received owing to the breaking down of the carriage in which he was travelling. The carriage when attached to the train was to all outward appearance reasonably fit for the journey; the tire of the wheel being of proper thickness and apparently of sufficient strength but an air bubble having formed in the welding, rendered the tire much weaker than it appeared, so that it was not reasonably fit for the journey: the tire broke and occasioned the accident. The defect was one which could not be detected by inspection nor by any of the usual tests, as it would ring to the hammer as if perfectly welded; there was no neglect on the part of the defendants, who took every reasonable precaution in examining the carriage.

For the defendants it was contended that as the accident was not occasioned by any neglect on the part of the defendants, but was occasioned by a latent defect in the wheel, which no skill or care on the part of defendants could have detected, they were not liable.

For the plaintiff it was contended that the defendants, as carriers of passengers, were bound at their peril to supply a carriage that really was reasonably fit for the journey, and that it was not enough that they made every reasonable effort to secure that it was so.

Held, by Mellor and Lush, JJ., that the duty of a carrier of passengers is not absolutely to carry safely, but to exercise the utmost care and diligence in performing his contract of carriage, and that the defendants were not liable to the plaintiff for an injury caused by reason of the latent defect in the tire of the wheel.

Held, by Blackburn, J., that there is a duty on the carrier of a passenger to supply a vehicle in fact roadworthy—that is, reasonably sufficient for the journey—and that defendants were responsible for the consequences of their failure to do so, though occasioned by what no care could have prevented.—*Readhead* v. *Midland Railway Company*, Weekly Notes, June 1, 1867.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

THE UNITED BOARD OF GRAMMAR AND COMMON SCHOOL TRUSTEES OF THE VILLAGE OF TRENTON, AND THE CORPORATION OF THE VILLAGE OF TRENTON.

Schools—Union of Grammar and Common Schools—C. S. U.C. ch. 63, sec. 25, sub-sec. 7—Ch. 64, sec. 79, sub-sec. 9.

"The United Board of Grammar and Common School Trustees of the Village of Trenton," applied for a mandamus to the Corporation of Trenton to levy a sum of money required by them for Grammar School purposes, as mentioned in the estimate; supporting the application by an affidavit of their Secretary, who stated that the Trustees of the Village of Trenton Grammar School had united with the Board of School Trustees of the Village of Trenton, and the same became and had ever since been the United Board of Grammar and Common School Trustees of the village.

Held that such Union of the two Boards of Trustees was not authorized by the Statutes—Con. Stat. U. C., ch. 63, sec. 25, sub-sec. 7, and ch. 64, sec. 79, sub-sec. 9; and the application was therefore refused.

[Q. B., Hilary Term, 1867.]

In last Michaelmas term, D. B. Read, Q.C., obtained a rule *nisi*, calling on the corporation of the Village of Trenton to shew cause why a peremptory writ of mandamus should not be issued

requiring the said corporation to provide for the united board of grammar and common school trustees, for the Village of Trenton, the sum of $500, as contained in the estimate of the said united board, dated the 25th September, 1866, and referred to in the affidavits filed.

The application was based on an affidavit of the secretary of "The United Board of Grammar and Common School Trustees of the Village of Trenton," who stated that before the 26th of September last "the Trustees of the incorporated Village of Trenton County Grammar School" united with "The Board of School Trustees of the Village of Trenton," in the county of Hastings, and the same became and have since been the United Board of Grammar and Common School Trustess of the Village of Trenton, and that such union took place about the month of June or July last; that on the 26th of September the estimates, a copy of which was attached to the affidavit, were passed by the said united board and under the seal thereof, and that he on the same day left the original estimates with the Clerk of the corporation of the Village of Trenton; that the corporation refused to provide for the grammar school purposes in said estimates mentioned, and still refuse so to do; that on the 5th day of November last, the said corporation passed resolutions, a copy of which was annexed to the affidavit.

The estimates were as follows:—"The following are the estimates of the United Board of Grammar and Common School Trustees of the Village of Trenton, for the current year, 1866, and 1867:

For Grammar School purposes.

For paying part of the salary of Teacher...	$300
For building Grammar School House, repairing, furnishing, warming, &c.....	200
	$500

For Common School purposes:

For paying part of the salaries of Teachers	$700
Warming, furnishing and keeping in order the school houses, their appendages, &c..	100
For all other necessary expenses connected with the schools, &c	100
	$1400

The United Board of the Grammar and Common School Trustees of the Village of Trenton desire the Municipal Council of said village to provide the above sums for the said Trustees, according to law.

September 26, 1866. [L.S.]

(Signed), J. MARSH,
Chairman,
U. B. G. and C. S. T. Trenton.

The resolutions referred to were as follows:

Council Room, November 5th, 1866. (Then the names of the four councillors present.)

Moved by, &c., that a By-law be passed levying 15¼ cents on the dollar, for common school purposes.—Carried.

Moved by, &c., that a By-law be passed levying 6 cents on the dollar for grammar school purposes.—Yeas, 2; Nays, 2. Res. lost,

During this term *M. C. Cameron*, Q.C., shewed cause, and *Read*, Q.C., supported the rule.

Con. Stat. U. C., ch. 63, secs. 16, 20, 24, 25, sub-sec. 7; ch. 64, sec. 27, sub-secs. 4, 7, 12; secs. 77, 79, sub-secs. 9, 11, 18; *The Trustees of the Weston Grammar School and the Corporation of York and Peel*, 10 U. C. L. J. 42; *The School Trustees of Toronto and the Corporation of Toronto*, 20 U.C. Q B. 302; *School Trustees of Sandwich and Corporation of Sandwich*, 23 U. C. Q. B. 642, were cited on the argument.

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

It was contended on the part of the applicants that they were a joint board within the provisions of the 7 sub-section of sec. 25, Con. Stat. U. C., ch. 63.

That sub-section authorizes the board of trustees of a grammar school "to employ, in concurrence with the trustees of the school section, or the board of common school trustees in the township, village," &c., "in which such grammar school may be situate, such means as they may deem expedient for uniting one or more of the common schools of such village," &c., "or departments of them, with such grammar school; but no such union shall take place without ample provision being made for giving instruction to the pupils in the elementary branches, by duly qualified English teachers; and these schools thus united shall be under the management of a joint board of grammar and common school trustees, who shall consist of and have the powers of the trustees of both the common and grammar schools; but when the trustees of the common school exceed six in number, six only of their number, to be by them selected, shall be the common school portion of such joint board."

Sub-section 9 of sec. 79 of the Upper Canada Common School Act (Con, Stat. U. C., ch. 64) authorises the board of school trustees "to adopt, at their discretion, such measures as they judge expedient, in concurrence with the trustees of the county grammar school, for uniting one or more of the common schools of the city, town or village, with such grammar school."

It was objected that the statutes did not authorise the union of these two boards of trustees into a united board; that it was not shewn that the provisions of the two sub-sections above mentioned were complied with, or that the schools referred to were united; and it was argued that before the joint board were entitled to call upon the corporation to provide the amount of the estimates sought to be enforced by mandamus, the applicants must show that a union of the schools, or some of them, had taken place under sub-section 7, above quoted.

