THE

Local Courts and Municipal Gazette.

(NEW SERIES.)

VOLUME V.

FROM JANUARY TO DECEMBER, 1869.

EDITED BY

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TORONTO:

PRINTED AND PUBLISHED AT 17 & 19 KING STREET EAST, BY COPP, CLARK & CO.

1869.

PRINTED AT THE STEAM PRESS ESTABLISHMENT OF COPP, CLARK & CO.,
17 & 19 KING STREET EAST, TORONTO.

TABLE

OF THE

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DIARY FOR JANUARY.

1. Frid.. *Circumcision.* Taxes to be comp. from this date.
3. SUN.. *2nd Sunday after Christmas.*
4. Mon.. Co. Ct. and Surr. Ct. Term begins. Municipal Elections. Heir and Devisee Sit. com.
6. Wed.. *Epiphany.* Elec. School Trustees. Christmas Vacation in Chancery ends.
8. Frid.. Last day for Township, Vill. and Town Clerks, to make return to County Clerk.
9. Sat. .. County Court and Surrogate Court Term ends.
10. SUN.. *1st Sunday after Epiphany.*
11. Mon.. Election of Police Trustees in Police Villages.
15. Frid.. Treas. & Chair. of Mun. to make ret. to Bd. of Audit. School Rep. to be made to L. S.
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18. Mon.. Municipalities and Munic. Councils (exc. Co.'s) and Tr. of Police Vil. to hold 1st meeting.
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29. Frid.. Examination of Law Students for Call to Bar.
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The Local Courts' AND MUNICIPAL GAZETTE.

JANUARY, 1869.

SUCCESSIVE SUMMONSES TO BAR STATUTE OF LIMITATIONS.

The case put by a correspondent in a former number raises a question upon which, so far as we are aware, there has been no decision in the Superior Courts. It is one not easy of solution, and County Judges have taken different views of the point.

We rather incline to the opinion that the issue of a *pluries* summons for *every* court would not be necessary, but that is all we can say. The 18th rule of practice for the Division Courts is evidently framed with a view to prevent the operation of the Statute of Limitations. It provides that "the ordinary summons on demand," &c., "shall be issued according to the form to these rules appended," &c., "*and the issuing thereof shall be the commencement of the suit;* and every summons shall be numbered to correspond with the demand or claim on which it issues, and dated as of the day on which the same was entered for suit, except in the case of *alias* or *pluries* summons, which shall be dated on the day on which it actually issues." Thus in an *alias* or *pluries* summons to connect it with the original with a view to prevent the operation of the Statute of Limitations, not only must the demand or claim correspond, but the numbering also must agree with the original summons, though the date of issue will necessarily vary. Although the necessity of suing out a summons *every* court to keep a suit alive may well be questioned, it would seem indispensable that a summons should be sued out in every year, if not every six months, in analogy to the practice in the Superior Courts.

In England, a similar rule for the County Courts permits successive summonses to issue, to prevent the operation of the Statute of Limitations, and provides that "the first and each subsequent summons shall be in force for twelve calendar months from the time of issuing the same," &c., and "that it shall not be necessary that any attempt be made to serve the first or any successive summons, unless the plaintiff require the same."

It is to be regretted that our statute or rules do not contain the full provision that exists in the English County Courts upon this subject; and whenever there is a revision of the Division Court rules, the subject should not be lost sight of.

LAW REFORM ACT OF 1868.

This Act, when in the shape of a Bill, was entitled "An Act to reduce the Sittings of the County Courts and General Sessions of the Peace, to abolish Recorders' Courts, and for other purposes." The sting is in the tail. The "other purposes" seem to be some of the objects of the Act, and the result of these purposes we propose shortly to discuss. The whole thing has been done so suddenly and so little time for discussion has been given to the interested public that it is now too late to reason upon the necessity for or propriety of such a measure or combat the argument of the supporters of the bill which has, with some amendments, now become law.

The principal features of this Act are these: Recorders Courts are abolished; the Equity Jurisdiction of the County Courts is done away with; the Terms and Sittings of the County Courts (except in the County of York) are reduced to two in each year; the Courts of General Quarter Sessions, now to be called the Courts of General Sessions of the Peace, are to be held semi-annually; all issues of fact and assessments of damages in actions brought in County Courts may be tried and assessed, in the election of the plaintiff, at

any sittings of Assize and Nisi Prius for the county in which the venue is laid; all issues of fact and assessments of damages shall in the absence of a notice to the contrary be heard, tried and assessed by the presiding judge without the intervention of a jury; and lastly, the City of Toronto is re-united for judicial purposes to the County of York.

Some of the changes introduced by the Act will meet with approval, and the expenses of criminal justice may be lessened; but, upon the whole, we venture to assert that the opinion of the judges, the bar, and practitioners generally, is largely opposed to the Act.

Upon the County Judges in those Cities where Recorders Courts have hitherto existed will devolve increased work with reference to criminal business in their capacity of chairmen of the General Session in their respective Counties. But the other changes introduced by this Act will, as we shall shew hereafter, much decrease their civil business. On the other hand, the criminal business in the Sessions throughout the country will as a rule be reduced, for much of it must necessarily (as there will be only two Sessions in the year and prisoners cannot be kept lying in jail untried) be sent to the assizes to be disposed of. The effect of this will be of course incidentally to swell the calendars at Assizes.

It has been thought by some, that the provisions of this Act respecting the alterations in the Quarter Sessions are unconstitutional, as beyond the powers of the Local Legislature. But we do not pause to consider this at present; nor need we here discuss a variety of alterations in matters of practice which are only interesting to the legal profession.

It is not, however, because some of the clauses in this Act are, in our opinion, defective in detail and crude in form that we object to it. It is because we think the effect of its principal provisions will work injuriously to the Superior Court judges, to the County Court judges, to practitioners and to the public. This is a sweeping assertion, but we nevertheless think that argument certainly is in our favour, whether experience will prove us to be wrong we know not, but time will tell. If we are wrong we will be the first to note the fact, and be only too glad to do so.

It will scarcely be denied that this Act will largely increase the duties of the Superior Court judges; if they had not enough to do now there would be no harm in this, but such notoriously is not the fact, rather the contrary. Litigation may be less in quantity than formerly, but the special business will increase with the wealth and business of the country, and is increasing. There is, therefore, no reason to suppose that the work of the Judges will decrease. This Act, we contend will both directly and indirectly increase the duties of the Superior Court Judges, and that not in simple cases only, but in special cases. *Directly*, because there will be two courts less for the trial of civil cases than formerly, and so of necessity County Court suits, where speed is of any object and can by that means be obtained, will be brought down to the assizes for trial.

Indirectly, the business of the Queen's Bench and Common Pleas will be increased, because the inclination will in all special cases be to take cases before Superior Court Judges, and for various reasons—

1. The expense is not thereby increased.

2. Parties will be saved the costs of appeals which might be necessary if the cases were tried in County Courts.

3. There is not the same confidence, as a rule, in the County Judges as in the Superior Court Judges, and clients as well as practitioners will doubtless make their selection in favor of the latter. And this will be especially the case in certain Counties that need not now be specified.