It certainly does not appear from the affidavit or papers filed that one or more of the common schools of the village of Trenton and the grammar school of that village are united. What is shewn is, that the trustees of the grammar school of that village united with the board of school trustees, and became the united board of that village, in what way and for what purpose does not appear.

What the school acts authorise is the union upon certain conditions, of the grammar school and one or more common schools, not of the two sets of trustees as trustees, and that such schools, when united, shall be under the management of a joint board of the trustees of the grammar school and the trustees of the common school the latter not exceeding six in number. There is no affidavit or proof of the union of such schools, or that the union of the grammar school was

with one or more or all the common schools, of Trenton.

We think the objections taken are fatal to the application.

It was contended on the part of the applicants, that if their board was not properly constituted, the onus was on the corporation to shew the defect, as the corporation had adopted the arrangement; but we see nothing to warrant such an allegation. It does not appear by affidavit that the corporation did do so. Two resolutions of the council are shewn, one adopted for levying so much on the dollar for common school purposes, without stating any sum or otherwise connecting the levy with the estimates sought to be enforced; for all that appears, the resolution refers to common school purposes other than those mentioned in the estimates of the applicants, and no affidavit is filed shewing to what that resolution refers.

For these reasons, we are of opinion that the rule should be discharged.

Rule discharged,

Regina v. Gemmell.

False pretences.

On an indictment for obtaining money by false pretences, it appeared that G., the prisoner, and another, were in a boat on the bay, and the prosecutor, M., agreed with them to take him to meet the steamer, G. saying the charge would be 75 cents at the steamer. The prosecutor, according to his own account, took out a $2 bill, saying he would get it changed. Prisoner said, "I'll change it;" upon which the prosecutor handed it to him, and he shoved off with it. Other witnesses represented the prisoner's statement to be that he had change. The prosecutor did not say what induced him to part with the money.

Held, that a conviction could not be sustained.

[Q. B. H. T. 1867.]

Case reserved from the Recorder's Court, Toronto.

Indictment for obtaining money by false pretences.

The prisoner and one Conlin were in a boat on the bay. The prosecutor, Menzies, and two companions were on the island, and agreed with those in the boat to take them to meet the steamer. Conlin, one of the two, said the charge would be 75 cents. At the steamer the prosecutor took out some silver, and handed to Conlin thirty-five or forty cents, being all the silver he had, and took out a $2 bill, saying he (prosecutor) would get it changed. Prisoner said, "I'll change it." Prosecutor handed him the bill. He put it into his pocket and pushed off. Prosecutor asked him to return it. He said, "No, we have earned it." He kept it.

Another witness swore that he heard Conlin say the charge was 75 cents, and prosecutor handed a $2 to Conlin to change. Conlin handed it back, saying he could not change it. Prisoner said he would change it, and prosecutor handed it to him. Prisoner took it, saying it was well earned. Prosecutor asked him for the change. Prisoner told him his right name and where he lived, and they shoved off. The witness further said that the prisoner said he could change the bill, before it was given to him.

Conlin was also called by the Crown. His evidence was the same in substance:—That after he had handed the bill back to prosecutor, the latter said to prisoner, "Have you change?" Prisoner said, "I think I have;" and prosecutor then gave him the bill. Prisoner put it in his pocket, pulled out some silver, and said, "I have not enough change;" and with that, the boat being in danger of the steamer's paddles, Conlin shoved off. Prosecutor called them scoundrels, and prisoner called out his true name and residence, and told prosecutor if there was any change to come to him. Conlin said he considered the 75 cents was for himself: that the prisoner had some change, but not enough: prisoner told prosecutor it was little enough for their trouble.

Another witness said the prisoner said he could change the bill, and the prosecutor did not ask him. Another said that the prosecutor did ask him, "Could he change it?" Prisoner said he thought he could, and prosecutor then gave him the bill. Prisoner put his hand into his pocket, and then said, "I can't change it." Conlin cried out, "Look out!" and the boat pushed off.

The learned Recorder explained the law as to larceny, and as to a conviction for false pretences, and asked the jury whether the prisoner represented to the prosecutor that he then had the change to give him for the bill, and if on that representation he obtained it for the alleged purpose of changing it; whether at the time he obtained it he really had the change mentioned, or was his representation in that respect false, and used as a pretence to get the bill;—if so, he would be guilty. That if he did not make such representation, or, if having so made it, he did not obtain the bill from the prosecutor thereupon, or having obtained the bill on such representation, and having in fact the change to give, although wrongfully withholding the change and retaining the bill—in either of these instances the prisoner would not be guilty.

The jury convicted the prisoner, and the case was reserved for the opinion of this Court.

Doyle, for the prisoner, cited *Rex* v. *Goodall*, Russ. & Ry. 461; *Rex* v. *Douglas*, 1 Moo. C. C. 462.

Robert A. Harrison, contra, cited *Rex* v. *Crossley*, 2 Moo. & Rob. 18; *Regina* v. *Giles*, 11 L. T. Rep. N. S. 643, S. C. 10 Cox C. C. 44; *Rex* v. *Jackson*, 3 Camp. 370; *Regina* v. *Woolley*, 1 Den. C. C. 559; *Regina* v. *Hughes*, 1 F. & F. 355; *Regina* v. *Naylor*, 13 L. T. Rep. N. S. 381.

Hagarty, J., delivered the judgment of the Court.

We think the learned Recorder correctly stated the law to the jury.

Sir William Erle said, in *Regina* v. *Giles*, 11 L. T. Rep. N. S. 643, 10 Cox C. C. 44, "I take the law to be that there must be a false pretence of a present or a past fact, and a promissory pretence to do some act is not within the statute." And again he says, "Was the prosecutor induced by means of that false pretence, and on the faith of its being true, to part with the money?"

The "existing fact" pretended by the prisoner here is, that he had sufficient money to change the $2 bill. There is evidence that the prisoner said he could change it, and that there-

upon the prosecutor gave him the bill. And there is also evidence (Conlin's) that he had *not* the means of changing it.

It is singular that the prosecutor himself was apparently not asked, nor does he say what induced him to give the bill to the prisoner. He swore the latter said, "I'll change it," (not "I *can* change it,") and he then handed it to him. The direct evidence of the allegation that the prisoner averred he had the means of changing the bill came from another witness.

The jury took the view of the evidence most unfavourable to the prisoner.

The case is open to the difficulty as to what induced the prosecutor to part with his money. If it was on a mere promise to get change, or to change it, the case would fail. The testimony of the witnesses leaves the operating inducement in the prosecutor's mind a matter of speculation. No one but himself could tell as a matter of fact what did so act as an inducement, and he gives no account of it whatever.

In the very peculiar case of *Regina* v. *Giles*, where the charge was that defendant obtained money and clothes, pretending to the possession of supernatural power to bring back a truant husband to an ignorant wife, accompanied by a promise so to bring him back, the prosecutrix swore, after narrating the conversation and the prisoner's assertion, "I parted with the money and the dress on the faith of what had passed between us on that first occasion."

As Cockburn, C.J., remarks in *Regina* v. *Mills*, 29 L. T. Rep. 114, "The question is whether the false representation is the *motive operating* on the mind of the prosecutor, and inducing him to part with the money." In that case, when the prosecutor parted with the money he was aware of the falsehood of the representation, and was laying a trap for the defendant, and an acquittal was directed.

If the prosecutor here had died before trial, and the rest of the evidence only had been given, there would be a difficulty as to the "motive operating" on his mind—whether it was the representation that the prisoner had the means to change, or whether it was merely his promise to change. The prosecutor's own statement is, that the prisoner said, "I'll change it."

So in Mill's case, just mentioned, if the prosecutor had died before trial, and others present, who were not aware of what the prosecutor knew, but who proved the pretence, its falsehood, &c., and the payment of the money, a conviction obtained on their testimony would be clearly erroneous in fact.

In *Regina* v. *Hewgill*, 1 Dears. C. C. 315, the prosecutor swore it was partly on the alleged existing fact and partly from a receipt produced, and other things, that he parted with the money, and the jury found that the inducement was proved and acted on by the prosecutor; and this was upheld on a case reserved.

In the case before us, we think the conviction for obtaining money on false pretences cannot be upheld, and must be quashed.

Conviction quashed.

Regina v. Connolly.

Assault with intent to ravish—Insanity—Consent.

In the case of rape of an idiot or lunatic, the mere proof of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent—*e. g.* that she was incapable, from imbecility, of expressing assent or dissent; and if she consent from mere animal passion, it is not rape.

In this case the charge was assault with intent to ravish. The woman was insane, and there was no evidence as to her general character for chastity, or anything to raise a presumption that she would not consent. The jury were directed that if she had no moral perception of right and wrong, and her acts were not controlled by the will, she was not capable of giving consent, and the yielding on her part, the prisoner knowing her state, was not an act done with her will. They convicted, saying she was insane and consented. *Held*, that the conviction could not be sustained.

On an indictment for attempting to have connection with a girl under ten, consent is immaterial, but in such a case there can be no conviction for assault if there was consent.

[Q. B., H. T., 1867.]

Case reserved from the Quarter Sessions of the County of Simcoe.

Indictment for assault with intent to ravish.

The evidence was that the person assaulted was a married woman, who for some years past had been insane. The prisoner was caught in the act of attempting to have connection with her. The learned Judge told the jury "that if upon the evidence they were satisfied that the woman was of unsound mind, that she had no moral perceptions of right or wrong, that her acts were not controlled by the will, were in fact involuntary, she could not be said to be capable of giving consent, because by reason of her state of mind incapable of judgment and discretion; and the yielding on her part to force ought not, in view of such impotence of her will (and knowledge of her state by defendant), to be taken as an act done with her will."

The charge was objected to on behalf of the prisoner, and it was contended that there was no evidence of want of consent necessary to constitute an assault; that the jury should be told that if they could find a solution consistent with innocence they ought to acquit.

The jury found the prisoner guilty, and in answer to the Court said that the woman was insane at the time the offence was committed, and that she was a consenting party to what the prisoner had done.

McCarthy for the prisoner. 1. There can be no assault when the person said to be assaulted consents, and the jury having found consent here, the prosecution must fail. An assault implies that it was committed against the will of the party. Russell on Crimes, 4th Ed. Vol. 1, p. 1023; *Regina* v. *Meredith*, 8 C. & P. 589; *Regina* v. *Martin*, 9 C. & P. 213; *Regina* v. *Read*, 1 Den. C. C. 377; *Regina* v. *Cockburn*, 3 Cox C. C. 543. 3. But the charge here is of assault with intent to ravish. Now the finding of assent negatives the intent, for when all that took place was with the consent of the woman, it cannot be said that the intent was to commit an act against her will. If it be held that an insane person cannot consent, then any attempt to take indecent liberties with such person must be an attempt to rape. There was no fraud in this case, and no force used by the prisoner. *Regina* v. *Charles Fletcher*, 12 Jur. N. S. 505, per Pollock, C. B., S. C. 14 L. T. Rep. N. S. 473; *Regina* v. *Stanton*, 1 C. & K. 415; *Regina* v. *Richard Fletcher*, Bell C. C. 63; Jur. of August 18th, 1866, p. 327, Leading Article.

Robert A. Harrison, contra. The indictment here is not for a rape, but for an assault with intent to commit it, and there is a difference between the two charges, as regards the will—*Regina* v. *Stevens*, 1 Cox C. C. 225. There must be not only a consent from mere animal passion, but a consent of the reason—*Regina* v. *Ryan*, 2 Cox C. C. 115; *Regina* v. *Page*, 2 Cox C. C. 433. The jury here have found the woman insane, and where this is the case, and a person knowing it attempts to have connection, he is guilty. The charge is assault with intent; an assault in law was proved, and the consent given was, under the circumstances, immaterial; it was proved here that the prisoner was aware of her insanity —*Regina* v. *Fletcher*, 8 Cox C. C. 131, 134. According to the arguments for the prisoner, every idiot found on the street might be ravished with impunity. *Regina* v. *Clarke*, 6 Cox C. C. 412; *Regina* v. *Francis*, 13 U. C. R. 116; and *Regina* v. *Sweenie*, 8 Cox C. C. 223, were cases in which the woman believed the person to be her husband, and the last case holds that it may be rape, notwithstanding.

In *Regina* v. *Fletcher*, 8 Cox C. C. 133, a definition of rape is given, which is approved of in *Regina* v. *Jones*, 4 L. T. Rep. N. S. 154. There can be no consent by an idiot or insane person, and the connection even by consent must therefore amount in law to rape.

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

The latest case on the subject that we have seen is *Regina* v. *Charles Fleteher*, 14 L. T. Rep. N. S. 573. The charge was rape on an idiot girl. Keating, J., left it to the jury in the terms used by Willes, J., in *Regina* v. *Fletcher*, 8 Cox C. C. 131, that if they were satisfied that the girl was incapable of expressing assent or dissent, and that the prisoner had connection with her without her consent, they should find him guilty, but that a consent produced by mere animal instinct would be sufficient to prevent the act being a rape. The verdict was guilty. Pollock, C. B., in delivering judgment, said there was no evidence except the fact of connection and the imbecile state of mind of the girl. Of the fact of connection there was the fullest proof, for it was admitted by the prisoner. There was, however, no evidence that it was against her will. "We are all of opinion that some evidence of that as a fact should have been given before a conviction could be obtained; and there was not that sort of testimony on which a Judge would be justified in leaving the case to the jury to find a verdict. We are unanimously of the opinion that there was no evidence here to establish either that this connection was against her will or without her consent. * * Here the contention on the part of the Crown must be that an idiot is incapable of consent, and it might be said in answer that the same cause which required an Act of Parliament to make the mere fact of connection a criminal offence in the case of children of tender years, would require an Act of Parliament in the case of idiots."