If then the duties of these judges are increased, some part of their work must be neglected, or arrears will accumulate. In either case there will be public dissatisfaction which must eventually bring about a cure, either by a return to the system before the "Law Reform Act," at which time the County Judges will necessarily be less competent for the work than now, or by increasing the number of Superior Court Judges, which would be unobjectionable except on the score of expense, or by increasing the jurisdiction of the Division Courts, a measure which would only make bad worse, for it is absurd to imagine that cases would be *more* satisfactorily disposed of in the hurry of a Division Court, than when they have the safeguards of written pleadings, &c., and the presence of counsel to assist the Judge, combined with the more deliberate investigation in a County Court—clearly, vastly *less* so. It would necessitate some mode of appeal and destroy the advantages of the present system without

sufficient to compensate for what would be lost.

So much, then, for the probable effect of this Act as to the Superior Court Judges, and now as to the County Judges.

We do not pretend to say that the County Court Bench is all that could be desired. But we do assert that many of the judges are as efficient, as hardworking, and as learned as any members of the profession who would accept appointments as such. The really first class men at the Bar will not take a County Judgeship; the inducements are not sufficient, except, perhaps, in the County of York. Appointments, also, have been made which did not redound to the credit of the various Governments that made them. But in addition to all this, the very position of a County Judge is a trying one, and it is not every good lawyer that would make a good County Judge. And their tendency is, if anything, to deteriorate rather than to improve, as has been found to be the case even in England.*

If the special business of the Superior Courts is increased by this Act, the special business of the County Courts will be proportionately decreased. Whatever other effect that may have, it will, we fear, tend to the gradual deterioration in the learning of the County Judges, they will in fact get "rusty;" they are likely to, and doubtless many will become more and more careless and pay less regard to legal principles; decisions when any thing special does come before them will be given more and more at haphazard; practitioners will be "at sea;" the laws will be administered without uniformity, and the general legal business of the country will suffer. The growth of the evil may in some counties, owing to the strength of character of the judge, be slow, but we fear the seeds of evil have been sown.

It is proposed we believe to give to the County Judges jurisdiction in those minor criminal cases which magistrates have hitherto disposed of, to be decided by them on their Division Court circuit. Whatever might be the advantages or disadvantages of such a provision it would not compensate for what the judges will lose in the way we have pointed out.

Attrition of one mind with another of equal, or better if of greater calibre is one secret of judicial success. What the county judges have of this advantage will in a measure be taken away by this Act. Better far to try if some scheme could not be devised to group the judges together so as to have an appeal from one judge to several and so increase the attrition.

As far as the profession are concerned, anything that is injurious to the *status* of the Judges by a reflex process operates injuriously on the profession.

The probable effects, as far as the public are concerned, have already incidentally been considered.

We do not propose at present to discuss other Acts of this Session which affect the tenure of office and dismissal of County Judges, they may possibly be disallowed by the Dominion Government as unconstitutional. But we must in conclusion protest against the absurdity of saying "the county judges are a bad lot, but we will remedy that by making them worse, though in the process we may do much harm to the country. The Superior Court judges have plenty to do, but we will remedy that by giving them more, though the effect may be to injure the public, and in the end bring things to a somewhat similar but infinitely worse position than they are at present."

Whilst feeling bound to make these observations on some of the provisions of this Act, we are, on the other hand, glad to think that some of the provisions will be beneficial to the public. The decrease in the number of Criminal Courts (we allude particularly to cities,) will be a great boon to that most long-suffering class of men who have, as jurors, to sacrifice themselves for the supposed good of their neighbours, and the expenses of criminal justice will be largely decreased. By sec. 18 of the Act suitors will have the privilege (whether this is an advantage or not is too long a subject for discussion at present,) of having their cases decided by a Judge who can decide both the law and the facts together, and this without the public being deprived of the safeguard of a trial by jury, when such a safeguard is required.

* See "Fallacy of Local Tribunals," *ante* vol. IV. p. 276.

DEATH OF JUDGE DRAPER, OF KINGSTON.

We regret to announce the death of William George Draper, the eldest son of the Chief Justice of the Court of Appeal, and Judge of the County Court of the County of Frontenac, on Thursday, the 17th December last.

He was a man of very considerable natural ability, and a universal favorite with all who knew him, from his generous and manly disposition. He was favorably known to the profession as the compiler of "Draper's Rules," and a useful handy book on the Law of Dower.

At a meeting of the Bar of Kingston, held on Friday, the 18th ult., Mr. Thomas Kirkpatrick, Q. C., in the chair, the following resolutions were unanimously adopted:—

Moved by Mr. James O'Reilly, Q. C., seconded by Mr. Alex. S. Kirkpatrick,

Resolved,—That it is with feelings of the deepest regret that we have heard of the death of William George Draper, Esq., Judge of the County Court of Frontenac, and for many years a leading member of its Bar.

Mr. Draper, in the discharge of the onerous duties of Judge, won the respect and esteem of the community; and by his ability and courteous demeanour towards the Profession, gained their highest regard and confidence. The Bar of Kingston, therefore, with unfeigned sorrow mourn his loss, and sympathise with his widow in her affliction.

Moved by Mr James Agnew, seconded by Mr. Daniel Macarow,

Resolved,—That the Bar, as a mark of respect, do attend the funeral of the late Judge Draper in costume, and do wear mourning for thirty days.

Moved by Mr. J. A. Henderson, D.C.L., seconded by Mr. Thomas Parke,

Resolved,—That a copy of the foregoing resolutions be sent to Mrs. Draper.

DIVISION COURTS' ACT.

Most of our readers are probably aware that an act was passed last session to give increased powers to Division Courts with reference to the attachment of debts, &c., and making some alterations in the law. Mr. O'Brien is preparing an annotated edition of the late act, which will shortly be published, in form similar to his previous book on Division Courts.

ACTS OF LAST SESSION.

The following are some of the Acts passed last session:—

AN ACT

To amend the Law as to Wills.

[Assented to 19th December, 1868.]

Whereas it is expedient to amend the law as to Wills, Therefore Her Majesty, &c., enacts as follows:—

1. Every Will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the Will.

2. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised (except an act by which the Will is revoked) shall prevent the operation of the Will with respect to such estate or interest in such real or personal estate as the testator shall nave power to dispose of at the time of his death.

3. Every will shall be revoked by the marriage of the testator, except a Will made in exercise of a power of appointment when the real or personal estate thereby appointed would in default of such appointment, pass to the testator's heir, executor or administrator, or the person entitled as the testator's next of kin under the statute of distributions.

4. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

5. No Will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another Will or codicil executed according to law, or by some writing declaring an intention to revoke the same, and executed in the manner in which a Will is by law required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some one in his presence and by his direction, with the intention of revoking the same.