There was no evidence in this case except the prisoner's admission; and a medical man testified that she was a fully developed woman, and that strong animal instinct might exist notwithstanding her imbecile condition.

In *Regina* v. *Beale*, L. R., 1 C. C. 11, the first count was for unlawfully attempting to have carnal knowledge of a child under ten years; the second for assaulting with intent; and the third for an indecent assault. The jury found a verdict "Guilty, for that the child was too young to know what she was doing, and therefore consented to the act done by the prisoner." On a case reserved, Pollock, C. B., said that consent was altogether unimportant; the facts shewed an attempt to commit a crime where consent was immaterial, adding, "Of course, if the indictment had been merely for an indecent assault, the question of consent would have become material."

In *Regina* v. *Cockburn*, 3 Cox. C. C. 543, for feloniously knowing a child under ten, the principal charge could not be supported, and the prosecutor urged that there could be a conviction for an assault. Sir J. Patteson said, "A child under ten years of age cannot give consent to any criminal intercourse, so as to deprive that intercourse of criminality, but she can give such consent as to render the attempt no assault. We know that a child can consent to that which, without such consent, would constitute an assault." This case was cited in *Regina* v. *Beale*.

Regina v. *Fletcher*, 8 Cox C. C. 131, 32 L. T. Rep. 338, was a charge of rape of an idiot girl aged thirteen; verdict guilty, and that the jury considered her incapable of giving consent from defect of understanding. Willes, J., mentioned the direction he had given in a case at the Old Bailey, already cited; and Lord Campbell said, "That direction was in accordance with Complin's and Ryan's cases. But here there was no evidence of that kind" (viz., consenting from animal instinct). "but rather to the contrary. * * If the offence is complete where it was by force and without her consent, then the offence is proved that was charged in the indictment, and the prisoner was properly convicted. Complin's case settles the definition of the offence, and all the ten Judges concurred in that. The definition includes the present case, the only difference in this being, that here the prosecutrix was not capable of giving consent. But then the prisoner knew her condition at the time."

[After reviewing other cases on the subject, the learned judge continued.]

We gather from all these cases, that in the case of a child under ten years of age, if the indictment be for the misdemeanour of attempting to commit the statutable felony, consent becomes unimportant:

That in such a case, on an indictment for the principal offence there cannot be a conviction for the assault, if there be consent to what was done, nor for an assault independently charged:

That in the case of girls from ten to twelve, on a charge of assault with intent to carnally know, or indecent assault, or common assault, consent is a defence:—

But that the prisoner may be indicted for attempting to commit the statutable misdemeanour, not charging an assault, in which case it seems consent is no defence, according to *Regina* v. *Martin*, already cited:—

That in the case of rape of an idiot or lunatic woman, the mere proof of the act of connection will not warrant the case being left to the jury; there must be some evidence that it was without

her consent—*e. g.* that she was incapable of expressing consent or dissent, or from exercising any judgment upon the matter, from imbecility of mind or defect of understanding: that if she gave her consent from animal instinct or passion, it would not be rape.

To apply these principles to the case before us. The jury might, on the evidence, have perhaps justly arrived at the conclusion that there was no consent in fact, from the account given by the witness as to what they heard the woman cry out as they approached.

But after they were told by the learned Judge that if they were satisfied she was of unsound mind, with no moral perceptions of right and wrong, that her acts were not controlled by the will, and were in fact involuntary, she could not be said to be capable of consent, and from her state of mind and impotence of will the yielding on her part to force ought not to be taken as an act done with her will—then when the jury so instructed found that she was a consenting party to what the prisoner did, we cannot but feel that the case presents a difficulty.

We may assume the jury took the law from the Court, as they should have done, and with that instruction as to what would be and would not be a consent, find that there was consent—not qualified (as in many of the cases noticed), as that from the state of her mind or unconsciousness either of the nature of the act, &c. &c., she consented; but generally. It is true they also found that she was insane at the time.

This suggests another aspect of the case. No question seems to have been asked or evidence given of the unfortunate woman's habits or character for decency or chastity. She was a married woman, with children, and was found to have acted at various times in such a strange manner as to furnish strong evidence of hallucination and delusion, warranting the jury in finding her, in popular language, insane.

But, quite consistently with the existence of insane delusions, there might be in the woman's mind perfect delicacy of feeling and chastity that would revolt from criminal intercourse, and, on the other hand, perfect consciousness of the impropriety and indecency of such intercourse. In the case of a mind in the latter state, however otherwise liable to delusion, we hardly see how the law could presume the absence of legal consent on the grounds suggested to the jury, in the face of evidence of consent in fact, which we must presume the jury found here.

The case may be summed up thus:

There is no evidence whatever as to the woman's general character for decency or chastito, or any thing to raise a presumption that she would not consent to the alleged ontrage upon her. There is evidence of insane delusion of some years standing, unconnected with anything relating to matters of this kind. The jury, on a view of the law certainly not too favorable to the prisoner, while they find the insanity, also find that she was a consenting party, not qualifying the latter finding.

We think this conviction cannot be supported.

We have treated the case throughout in the view least favorable to the prisoner, and our remarks would more pointedly apply to a case where the connection had actually taken place.

On a charge like the present, of an assault with intent to ravish, it would seem, on the decided cases, to be impossible to support a conviction where there is consent found.

As the Chief Baron remarked, there is no Act of Parliament declaring the fact of criminal connection with an idiot or lunatic to be an offence, as in the case of children of tender years.

In the principal offence, consent from mere animal instinct has been held to be a defence in the case of an idiot.

It is impossible to say that it must not be equally so in the lesser charge of assault with intent, and equally impossible when a consent in fact is proved. In the case of the idiot, the lunatic, the drunken, or insensible, the crime can only be complete on the actual or the legal deduction that the connection took place without consent.

In what manner the absence of such consent has been presumed or inferred has been already considered.

Conviction quashed.

PRACTICE COURT.

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

IN RE MCKINNON, ONE, &c.

Attorney and client—Application to pay over—Liability.

On an application against an attorney to pay over money collected for a client, it appeared that the latter took from the attorney his note, indorsed by another, who turned out to be insolvent. It was also a question whether this note had been sold or only given as security by the applicant for a debt.

Held 1. That the note was only assigned collaterally, not absolutely in payment.

2. That the client had not lost his remedy by taking the note.

Remarks upon the impropriety of agreements by an attorney with his client (otherwise unadvised) which may tend to curtail the rights of the latter, and upon the necessity for a summary remedy against attorneys in such cases.

[P. C, H. T., and Chambers, May 22, 1867.]

This was a rule nisi enlarged by consent into Chambers.

It was an application against an attorney to compel the payment of a sum of money collected for the applicant, one Ker. The receipt of the money was admitted, as also its nonpayment.

The order was resisted on the ground that the applicant took a note from the attorney for the amount, at nine months date, in which a brother of the latter joined as his surety. The note was dishonoured, and it was sworn that the surety was insolvent.

The attorney and his brother-in-law, one Kirkpatrick, swore that Ker took this note on the distinct understanding that he thereby waived all right of applying to this court as he does now. Ker denied this positively, admitting that he agreed to waive such right, but only while the note was current. But great doubt was, in the opinion of the learned judge, thrown on Kirkpatrick's testimony on this point by the evidence of Ker and one Phillips as to what took place with him, when Ker spoke to him about his having made this statement

It was also objected that Ker had parted with his interest in this note to certain parties in New York, who notified the makers that they were the holders.

Ker, however, swore that he only gave it to them in security for a smaller debt that he owed them, and in trust as to the surplus, if collected, for himself, and that he did not sell or discount the note to them, and that the application was made *bonâ fide* in his interest, as well as in theirs, and that the note is in the hands of Messrs. Martin & Bruce, the solicitors making the application, who are authorised by Ker and the parties to whom he was so indebted, and that such parties were still his creditors, and his debt not discharged in any way by the note.

Spencer shewed cause.

S. Richards, Q. C., supported the application.

HAGARTY, J —I am of opinion that the applicant has not lost his right of applying to the court by any disposition which he has made of the claim. A man may have a claim in the hands of an attorney for collection, and may give it to his creditor as collateral security for his debt, remaining still liable to the latter. If he absolutely parted with all interest in the claim, I think it would be different. The assignee and not the client would then be the real applicant for the court's interference. I do not think the facts before me would warrant a refusal to interfere on that branch of the case.

The chief difficulty that I felt during the argument was as to the effect of the note given by the attorney and his brother: whether that should so alter the position of the parties as to put an end to all remedy as between attorney and client.

I have been somewhat surprised to find no case in point, so far as I have searched The books of practice, and several works on attornies, and the digests for some years past have been consulted without effect.

I was pressed on the argument with the assertion of the attorney and Kirkpatrick, as to Ker's taking the note and agreeing to waive all right to this summary proceeding.

Even if this were proved beyond question, I think the court must look with great suspicion on any such agreement alleged to have been obtained from a client by his attorney; the client not being provided with any independent legal adviser to explain his rights to him.

Agreements not to insist on legal rights—not to go to law—are not looked on with favour; still less so when urged by the professional adviser against the client, who is in his hands and who has no other person to advise with.

There is nothing in the attorney's affidavits to shew that his position has been in any way altered or prejudiced by his getting his brother to join in this note, or that any consideration was given to him for so doing.

As I do not find any authority in point, I must treat this as a case of the first impression, and have come to the conclusion that, under the circumstances in evidence before me, I ought not to hold that the applicant has lost his right to ask the interference of the court. An apparently worthless note has been given to him; he has waited during its currency and until its dishonour. Whatever he has done has been done at the instance of the attorney; the latter has had the full benefit of the time given; and I am not now prepared to hold that he is exonerated from the consequences of his misconduct in appropriating his client's money to his own use.

If he be excused by what has taken place, then the case will assume this shape.—He owed a large sum of money to his client, which the latter could compel him to pay by application to this court on peril of forfeiting his professional position. He bargains as he alleges with his client to forego this advantage on condition of receiving a worthless promissory note; the client being without any legal adviser to protect his interests in the matter.

It is an old and most salutary rule, that whenever an attorney purchases from a client the whole burden of proof is cast on the former, to show that the interest of the client was fully protected, and that he was fully apprised of his legal rights; that in fact the sale was as advantageous to the client as it would have been if the solicitor had used his utmost endeavours to sell the property to a stranger: *Spencer* v. *Topham*, 22 Beav. 573. It is not easy to see why a somewhat analogous rule should not apply to the case of the solicitor bargaining with a client (otherwise unadvised) about a debt due by him to the client.

There is no suggestion here that this money was not received by defendant as an attorney, nor did he in any of the earlier proceedings assert that he had any claim for costs. In one of his affidavits he says that, if the acceptance of the note be not sufficient to relieve him from this application, he asks the right of setting off against the claim "such costs and charges as I have against the said J. B. Kerr." I can hardly accept this as any positive proof, after all that has taken place, of a *bonâ fide* claim for costs.

On the general question, I am of opinion that I ought not to do any thing to narrow or weaken the most wholesome jurisdiction of the courts in giving a summary remedy to clients who are so unfortunate in the selection of their attornies as this applicant has been. I think such a jurisdiction is absolutely necessary, and ought not, except on clear authority, to be narrowed.

The rule must be made absolute, the applicant bringing the note into court to be delivered up to the attorney. *Rule absolute.*

Since giving this judgment, I have found the case of *In re Davis, one, &c.*, 15 L. T. N. S. Ex. 161. On an application to pay over, it was shown that the applicant had recovered judgment for the claim against the attorney, the court refused to interfere, saying that he had changed the debt into a judgment, on which the attorney could be taken in execution. Nothing was suggested either in argument or judgment against the right of an applicant on the facts before me.

COMMON LAW CHAMBERS.

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

IN RE SMITH, AN INSOLVENT.

Insolvent Act—Jurisdiction, if no estate—Fraud.

Held, on the facts set out below, that the insolvent had an estate to be administered under the Insolvent Act.

Quære, whether, if there had been no estate, proceedings could have been taken by the debtor.

Held that the facts set forth below, though unfavorable to the insolvent, were distinguishable from acts or other misconduct constituting fraud, and that, unless the latter be shewn, the insolvent is entitled to the benefit of the statute.

[Chambers, March 18, 1867.]

This was an appeal from the decision of the Judge of the County Court of the County of Hastings, by Wm. Darling, of the City of Montreal, merchant, a creditor of the insolvent.

The Judge of the County Court granted a discharge to the insolvent, and the creditor petitioned against this decision because, as was alleged:

1. The insolvent was guilty of fraud within the meaning of the Insolvent Act.

By having given a fraudulent preference.

By purchasing goods and obtaining credit, and contracting debts while he was insolvent and unable to meet his engagements; and fraudulently concealing his insolvency and representing himself to be solvent.

By reckless and improvident waste of his estate, in fraud of his creditors.

By evasion and prevarication on his examination as to his estate.

By fraudulent sale and disposal of his estate; and

By not keeping books of account.; and

2. Because the insolvent had no estate at the time of his making an assignment under the Insolvent Act, by reason of his fraudulent disposal of his estate prior to his making an assignment, and is not therefore entitled to any relief under the said act.

The questions under discussion were—

1. Was there fraud in fact, within the meaning of the statute, on the part of the insolvent?

2. If there was such fraud in fact, could that fraud prevent the discharge being given to the insolvent, when he was guilty of it (if at all) before the passing of the statute?