6. This Act shall not apply to the Will of any person who is dead before the first day of January, one thousand eight hundred and sixty-nine.

AN ACT

To amend the Registry Act, and to further provide as to the Certificates of Married Women, touching their consent as to the execution of Deeds of Conveyance.

[Assented to 19th December, 1868.]

Whereas it is desirable to amend the Registry Law of Ontario, so far as to give certainty to the right of married women jointly with their husbands to execute certificates of discharge of mortgage: Therefore, Her Majesty, &c., enacts as follows:—

1. From and after the passing of this Act, when any registered mortgage of lands wherein a married woman may happen to be a mortgagee therein, or whereof the assignee is a married woman, shall have been satisfied, the Registrar, on receiving a certificate, executed jointly by such married woman and her husband, in the form prescribed by the Registry Act of Ontario, shall register such certificate in the same manner provided by said Act for registering certificates of discharge of mortgage, and such certificate shall be deemed a discharge of such mortgage to the same effect as any other certificates registered under the said Act; and it shall not be necessary to produce any certificate of such married woman

having been examined before any Judge or Justice of the Peace touching her consent therein in anywise, nor shall such examination be necessary.

2. In case more than one married woman executes the same deed of conveyance mentioned and referred to in the second section of chapter eighty-five of the Consolidated Statutes of Upper Canada, the Judge or Justices of the Peace therein mentioned, may include the examination and names of all or any number of such married women in one certificate in the form mentioned and set out in said section as far as applicable.

SELECTIONS.

NEED A DISTRESS WARRANT GIVEN BY A CORPORATION AGGREGATE BE UNDER THE CORPORATE SEAL?

In the case of *Strong* v. *Elliot*, which has recently been decided by Mr. Serjeant Petersdorff in the Exeter County Court, and which we report in another column, the question was raised whether a distress warrant given by a corporation aggregate need be under the corporate seal. The decision of the learned serjeant turned upon another point, but he expressed a very decided opinion on the question to which we have alluded. The matter is one of considerable importance to all corporate bodies, and some doubt exists on the subject. It may, therefore, be well briefly to remind our readers of the present state of the law on the point.

As Serjeant Petersdorf remarked it has now become a common practice not to affix the corporation seal to distress-warrants. Nevertheless until the last few years it was generally understood in the profession that the formality could not safely be omitted, and many of the older practitioners still adhere to the practice. Strangely enough the text-books on the law of landlord and tenant give no information on the sbject; even Woodfall preserves a discreet silence. On turning to the authorities we find them somewhat conflicting. Although it was formely held (see the Year-books, 4 Hen. VII. 6; 13 Hen. VII. 17; 13 Hen. VIII. 12) that a corporation could do no act whatever without deed, it was soon afterwards allowed that in all *ordinary* matters—such as *e. g.*, the appointment of a cook or butler—it might act without seal. The earliest case, however, directly bearing on the present point is that of *Horn* v. *Ivie*, 1 Vent. 57, 1 Sid. 441, 1 Mod. 18, decided in Michaelmas Term, 20 Car. 2. This was a very peculiar case. Charles II. had granted a patent to the Canary Company which conferred on it the exclusive right of trading to the Canaries, and provided that all other merchants who should bring goods from there should "forfeit such ships and goods" to the company, The plaintiff was alleged by Company to have traded to the Canaries in violation of the patent, and the defendant Ivie had, as the company's bailiff, seized a certain ship and sails belonging to the plaintiff. The defendant by his plea, justified the seizure under the patent but did not allege any authority under the corporate seal. On demurrer the Court of King's Bench held that the appointment of a bailiff by a corporation must be under the corporate seal, and that the plea was bad. Only a few years after this, however, we find the Court of Common Pleas deciding, in the case of *Mauby* v. *Long*, 3 Lev. 107, that a bailiff who had seized cattle *damage feasant* need not allege, in his plea of justification, that his appointment was under the corporate seal. The cases of *Horn* v. *Ivie* and *Manby* v. *Long*, therefore, established that, as a general rule, the bailiff of a corporation must be appointed by writing under the corporate seal; but that a bailiff to distrain cattle *damage feasant* need not be so appointed. This rule is accordiugly laid down in Viner's Abrig. Tit. *Corporation* (B.) 5; where however, it is added that if the corporation have a head an appointment under seal is not necessary. It should be noticed, however, that *Cary* v. *Mathews*, which we shall presently notice, is the only authority cited in support of the passage. In *The East London Waterworks Company* v. *Bailey*, 4 Bing. 489, the necessity for an appointment under seal is asserted by Best, C. J., in a considered judgment of the Court of Common Pleas. Moreover, in the last edition of Chitty on Contracts, the judgment in *The East London Waterworks Company* v. *Bailey* is cited with approval as showing the existing law. Notwithstanding these authorities, however, we have no doubt that both *Horn* v. *Ivie* and the rule established by it are now overruled. In the first place, as was pointed out in *The Dean and Chapter of Windsor's case*, 2 Wms. Saund. 305 a., and in *R.* v. *Bigg*, 3 P. Wms. 423, the service in *Horn* v. *Ivie* can hardly be said to have been an ordinary service, and indeed was not in truth a distress at all, but a seizure of forfeited goods. Moreover it is laid down in Bro. Abridg. *Traverse per sans ceo*, pl 3; and is still clear law, that a subsequent ratification by a landlord of a bailiff's authority is as effectual as a previous command, and it is hard to see why this rule should not apply in the case of corporations. Independently of this, too, there are several direct authorities on the other side. The first is a note in 1 Salkeld, 191, in the following words: "A corporation aggregate may appoint a bailiff to distrain without deed or warrant, as well as a cook or butler, for it neither vests nor divests any sort of interst in or out of the corporation: so held inter *Cary* v. *Mathews* in Cam. Scacc." This case, however, is also reported in 1 Shower, 61, and 3 Mod. 137, and from these reports it would appear that the real question there, as well as in one or two earlier cases, was whether a bailiff of a corporation, who was duly appointed for general purposes, could distrain without a special authority. Perhaps, therefore, neither *Cary* v. *Mathews*, nor the above cited passage in Viner's

Aridg., which depends upon it, can be considered as of any authority on either side of the question. Far more weight, however, is due to a passage in Viner's Abridg. Tit. *Corporations* (K), 25 and 29, where it is said that "He who distrains as bailiff of a corporation, and is not bailiff, may make conusance, &c., if they agree to it, and good without deed; and the case was that one of the corporation had distrained in right of the corporation, and had not their deed." *Though the law is that a bailiff may justify in trespass*, as bailiff to a corporation without a deed, yet it is not like to a bailiff *in an assize*. *Doe* v. *Peirce*, 2 Camp. 96, though indirectly bearing on the present question, may be considered as shaking the authority of the old decisions, as it was there held that a verbal notice to quit given by a steward of a corporation was good, without showing his authority. The old rule, however, seems to have received its great blow from the Court of Queen's Bench, in *Smith* v. *The Birmingham Gas Company*, 1 A. & E. 526. After considering the authorities the Court there held unanimously that a bailiff need not be appointed by writing under the corporate seal. An attempt may indeed be made at some future day to place this case on the narrow basis of the company's Act, the 9th section of which would have quite supported the decision. It is clear, however, from their judgments, that the learned judges did not decide the case on any such narrow basis, but intended to lay down a broad general rule. Indeed they refused to recognise *Horn* v. *Ivie* as a general authority, and Lord Denman, C. J., said that it proceeded simply on the ground that the service of the bailiff was not an ordinary one.