3. Had the insolvent an estate to be administered under the statute, at the time he took proceedings in insolvency?

4. If he had no estate at that time, was he entitled to take proceedings as an insolvent under the act?

The facts of the case were — The insolvent commenced business in the year 1855, in Belleville; in the fall of 1857, he bought goods from different persons to the extent of about $6,000; his purchase at that time from Darling & Co. was about $1,600. He was insolvent then, but he did not know it. In the spring of 1858, he took stock and found he was insolvent. His stock then amounted to $3,225, which, in March, 1858, he sold to his brother, A. L. Smith, for fifteen shillings in the pound, and took his notes for the amount. These notes were sent to the creditors, and the insolvent believes they have been paid. Darling & Co. received in this way $413 on account. The insolvent ran away to the United States immediately after he sold out to his brother; he returned to this country in 1862. He then assigned to his brother his accounts and notes, amounting to $2,697; they were for debts contracted between 1852 and 1858. Nothing was given by his brother for this assignment of debts; it was for the benefit of his estate. He does not now think the debts were worth any thing, and he does not know if any of them have been collected.

S. Richards, Q. C., for the insolvent.

As to fraud or alleged fraud being within the act, Insolvent Act of 1864, sec. 8, sub-secs. 3-7; sec. 9, sub-sec. 6.

As to fraudulent preference, sec. 8, sub-sec. 4; sec. 9, sub-sec. 6.

As to obtaining goods and representing himself to be solvent, sec. 8, sub-sec. 7.

As to evasion and prevarication on his examination, sec. 9, sub-sec. 6.

As to the other grounds of fraud, they are not within the act.

As to the insolvent being within the act, even although he had no estate, sec. 1, which extends the act to all persons.

Robt. A. Harrison contra.

There was fraud clearly established against the debtor, sec. 9, sub-secs. 6-11. If he were within the act, to take the benefit of its advantages, he must be subjected to its conditions and disabilities; but as he had no estate to be administered, he was not within the provisions of the act at all. —*Ex parte Morrison*, 10 Jur. N. S. 787; *Re Dennis*, 6 L. T. N.S. 755.

The preamble of the act shows this also, because it recites that it is desirable to provide for the settlement of the *estates* of insolvent debtors, and where there is no estate there is no jurisdiction.

ADAM WILSON, J.—The first question is whether C. F. Smith had or had not an estate to be administered in insolvency when proceedings were begun there? If he had, the question whether a person without an estate is within the operation of the statute will not arise.

I think the facts shew that there was an estate, perhaps not of much worth, but still an estate to be administered for creditors; and therefore I am not obliged to consider the case whether, if there had been no estate, the proceedings could have been taken by the debtor under the statute. What conclusion I might have formed if I had been obliged to consider it I am not prepared to say. The case of *Ex parte Mitchell*, 1 D. & G. 257, in addition to those cited in the argument, may be referred to.

As to whether there was fraud or not on the part of the insolvent depends principally upon the circumstances before stated—the purchasing goods in the fall of 1857, to the amount of about $6,000, at a time when the debtor did not know how his affairs really stood; and the making an assignment, in the spring of 1858, for so small a sum as $3,225 (including some hundreds of dollars of old stock), without very satisfactorily accounting for the difference, excepting that it was applied to the payment of old debts.

I do not think the facts show that the debtor purchased these goods on credit, knowing or believing himself to be unable to meet his engagements, and concealed the fact from the persons who became his creditors with intent to defraud them, under sec. 8, sub-sec. 7; nor do I see any fraud under sec. 9, sub-sec. 6; and therefore it is not necessary to consider whether the acts of fraud charged, and which are said to have been committed before the passing of the Insolvent Act, are or are not within the provisions of the statute.

There is much, as the learned judge in the court below manifestly felt, in the conduct and proceedings of the debtor, which were not very favorable to him, but which must nevertheless be distinguished from acts or other misconduct constituting fraud; for unless the debtor be amenable for this graver conduct, he is entitled to receive the benefit of the statute; and credi-

tors must only be more careful than they have heretofore been whom it is they trust with such very extensive stocks of goods.

I think I must dismiss the appeal, but it must be without costs.

Appeal dismissed.

CORRESPONDENCE.

To the Editors of the Local Courts' Gazette.

Power of Magistrates to Commit under Petty Trespass Act of Upper Canada.

Gentlemen,—Trespass by defendant crossing the inclosed field and premises of complainant.

Page 947 Con. Stats. U. C. Trespass Act.

25 Vic. cap. 22, Amendment thereto.

By 2nd section substituted for 1st section of said Act, trespass without injury, penal.

3rd section of said Trespass Act makes the provisions of Summary Convictions Act, page 1083 C. S. Canada, operative as to procedure.

In the Act and Amendment no provision is made for enforcing the penalty, or any imprisonment mentioned.

57th section Summary Convictions Act—Powers vested in Magistrates to issue distress warrants according to statute, under which conviction made, and also in cases where no such provisions are made.

62nd section same Act—In default of distress, commitment, "in such manner and for such time as is directed and appointed by the statute on which the conviction or order mentioned in such warrant of distress is founded."

Your opinion as to whether a defendant could be committed to prison after return of distress warrant under the provisions of said Trespass Act, would much oblige,

A Justice of the Peace.

[Sec. 62, referred to, seems to apply, and speaks of the distress issued under Sec. 57, which is the preliminary proceeding intended to enforce the pecuniary penalty spoken of in the Petty Trespass Acts. A commitment therefore would seem to be authorized, if the proper preliminary steps had been taken, as pointed out by the sections of the statute preceding Sec. 62.—Eds. L. C. G.]

To the Editors of the Local Courts' Gazette.

An important question—The Bankrupt Law.

Messrs. Editors,—I would respectfully ask your opinion on this question:

Can an insolvent debtor, under his *certificate of discharge from all his debts*, claim a discharge from a judgment or debt *not included* in his list of creditors attached to the schedule to his petition?

There is nothing positive in the Bankrupt acts of Canada in the affirmative or negative, but several clauses of the act of 1864, say that he must attach a list of his creditors to his assignment.

Perhaps some of your legal readers can give an answer or some authorities on this point. I may refer to the question in your next issue, and in the meantime, if convenient, would feel obliged for the opinion of yourselves.

Toronto, June 24, 1867. Scaroro.

[We should be glad to hear from our correspondent again, or from others who may have light to throw on the subject.—Eds. L. C. G.]

Evidence of wife against husband.

To the Editors of the Law Journal.

Gentlemen,—There have been some conflicting decisions by the judges of the Superior Courts at Nisi Prius, respecting the *competency* of a wife to give evidence against her husband. Referring you to the 5th section of chapter 32 of 22 Victoria, Con. Stat. U. C., page 402, I request you to mark the wording. It enacts that "This act shall not render *competent*, or *authorise* or *permit* any party to any suit, &c., or the husband or *wife* of such party, to be called as a witness on behalf of *such party*; but *such party* may, in any civil proceeding, be called and examined as a witness in any suit or action at the instance of the *opposite party*: *Provided* always, that the *wife* of the party to any suit or proceeding named in the record, shall not be *liable* to be examined as a witness at the instance of the *opposite party*."

The question is, can a brother, who has supported a wife and her child, who have been inhumanly driven by her husband from his home, when only a few days out of her confinement, call upon the wife to prove the board, lodging, necessaries, &c., furnished to her during a period of two years, in which her husband has deserted her by removing to a foreign country? The late Chief Justice McLean held that she was competent, *if so disposed*; that she was not *liable* to be examined, if she objected. There has been a contrary decision given since then. Pray which decision is right? I have only to remark that the wife *may be* the *only* person able to prove the expulsion from her hus-

band's house, and the amount furnished her. Being married, she cannot bind *herself* (she may bind her husband) for necessaries. She is not named in the record; she cannot be said to be "a person" in whose immediate or individual behalf the action is brought. It is brought in behalf of her brother, to whom she is in no way legally liable. I am, &c.,

QUESTIONER.

[We touched upon this subject in the last number of the *Local Courts Gazette;* but as the views of the learned gentleman who writes are not, we understand, entirely in accordance with views we have expressed, we shall endeavour to return to the subject next month.—EDS. L. J.

REVIEWS.

ON PARLIAMENTARY GOVERNMENT IN ENGLAND; ITS ORIGIN, DEVELOPMENT, AND PRACTICAL OPERATION. By Alpheus Todd, Librarian of the Legislative Assembly of Canada. In two volumes. Vol. I. London: Longmans, Green & Co., 1867. $4 50.

The Dominion of Canada is, we all hope and most of us think, "equal to the occasion." She possesses eminent statesmen, at whose head, it may not be going out of our way to boast, is one of our cloth. Judges we have had and still have, whose industry, talents and unblemished integrity, are an omen of good for the future. Others we have, who in various ways have, and yet will leave a worthy name on the page of history. But in a country whose existence as a nation can scarcely even yet be said to have commenced, and where life is so active, with so few opportunities for men, even with a taste for letters, to follow the bent of their talent or inclinations, it might naturally be thought that it would be difficult to find a person who could attain to eminence in the study of such a profound subject as that treated of in the volume before us.

Many men might in the position of Mr. Todd as Librarian of the Legislative Assembly of Canada, be as courteous and as attentive to his duties as he is (though even this may be questioned), but few, we venture to say, would improve the occasion with his diligence and devotion, and fewer still could with equal talent give to the world the result of such research and thought as he has displayed.

In the preface, the author gives an explanation of the "attempt by a resident in a distant colony to expound the system of parliamentary government as administered in the mother country." An explanation only useful, we should imagine, for the purpose of disarming that very liberal portion of the British public who think that nothing is good that is not English.

More than twenty-five years ago, prior to the appearance of May's "Usages of Parliament," Mr. Todd published a manual of parliamentary practice for the use of the Legislature, which was received with much favour by the Canadian Parliament, and was formally adopted for the use of members, and the cost of its production defrayed out of the public funds. In the same year, the principle of responsible government was first applied to our colonial constitution.

Being frequently applied to by those engaged in carrying out this new and then untried scheme, as well as by his own addiction to parliamentary studies, he acquired a mass of information which proved of much utility in the settlement of many points arising out of responsible government; this moreover was not of a merely local or temporary character, but capable of general application. This led him eventually to write a treatise on the parliamentary government of Great Britain —which, as he says, whilst trenching as little as possible on ground occupied by former writers, might supply information upon branches of constitutional knowledge hitherto overlooked, and give some account of the growth, development and present functions of the Cabinet Council, and the practical treatment of the questions involved in the relations of the Crown and Parliament.

Our author is eminently conservative (using the word, of course, in its original and not in its political acceptation) in his views on these subjects, claiming that "the great and increasing defect in all parliamentary governments, whether provincial or imperial, is the weakness of executive authority," and that "any political system which is based upon the monarchical principle, must concede to the chief ruler something more than mere ceremonial functions." An attentive perusal of that part of the work devoted to the royal prerogative, will go far to convince the most skeptical that the sovereign is really more than an ornamental appendage to the state, and that the functions of the Crown have their appropriate sphere. These functions "are the more apt to be unappreciated because their most beneficial operations are those which, whilst strictly constitutional, are hidden from the public eye."

The first volume, which alone has yet been published, is complete in itself, and is divided into five chapters:

Chap. I.—A general introduction.

Chap. II.—Historical introduction, giving a review of the origin and progress of Parliamentary Government.

Chap. III.—The constitutional annals of the administrations of England from 1782 to 1866, with a tabular statement of the Ministries during the same period, their appointment, retirement, &c.

Chap. IV. is devoted to the discussion of the constitutional position, powers, privileges and duties of the sovereign, with a sketch of the character and public conduct of the four

Georges, William IV., Queen Victoria and the late Prince Consort.

Chap. V. treats of the Royal Prerogative in connection with Parliament.

It is impossible more than thus to give a faint outline of the subjects treated of in this volume. Let it suffice to say that they are of the most interesting nature, and that a variety of information is given which can no where else be found collected and arranged in an analytical and methodical shape. References are given to the writings and speeches of the most eminent statesmen, historians, and writers on constitutional law, to establish the various views and propositions laid down by the author.

We take at random some extracts from the volume, to show the style of the writer. In speaking of the constitutional position of the sovereign, he says:—

"We have already seen that, in a system of parliamentary government, as it is administered in England, the personal will of the monarch can only find public expression through official channels, or in the performance of acts of state which have been advised or agreed to by responsible ministers; and that the responsible servants of the crown are entitled to advise the sovereign in every instance wherein the royal authority is to be exercised. In other words, the public authority of the crown in England is exercised only in acts of representation, or through the medium of ministers, who are responsible to Parliament for every public act of their sovereign, as well as for the general policy of the government which they have been called upon to administer. This has been termed the theory of Royal Impersonality. But the impersonality of the crown only extends to direct acts of government. The sovereign retains full discretionary powers for deliberating and determining upon every recommendation which is tendered for the royal sanction by the ministers of the crown; and, as every important act of administration must be submitted for the approval of the crown, the sovereign, in criticising, confirming, or disallowing the same, is enabled to exercise an active and intelligent control over the government of the country.

"In the fulfilment of the functions of royalty, much must always depend upon the capacity and personal character of the reigning monarch. It has been well observed, by a sagacious political writer, that 'a wise and able sovereign can exercise in the councils which he necessarily shares whatever authority belongs to his character, to his judgment, and, in the course of years, to his unequalled experience. A lifelong tenure of office ensuring an uninterupted familiarity with public business, gives a king considerable advantage over even veteran ministers; and the undefinable influence of supreme rank is in itself a substantial basis of power.* But in order to discharge his functions aright, it is indispensable that the sovereign should be ready and willing to labour, zealously and unremittingly, in his high vocation; otherwise he will be unable to cope with the multifarious and perplexing details of government, or to exercise that controlling power over state affairs which properly appertains to the crown. On the other hand, a sovereign who, from whatever cause, is indifferent to the exercise of his kingly functions, may neglect the administrative part of his duties, and, if he be served by competent ministers, the commonwealth will suffer no immediate damage. But, in such a case, the legitimate influence of the monarchical element in the constitution is impaired, and is rendered liable to permanent deprivation.† Moreover, while a sovereign may forego the active control of the affairs of state without apparent public loss, provided his ministers are able and patriotic, the moment political power falls into the hands of self-seeking and unscrupulous men, the nation is deprived of the check which a vigilant monarch alone can maintain—a check no less valuable because unseen, but which may suffice, upon an emergency, to save the country from the effects of misgovernment. For the sovereign can always dismiss a ministry, and summon another to his councils, provided he does so, not for mere personal considerations, but for reasons of state policy, which the incoming administration can explain and justify to the satisfaction of Parliament. This branch of the royal prerogative will hereafter engage our attention more fully."