On the whole the weight of authority seems very strongly in favour of the view that the corporate seal is not necessary; but at the same time, both corporations and bailiffs will do well to have the corporate seal affixed whenever circumstances will allow this to be done.—*Solicitors' Journal.*

THE LAW OF LIBEL.

The law of libel has proverbially proved a stumbling-block of perplexity to public, counsel, judges, and juries. But it has lately received a magisterial interpretation more perplexing than ever, and which, if it be confirmed by judicial *fiat*, may well suggest to many an elector, and many a candidate, in the coming contest, the necessity for a revision as to some of its clauses. The conclusion arrived at in the case alluded to seems so utterly at variance with common sense as to become almost incredible; and yet the legal profession is understood to hold it to be technically sound. But what will common sense say to such circumstances as these? A certain London tradesman provides his son with an education which, as far as can be judged of his means, may be termed a more than liberal one, and on his becoming able to undertake it, procured him a situation in a bank. But by the time this young gentleman had attained the age of twenty-three, he had managed to get dismissed from his appointment, under circumstances very nearly bringing him within the verge of the law, as well as to commit two or three escapades of a similar nature—to become bankrupt, to incur overwhelming debt, and to marry disreputably. The family being aware of all this, cast him off, the father expressly declining all further personal intercourse with him. In answer, however, to an application made to him a few weeks ago by his son, the father dictated a letter, through one of his daughters, renewing the repudiation, and recounting his reasons for his decision For sending this letter the son summoned the father before the Lord Mayor on a charge of "unlawfully writing and publishing, or causing to be written and published, a false and defamatory libel!" Did ever technical terms so utterly pervert the simple truth? The son, in cross-examination, admitted every fact which the father had asserted in justification of his own conduct. It was not denied that in a legal point of view, had the father indited the epistle with his own hand, it would have been a "privileged communication," and so, unimpeachable. But because, declining any primary communication with his worthless offspring, he chose to employ his daughter—the lad's own sister—as his amanuensis—it is ruled that the law may step in and declare him to have written and published" a libel! So little of "publishing" was there in the matter that in this very letter the poor man offers to pay £20 if his son will take another name, so that the family may not be disgraced by the "publicity" of his misdeeds. He was, nevertheless, committed for trial—under bail, of course—and Westminster Hall says that no other conclusion was possible! Now, the trial will most likely come on next week, and as it is quite impossible to suppose that any jury will convict, or, if it did, that any judge would pass other than a nominal sentence under the circumstances, would it not be worth the while of our future legislators just to dock the "law of libel" of a possible intrepretation which is not only a reproach to its common sense, but which must end in being practically nullified on every occasion when it is asserted —*London Cor. of Saunders' News-Letter.*

THE ACTIONS FOR BREACH OF PROMISE OF MARRIAGE.

Baron Bramwell has ventured to talk common sense to a jury on this subject, and we rather hope than expect that other Judges will follow his example. He has told a jury that when a man and a woman have found out that they could not agree, it was better for them to break the engagement than to keep it. This seems sufficiently obvious when put into print; nevertheless, it has rarely found expression in a Nisi Prius Court, Judge and jury and counsel usually, as by one consent, lay-

ing aside their good sense, and talking and acting upon sentimentalities which they would be as unanimously ashamed to acknowledge upon any other occasion. From the opening of the counsel for the plaintiff to the final verdict, it is always assumed that the woman is an injured innocent, the man a sneaking coward, and heavy *damages* are awarded to the plaintiff, for what?—for having escaped from a bad husband and a life of misery.

We were surprised to see our usually sensible and sober-minded cotemporary, the *Daily News*, yielding to the sentimental mood, and commending this action as an alternative for the personal chastisement which irate fathers and brothers would otherwise inflict upon the offender. In putting forward this argument, the *News* falls into the fallacy that lurks at the bottom of all the arguments that are urged by the supporters of this action—that it is a protection to good and honest women. Now that is precisely what it is *not*. The really injured woman never seeks damages for wounded affections. The very fact that a woman will go into a court and permit her heart's secrets to be exposed to public gaze, and her love passages made the jest of counsel and the provocation to "shouts of laughter," is of itself proof that she is not a woman whom any man ought to be compelled to marry. The action, in fact, answers itself. It should be said, "Your presence here is proof positive that you had no true womanly feelings to be outraged, and therefore you have incurred no damage."

There is, of course, one shape which this action may assume that would entitle the plaintiff to compensation: where advantage has been taken of the engagement for the purpose of seduction. But even in such cases the wrong is the seduction, and that is the proper form of the action, the engagement being an aggravation of the damages.

As a matter of fact, nine-tenths of the actions for breach of promise of marriage are purely mercenary. The woman has first deliberately set a trap for the man, and caught him, as designing mothers and clever daughters know so well how; and it is a matter of calculation that the victim must be bled somehow. If he marries, his whole fortune is captured; if he recovers his senses and escapes, then a good slice of it; this latter is the event most desired, and not infrequently the woman would herself have broken it off, if the man had proved more faithful than she had hoped.

How juries having a knowledge of the world can award the outrageous damages they so often give in cases where forty shillings would exceed the plaintiff's deserts, is one of those mysteries of the jury-box which the lawyers, who are excluded from that sage tribunal, are wholly unable to explain. Perhaps if the hint we published recently from one of the briefless, that he and his brethren might do useful duty as special jurymen, should be hereafter adopted, we may hope to learn something of the manner in which jurymen argue and form their judgments and arrive at verdicts. As it is, we can only urge upon the counsel for the defence in these cases, to substitute for feeble jests an earnest appeal to the common sense of the jury, and upon the Judge to give it effect after the manner of Baron Bramwell, and perhaps some of us may yet live to see a rational view of this action accepted and offered.—*English Exchange.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Sunday Public Entertainment.—Action for penalties. Case stated without pleadings for the opinion of the Court whether, under the following circumstances, St. Martin's Hall had been opened or used on Sunday for public entertainment or amusement, or for publicly debating, and was to be deemed a disorderly house, within 21 Geo. III. c. 49. Defendant, as president of an association, duly registered the hall under 18 & 19 Vict. c. 18, as a place of meeting for religious worship by the association, under the title 'Recreative Religionists.' On several Sunday evenings meetings were held, when sacred music was played and sung by singers, some of whom were paid, and addresses delivered, some of a religious tendency, some neutral rather than religious, but never irreligious or profane; no debating or discussion, nothing dramatic or comic, or tending to the corruption of morals, or to the encouragement of irreligion or profanity. Admission was partly free, partly by tickets sold for money. Pecuniary gain was not the object of the promoters, who in fact suffered a pecuniary loss.

The Court held that a place duly and honestly registered as a place of public worship (though that worship be not according to any established or usual form), in which no music but sacred music is performed or sung, where nothing dramatic is introduced, where the discourses are intended to be instructive, and contain nothing hostile to religion, and where the objects of the promoters may be either to advance their own views of religion, or, as they allege, 'to make science the handmaid of religion,' is not 'used for public entertainment or amusement' within the statute; and as to the proviso in section 8, that the promoters were not deprived of the benefit of the Toleration Act, 1 W. & M. c. 18.—*Baxter* v. *Langley*, English Rep., Nov. 19, 1868.

Transfer of Mortgage—No Notice to Mortgagor.—In July 1858 the trustees of a school

and chapel, mortgaged the property for 1,400*l.* to Messrs. Nixon & Few, who in January, 1864, transferred the mortgage to the plaintiff. On the transfer Messrs Stuckley & Wrigle, acted as solicitors of both parties; the plaintiff permitted them to retain the deeds, and gave no notice of the transfer to the mortgagors. In August 1864 the mortgagors, in ignorance of the transfer, paid the whole sum due on the mortgage to Stuckley & Wrigley, agents for Nixon & Few, who acknowledged the payment by a deed the nature of which was falsely represented to them. Meanwhile, Stuckley & Wrigley concealed these transactions from the plaintiff, and continued to pay him interest at the proper intervals, until the end of 1867, when Stuckley disappeared, and the whole fraud was discovered. The plaintiff now filed a bill of foreclosure against the mortgagors.

For the defendants it was argued that the plaintiff, not having given notice, was bound by any transactions between the mortgagors and the original mortgagees, and that payment to Stuckley & Wrigley operated as a payment to them.

The Master of the Rolls held that the payment to Stuckley & Wrigley, and the acknowledgment under seal given by Nixon & Few, could not affect the plaintiff and could only affect Nixon & Few by way of estoppel; and his lordship made the common foreclosure decree.—*Withington* v. *Tate*, English Rep., Nov. 24, 1868.

COVENANT NOT TO BE "CONCERNED OR INTERESTED IN" A TRADE.—This was a motion for an injunction against the defendant, who had sold to the plaintiff the good will and business of a tailor's trade, which he had carried in High Holborn, the defendant covenanting upon settling the purchase not to "carry on or be concerned or interested in the business of a tailor" within a fixed distance from his late place of business. The defendant had recently taken an engagement as foreman (according to the plaintiff) to his nephew, who carried on the same trade under the same name as that of the defendant, within the proscribed limits.

On a motion to restrain the breach of the covenant. it was, on the part of the defendant, denied that he was acting as foreman, and submitted that his hiring himself as a mere journeyman tailor to a relation who happened to bear the same name was no breach of the covenant, which only applied to the interest of a principal or partner in business.

Held, that every workman was "interested" in the trade of his master; the defendant had the opportunity, and probably took advantage of it, of withdrawing the plaintiff's customers, and inducing them to follow him; he had therefore brought himself both within the spirit and the letter of the covenant, and the injunction was granted accordingly.—*Newling* v. *Dobell*, English Rep., Nov. 19, 1868.

CONTEMPT OF COURT — PUBLISHING IN NEWSPAPERS OF MATTERS CONNECTED WITH A PENDING SUIT.—The solicitor for the defendant in this suit had written anonymously in the *Volunteer Gazette*, impeaching the novelty and usefulness of a cartridge, a patent for which the plaintiff has, and the validity of which is in question in the suit. This was a motion to commit the solicitor as having been guilty of contempt of court. There was also a motion against the editor of the newspaper.

The Master of the Rolls made an order to commit the solicitor, but directed that it should not be enforced for a fortnight, to enable him to insert an apology in the *Volunteer Gazette;* and in case he did so, that it should not be enforcod at all, except that he was to pay the costs of the motion. He refused to make an order against the editor, but did not give him costs.—*Daw* v. *Eley*, L. J. Notes, Dec. 18, 1868.

ACTION ON ADMINISTRATION BOND.—On an application to stay proceedings on an administration bond:

Held, 1. That no citation is necessary to compel the delivery of an account by an administrator, or to make it necessary for an administrator to collect and pay debts.

2. The want of a decree of distribution is an answer by way of plea to a breach for not distributing.

3. Full damages may be recovered on breach for not administering. *Quære*, if the breach should show receipt and misappropriation of funds; but if declaration defective in that respect, defendants should demur.

Stay of proceedings refused.—*Neill* v. *McLaughlin et al.*, 5 U. C. L. J., N. S., 18.

DEFAMATION — RUMOUR — JUSTIFICATION.—To an action for slander the defendant pleaded that in speaking the words he meant, and was understood to mean, that there was a rumour current to the effect of the words used, and that such a rumour was actually current

Held, that the existence of the rumour was no justification, and that the plea was bad.—*Watkin* v. *Hall*, 6 W. R., 857.

ONTARIO REPORTS.

QUEEN'S BENCH.

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

GRANT AND THE CORPORATION OF THE TOWNSHIP OF PUSLINCH.

Town Hall—By-law to erect—Provision for payment

A Township corporation passed a by-law on the 15th June, 1867, authorizing the purchase of a site for and the erection of a town hall, but not making provision for meeting the expense, for which it did not appear that there were surplus moneys on hand. On the 31st of August they passed the annual by-law for ordinary expenditure, and, in addition to the sum required therefor, provided by the same by-law for raising the amount required for the site and building. On application to quash these by-laws it appeared, in answer, that the site had been conveyed to the corporation and paid for, and the hall completed, and that there were funds in the treasurer's hands to pay for it.

Held, that although the corporation might not have been strictly regular, the by-laws should not now be quashed, and the rule was discharged, but without costs.

[Q. B., H. T., 31 Vic., 1868.]

In this case *Walsh*, during last term, obtained a rule *nisi* calling upon the Corporation of the Township of Puslinch, to show cause why by-laws Nos. 144, 145, and 146, or some of them, or some parts thereof, should not be set aside, with costs, on various grounds: 1. That it does not appear by said by-laws, or either of them, at what time the debt or obligation thereby created should fall due or be dischargeable. 2. That the debts, as to the purchase of a site of a town hall and the erection thereof, is not an ordinary expense of the Township. 3 That the amount of the ratable property of the Township for the year 1867, according to the last revised assessment roll, is not recited in either of said by-laws. 4. That it is not stated whether the corporation had at the time of passing the by-laws respectively other or any existing debts, whereby it might be known whether the rate for this debt would be beyond the power of the Council to contract. 5. That the corporation had not surplus funds or moneys in their hands at the time of passing any of the by-laws for the purchase of the site of the town hall, or the erection of the building thereon. 6. That the said by-laws, or so much of them as relates to the site and the erection of the hall, is bad and voidable. 7. That the by-laws were not submitted to the ratepayers. according to the Statute. 8. That by-laws Nos. 144 and 145 do not shew on what day or at what time they go into effect.