Our author thus concludes his first volume:

"We have now passed under review the principal prerogatives of the British crown, and have endeavoured to point out, in the light of precedent, and with the help of recognized authority in the interpretation of constitutional questions, the proper functions of Parliament in relation thereto. We have shewn that the exercise of these prerogatives have been entrusted, by the usages of the Constitution, to the responsible ministers of the crown, to be wielded in the king's name and behalf, for the interests of the state; subject always to the royal approval, and to the general sanction and control of Parliament. Parliament itself, we have seen, is one of the councils of the crown, but a council of deliberation and advice, not a council of administration. Into the details of administration a parliamentary assembly is, essentially, unfit to enter; and any attempt to discharge such functions, under the specious pretext of reforming abuses, or of rectifying corrupt influences, would only lead to greater evils, and must inevitably result in the sway of a tyrannical and irresponsible democracy. 'Instead of the function of governing, for which,' says Mill,‡ 'such an assembly is radically unfit, its proper office is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable, to censure them if found to merit condemnation; and if the men who compose the government abuse their trust, or fulfil it in a manner which conflicts with the deliberate sense of the nation, to expel them from office'—or, rather, compel them to retire, by an unmistakable expression of the will of Parliament. Instead of attempting to decide upon matters of administration by its own vote, the proper duty of a representative assembly is 'to take care that the persons who have to decide them are the proper

* *Saturday Review*, Nov. 8, 1862. And see some weighty remarks in the same journal, for June 4, 1864, in an article on "Foreign Influence." See also, on the advantages derivable from the experience of a sagacious king: Bagehot, on the English Constitution, in the Fortnightly Review for October 15, 1865, pp. 605–609.

† See Bagehot's paper, above cited, pp. 610–612.

‡ Mill, Rep. Govt. p. 104.

persons,' 'to see that those persons are honestly and intelligently chosen, and to interfere no further with them; except by unlimited latitude of suggestion and criticism, and by applying or withholding the final seal of national assent.‖"

The second volume will be composed, we are told, of four chapters, as follows:—I. The Cabinet Council; its origin, modern development and present position in the English constitution. II. The several members of the Administration; their relative position and political functions. III. The Administration in Parliament; their conduct in public business, &c. IV. Proceedings in Parliament against Judges for misconduct in office. We can well imagine, judging from the contents of the first volume, how interesting and instructive the second will be, and we look forward to its perusal with pleasure. It will not, however, as we are informed, be published this year, as the announcement at the end of the first volume would seem to indicate.

A glance at the apparently very complete Index, at the end of the first volume, shows a vast store of interesting topics discussed by the learned and pains-taking author. The paper and printing are of the best description, from the celebrated house of Longmans, Green & Co.

We may mention that this work has had a very flattering reception from the press in England. The London *Globe*, the London *Canadian News*, and that most hard-to-please periodical, the *Saturday Review*, all notice the volume most favorably.

To conclude. Coming as it does at this particular juncture, the crisis of Canadian history, when parliamentary government must necessarily become of more importance than it has hitherto been, the information to be derived from this book, and the sober-minded, sound and thoroughly British views held and so well expressed by the author, will be of the greatest service; and we doubt not that it will command a very extensive sale, not only amongst those intimately connected with the machinery of government and legislation, but amongst all who have any desire, as all should have, to understand the theory and practice of that admirable form of government which we have inherited from our forefathers, and which we all hope to perpetuate in this Canada of ours.

How to Arrive at a Verdict.—Colonel Myddelton Biddulph, M.P., and the trustees of the Wem and Bronygarth-road not being able to settle the amount of compensation for land amicably, the matter has been settled by a jury. And it would appear that the 12 gentlemen who composed the conclave were much divided in their notions of the value of the colonel's land, some considering that £75 was sufficient compensation, and others holding the opinion that £450 was not to much. After nearly two hours "deliberation," the knotty point was decided by a stroke of genius on the part of the foreman, who suggested that each should put down on a slip of paper the amount he considered a just satisfaction to the claim, and when they had done so he would add up the twelve sums and the division of the total by twelve should be the amount awarded. This proposal was heralded with delight, every one would be represented in the decision, the idea was carried out, and Colonel Myddelton Biddulph was awarded £165.—From the *Oswestry Advertiser.*

Dean Swift's character is exemplified in his will. Among other things, he bequeathed to Mr. John Grattan, of Clommethan, a silver box, "in which I desire the said John to keep the tobacco he usually cheweth, called pigtail."

Others wrote their wills in verse, and as a specimen, we will give that of William Jacket, of the Parish of Islington, which was proved in 1787, when no witnesses were required to a will of personal estate:—

"I give and bequeath,
When I'm laid underneath,
To my two loving sisters so dear
The whole of store,
Which God's goodness has granted me here.
And that none may prevent,
This my will and intent,
Or occasion the least of law racket,
With a solemn appeal,
I confirm, sign and seal,
This the act and deed of Will Jacket."

Some wills contain a kind of autobiography of the testator, as well as his thoughts and opinions. Such was the will of Napoleon, who gave a handsome legacy to Chautillon, "who had as much right to assassinate that oligarchist, the Duke of Wellington, as the latter had to send me to perish on the rock at St. Helena."

Such, also, was Sir William Petty's, which states, with a certain amount of self-pride, that, "at the full age of fifteen, I had obtained the Latin, French, as well as Greek tongues," and at twenty years of age, "had gotten up three score pounds with as much mathematics as any of my age were know to have."—*Exchange Paper.*

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

CYRUS CARROLL, of the village of Wroxeter, Esq., to be a Notary Public for Upper Canada. (Gazetted May, 11, 1867.)

ROBERT MITCHELL, of Guelph, Esq., Attorney-at-Law, (of the firm of McCarry & Mitchell of that place,) to be a Notary Public for Upper Canada. (Gazetted May 11, 1867.)

DAVID WILSON, of Farmersville, Esq., to be a Notary Public for Upper Canada. (Gazetted May 25, 1867.)

CORONERS.

WILLIAM J. ROE, of Bothwell, Esq., M.D., to be an Associate Coroner for the County of Kent. (Gazetted May 25, 1867.)

TO CORRESPONDENTS.

"A Justice of the Peace," "Scarboro'," "Questioner," —under "General Correspondence."

‖ Mill. Rep. Govt. pp. 91, 106. The whole chapter 'On the Proper Functions of Representative Bodies,' is deserving of a careful study.