The application was made on sworn copies of the by-laws and affidavits, shewing that the site for the town hall had been purchased and a contract entered into for the erection of the building, and that the works were in progress.

The facts in the case, from the affidavits filed, appeared to be these:—that the Council of the Township on the 15th June, 1867, passed a by-law, No. 144, authorizing the purchase of a particular piece of land for a site for a town hall, paying therefor $384, which the Treasurer was to pay out of the funds of the corporation: that on the 29th July they passed a by-law, No. 145, to raise by rate moneys for the general purposes of the corporation, and also to provide means to pay for the town hall and site.—(It is unnecessary to notice this by-law at length, as it was never acted upon and was repealed); and that on the 31st August 1867, they passed by-law No. 146. This by-law recited that by-law 145 had not been acted upon, and after reciting that estimates had been made for the lawful purposes of the township for the year 1867, it provided that in addition to the rate for County purposes, &c., there must be levied for a site and the erection of a town hall authorized by by-law 144, $2000. It then enacted that by-law 145 be repealed, and it provided for the raising and collecting upon the ratable property in the Township for the then present year, besides the sum required for the ordinary purposes, $2000 for the site and building, and for that purpose imposed a rate of 2 mills in the $, which would be sufficient to meet that amount

It also appeared that the town hall was much wanted, and that it was the desire of the ratepayers that one should be erected that the township was a wealthy one, and without any debt: that it was not intended to create any debt on account of this site and hall to be erected thereon, but that the whole amount required should be imposed by a rate for that purpose, and collected and paid over during the then current year: that $3029 had been collected of the rate imposed by by-law 146, without any distress being made: that the site was paid for out of these rates: that on the 5th December the town hall was completed and pronounced satisfactory by the Township Inspector: that according to the terms of the contract, a copy of which was attached to the Treasurer's affidavit, the building was only to be paid for when completed and passed by the Inspector; and the Treasurer swore there was more than enough in his hands to pay the ful amount of the contract price.

C. Robinson, Q. C., and *Guthrie* shewed cause during the same term, referring to the Municipal Institutions Act 1866, secs. 191, 234, 235, 225, 226, 227, 246, sub-sec. 1, 269, sub-sec. 3, 279, 282; *Fletcher and the Municipality of Euphrasia*, 13 U. C. R. 129; *Grierson and the Municipality of Ontario*, 9 U. C. R. 629.

Freeman, Q. C., supported the rule, citing *McMaster and the Corporation of Newmarket*, 11 C. P. 398.

MORRISON, J. delivered the judgment of the Court.

A perusal of the affidavits filed shews very clearly that the merits of the case are entirely with the corporation. It is quite evident that the by-law 146 is not a by-law, nor was it intended to be one, within the provisions of sec. 226 of the Municipal Act. It is merely a by-law for the raising funds for the ordinary purposes of the municipality for the current year, containing a provision for raising by special rate during the same year an amount necessary to defray the purchase of the site and the expenses of erecting a town hall. Nothing appears shewing in the slightest degree that the Council were not acting *bonâ fide*, or contrary to the wishes of the ratepayers.

The case is quite distinguishable from *McMaster and The Corporation of Newmarket* (11 C. P. 398), relied on by the applicant's counsel. There no provision was made by rate to raise the necessary amount to pay for the site and the erection of the hall, nor were the funds on hand to meet the demand when due, and a debt was contracted which had to be paid by funds during the ensu-

ing year. In that case also the council were acting in defiance of the ratepayers, and a petition signed by a large majority of the electors. In the case before us none of these objections exist. The only ground taken in the rule that can affect these by-laws is the fifth—that the corporation had not surplus funds or moneys in their hands at the time of passing any of the by-laws for the purchase of the site or the erection of the building. As to the other objections, they are pointed at by-laws within provisions of the 226th section.

But, under all the circumstances, and considering that the site has been conveyed to the municipality and paid for, that the town hall is erected and accepted by the corporation, and that the funds are in the hands of the Treasurer to meet the contract for its erection, we think that in such a case, although the corporation may not have been strictly regular in their proceedings, we ought to abstain from exercising the discretionary authority given to us by the Municipal Act, and decline to interfere. In so deciding we by no means desire to countenance in any degree non-compliance with the salutary provisions enacted by the Legislature to protect ratepayers against the creating of debts, and for the proper raising and application of municipal moneys.

We discharge the rule, but not with costs, as we think the applicant had some grounds for questioning the legality of the proceedings.

Rule discharged.

COMMON LAW CHAMBERS.

(*Reported by* HENRY O'BRIEN, Esq., *Barrister-at-Law, Reporter to the Court.*)

TAYLOR v. GRAND TRUNK RAILWAY COMPANY.

Railway Co.—Service of writ of summons on Station Master.

The station master of a railway company, the head office of which is not within Ontario, is not an agent on whom service of a writ of summons against the company can properly be effected, under C. L. P. Act, sec. 17.

[Chambers, Oct. 13, 1868.]

Lauder obtained a summons calling on the plaintiff to show cause why the service of a writ of summons against the defendants, which had been effected on a station master of the company, should not be set aside as irregular, on the ground that the station master was not an agent of the company within the meaning of section 17 of the Common Law Procedure Act, which enacts that "every person who, within Upper Canada, transacts or carries on any of the business of or any business for any corporation whose chief place of business is without the limits of Upper Canada, shall for the purpose of being served with a writ of summons issued against such corporation, be deemed the agent thereof."

Osler showed cause, and contended that the words were so wide and general as necessarily to embrace the case of a station master or agent.

MORRISON, J., held that the agent contemplated by the act was in his opinion a general agent, or superintendent, or some other officer of that description; and that the service of the writ on the station master was irregular.

Summons absolute, without costs.

THE QUEEN v. MULLADY AND DONOVAN.

Application for bail by prisoners committed for murder—Delay in trial.

On an application by prisoners in custody on a charge of murder, under a coroner's warrant, to be admitted to bail, it is proper to consider the probability of their forfeiting their bail if they know themselves to be guilty.

Where in such case there is such a presumption of the guilt of the prisoners as to warrant a grand jury in finding a true bill, they should not be admitted to bail.

The fact of one assize having passed over since the committal of the prisoners, without their having been brought to trial, is in itself no ground for admitting them to bail.

The application is one to discretion, and not of right, the prisoners not having brought themselves within 31 Car. II. cap. 2, sec. 7.

[Chambers, Nov. 18, 1868.]

This was an application to admit the prisoners to bail. It was grounded upon two principal allegations: 1st, that the prisoners were committed on a charge of murder to the common gaol of the county of Huron, before the last assizes for the county of Huron, at which court no indictment was preferred against them; and, 2nd, that upon the depositions which were taken at the coroner's inquest, the case against the prisoners was one of circumstantial evidence only, and amounted to no more than a case of suspicion, which, however strong, would not justify the detention of the prisoners in gaol.

The prisoners were committed in June last, upon a coroner's warrant, founded on an inquest, by which it was declared that they were guilty of wilful murder.

Gwynne, Q. C., for the Crown, showed cause. The prisoners are not entitled to bail as of right, unless they bring themselves (which they do not) within 31 Car. II. cap. 2, sec. 7: *Anon.* 1 Vent. 346; *Lord Aylesbury's Case*, 1 Salk. 103; *Reg.* v. *Barronet*, 1 E. & B. 1, Dears. C. C. 51; *Barthelemy's Case*, 1 E. & B. 8, Dears., C. C. 62.

Nor are they entitled as a matter of discretion; 1st, because in such case they must bring the deposition before the Court, which they do not do, and must establish by the depositions that there was nothing to justify the verdict of the coroner's jury: *Rex* v. *Mills*, 4 N. & M. 6; 1 Ch. Crim. Law, 98. 2nd, because the Crown now brings those depositions, which establish sufficient to justify the conclusion arrived at by that jury. 3rd, because a sufficient explanation is given on affidavit, on the part of the Crown, that a due regard to the ends of justice demanded that the case should be postponed to the next court, for the purpose of obtaining evidence to supply certain missing links in the chain of circumstantial evidence, and to show why the case was not proceeded with at the late court.

The judge cannot try the case. If there be sufficient to justify the charge being made, so as to put the prisoners on their trial, that is a sufficient reason why bail should be refused. The lapse of an assize can make no difference, except in so far as it may enable the prisoners to take such steps as, under 31 Car. II., would entitle them of *right* to bail.

McMichael contra. 1st. We do not ask bail as a matter of right, but appeal to the discretion of the court: *Reg.* v. *McCormack*, 17 Ir. C. L. Rep. 411. 2nd. The Crown have allowed an assize to pass since the prosecution, and this entitles us to ask for bail: *Fitzpatrick's Case*, 1 Salk. 103; *Lord Aylesbury*, Ib.; *Lord Maughan's Case*, Ib.; *Reg.* v. *Wyndham*, 3 Vin. Ab. 515. 3. It does

not appear from the depositions that it was a clear case of murder, and therefore a judge has discretion to bail: O'Brien, J., in *Reg.* v. *McCarthy*, 11 Ir. C. L. Rep. 210 & 226.

DRAPER, C. J —The prisoners did not pray, on the first day of the assizes, under the Habeas Corpus Act, to be brought to trial, and the Crown was not therefore bound to indict them at that court, and therefore they cannot claim to be discharged as of right. The present application is therefore one to discretion; and the fact that one assize has passed over without their being proceeded against, can have no other influence than to induce a somewhat closer examination of the evidence on which the prisoners were committed.

The offence charged involves the lives of the prisoners; and it is not too much to say, that if they are self-convicted of guilt, and have no hope but that the prosecutor may not be able to produce sufficient evidence to satisfy a jury, or that some fortuitous circumstance may save them, they will rather forfeit their bail than their lives. There is a peculiar atrocity attaching to one of the prisoners if he be guilty, which must extinguish any hope that capital punishment will not follow conviction. This consideration must have its proper weight in disposing of the present application.

The inquiry that is of principal importance, then, is, as to the sufficiency of the evidence to establish a case to go to the jury. I certainly am not called upon to express any opinion as to whether the evidence is such that, if believed, it ought to induce the jury to convict. It is going quite far enough to inquire if there be evidence which would sustain a conviction; and I am compelled to say that after going through the depositions, I think they contain a strong *primâ facie* case, though one which, if there be additional evidence, I think ought not to have been tried without it, or until proper efforts to procure it have been made and have failed.

I abstain advisedly from going into a particular consideration of the facts which I think bear against the prisoners. I will go no farther than to say that, as they stand, they afford a presumption of guilt, at least so strong that a grand jury would, in my opinion, find a true bill against the accused. Of the fact of murder having been committed, there can, I apprehend, be no doubt; and I go no farther than to say that there is in my judgment sufficient evidence to put them on their trial.

So far as regards the charge, and the evidence supporting it, I think the application should be refused. I have already observed on the probable result, if the prisoners, knowing themselves to be guilty, should be admitted to bail.

ENGLISH REPORTS.

CROWN CASES RESERVED.

REG. v. CRAB.

False pretences—Inducing persons applying for situations to deposit money as a guarantee for honesty—Pretence of carrying on business as a house agent.

The prisoner was convicted for obtaining money by falsely pretending that he carried on an extensive business as a surveyor and house agent, &c.; and the jury found that he carried on no buiness whatever. *Held*, that the conviction was right.

[C. C. R. 16 W. R., 732, May 16, 1868.]

Case reserved by the Assistant-Judge of the Middlesex Sessions:—

John Augustus Crab was tried before me on the 27th March, 1868, for having obtained various sums of money from several persons by false pretences, with intent to defraud.

The pretences relied upon were, that he was at the time he obtained the moneys, carrying on an extensive business as a surveyor and house agent, and that he had employment for several clerks to collect rents and assist in the conduct of the said business. By these pretences he induced individuals to deposit sums of money with him as a guarantee of their honesty, and it was proved that he was not carrying on an extensive, or *any* business as a surveyor or house agent, and that he had not any employment for several or any clerks to collect rents, or to assist in the conduct of any business whatever.

The prisoner's counsel declined to address the jury on the facts, and relied on the objection that the above pretences were not in point of law sufficient to sustain a criminal charge. The prisoner was found guilty, and sentence was deferred. He is now in the House of Correction in and for the county of Middlesex, awaiting the decision of this honourable Court upon the above objection.

The question I have to submit to this honourable Court is whether the pretences above set forth are or are not sufficient in point of law to sustain the charge upon which the prisoner was convicted.

[The case as above stated having been called on for argument upon the 25th April, was sent back to the learned judges for amendment, and was now returned by him amended as follows:—]

James Hawkins was induced by an advertisement in the *Times* to see the prisoner, who was found in the occupation of a room in Margaret-street, Cavendish-square, having the appearance of an agency office.

The prisoner said that he was the advertiser, and wanted several clerks to assist in carrying on his business as a surveyor and house agent, that his business was of great extent, and that as the clerks he wished to engage would be entrusted to collect rents to a large amount, he should require the sum of £25 to be deposited with him by each as a security for his honesty.

In consequence of these pretences James Hawkins was induced to hand £25 to the prisoner.

James Cirmichael was induced by the same pretences to give the prisoner £10, and several other witnesses proved that they were about to deposit money with the prisoner under similar circumstances, but that they were prevented doing so by the interference of the police.

It was proved to the satisfaction of the jury that the prisoner was not carrying on the business of a surveyor or house agent; that he had not employment in such trades for any clerks, and that the prisoner's office was open for the sole purpose of defrauding persons invited to it by the advertisement published by the prisoner.

The prisoner's counsel contended that the pretences used were only exaggerated representations of the extent of his business, but as the jury found that he was not carrying on any business whatever I thought the pretences were such as would support the charge against him.

M. Williams, for the prisoner, said that in a

case similar to the present, tried before Byles J., at the last Kingston Assizes, his Lordship had said that a false representation by a man of his doing a good business was ground for a civil action, but not for indictment, as it was a question merely of degree. [SMITH J.—But here the learned judge reports that the prisoner was carrying on no business whatever, and, therefore, no such question arises.]

Besley, for the prosecution, was not called on; but stated that in the case referred to, before Byles, J., there was evidence that business to some extent was in fact carried on.

KELLY, C. B.—I do not think the objection can be maintained. In order to support this indictment there must be a pretence of an existing fact. It must appear that the party defrauded has been induced to part with his money by the pretence, and the pretence must be untrue. There is all that here. The jury find that he was not carrying on any business whatever.

Conviction affirmed.

BIBLE v. HUSSEY.

Sheriff—Execution—Landlord and tenant—Rent.

A sheriff is liable under statute 9 Anne, c. 8 (Ir.), for removing goods which he has seized under a fi. fa., after notice from the landlord of the execution debtor that the latter owes a year's rent in arrear, *although* the notice be not given until after the sheriff had sold (on the land) a sufficient part of the goods to satisfy the debt and costs, and has withdrawn from possession of the unsold goods, and although the amount of goods first seized would have been sufficient to satisfy the year's rent as well as the debt and costs if the notice had been given in time.

[16 W. R., 710, January, 1868.]

The plaintiff stated that one Curry Rea was tenant to the plaintiff of certain lands at the yearly rent of £100, and that one year's rent was in arrear, and that thereupon defendant, as and being sheriff of county, acting under a *fi. fa.* against the goods of Curry Rea, took the goods of Rea being upon the premises, and afterwards, and before the removal of the goods, the plaintiff gave notice to the defendant of the rent being in arrear, and requested him not to remove the said goods from the premises unless the arrears of rent should be first paid; yet the defendant afterwards, under cover of the said writ, wrongfully removed the goods without the arrears being first paid contrary to the statute.

Defence, that the defendant seized under the *fi. fa.* goods of Curry Rea sufficient to have satisfied the alleged claim for rent together with the amount liable for debt, costs, and expenses, under the execution, but that he had no notice that any rent was due by Curry Rea to the plaintiff, as alleged, until after he had by seizure and sale of a sufficient portion of the goods realised the full amount (and no more) of the debt, costs, and expenses, and until after he had withdrawn, as he lawfully might, from the possession of the unsold goods of Curry Rea.

Demurrer to the defence on the ground that it showed no justification for removing the goods; that it did not aver that the defendant had paid the proceeds of the sale to the execution creditor before notice of the rent.

Woodroofe, in support of the demurrer.—At common law the landlord had a right to distrain goods while on his land, but this was subject to the exception of goods which had been seized by the sheriff and were therefore *in custodia legis*. The object of statute 9 Anne, c. 8 (Ir.), was to take away this exception. The sheriff had no right to permit the removal of goods after notice before the rent was paid. He might and should have removed them before sale, and no difficulty could then have arisen. He cited *Wharton* v. *Naylor*, 12 Q. B. 673; *Risely* v. *Ryle*, 11 M. & W. 16; *Allen* v. *Lloyd* (*dictum*), 2 Ir. C. L. 53; *Dixon* v. *Wilks*, 9 Ir. Cl. 467; *Gill* v. *Wilson*, 3 Ir. C. L. 544.

Keogh (*Dowse*, *Q. C.*, with him) *contra*.—If when the notice was given the rent had then been paid, there would not have been sufficient left to pay the execution creditor, and yet the sheriff could make no further seizure, for he had then withdrawn and was *functus officio*. Nor could he return *nulla bona*, because there were other goods which he might have seized under the execution if he had received notice in time. [FITZGERALD, B.—Might he not have made a return specially stating the facts?] Probably not; the statute contemplated the case where the sheriff still had the goods in his possession. *West* v. *Hedges*, Barnes, 211; *Arnitt* v. *Garnett*, 2 B. & A. 440; Bacon's Ab. "Execution (D)," 2 Wms. Saund. 47a, note 1; 2 Furlong L. & T. 772, were cited.

Armstrong, *Serjt.*, replied.

FITZGERALD, B.—The demurrer must be allowed. The removal off the premises before the rent is paid was the very thing forbidden by the statute. The act complained of was the sheriff's removal of the goods, and it has not been justified in law.

DEASY, B., concurred.—The law is stated very clearly by Mr. Justice Patteson, in *Wharton* v. *Naylor* (*ubi sup.*) that the sheriff shall not remove the goods unless the rent is first paid. The seizure is lawful *primâ facie* but, in case the goods be removed without payment of the rent after notice that it is due, such removal renders the whole proceeding unlawful as regards the landlord. He says a bill of sale is not a removal, and, even though the sheriff gets payment under the bill of sale, that is, he says not a sufficient removal.

HEWITT v. KAYE.

Donatio mortis causa—Banker's cheque—Death before payment—Delivery.

The delivery of a cheque by a person about to die is not sufficient of itself to make a valid *donatio mortis causa*. There must be something in addition to complete the gift—*e.g.*, payment before the death of the donor.

[M. R. June 3, 1868.]

This was a special case.

Elizabeth Harrison, by indenture of the 30th of April, 1830, duly enrolled, conveyed certain land to trustees for the purpose of founding an institution, to be called "St. Scolastica's Retreat," for the benefit of poor Roman Catholics. She also executed a deed-poll, dated the 3rd of September, 1866, ad duly enrolled, giving directions as to the nature of the institution, and the application of such funds as she might bequeath to it.

By an indenture of the 10th of October, 1861, and duly enrolled, she conveyed a piece of land to other trustees to found another institution, to be called "St. John's Hospice," and gave directions as to the application of funds she might bequeath to it.

E. Harrison, by her will, dated the 25th of September, 1866, gave to the trustees of "St.

Scolastica's Retreat," all her residuary personal estate applicable to charitable purposes, to be applied for the benefit of the institution subject to a provision for accumulation till the income amounted to £2,000 a year.

The plaintiffs and the defendant John Peter Kaye are the trustees of "St. John's Hospice," and the remaining defendants are the trustees of "St. Scolastica's Retreat."

On the 15th of October, 1867, the testatrix, being on her death-bed expressed a desire and intention to vest a sum of £600 in the trustees of "St. John's Hospice," for the benefit of that institution, and directions were given to her solicitor to prepare a codicil to that effect. Late the same night, believing, as she stated, that she would not live to execute the codicil, and desiring to carry her intention into effect, she verbally desired the defendant John P. Kaye to fill up for her signature a cheque for £600. He filled it up, and she immediately signed it, and handed back the cheque-book with the cheque in it to the defendant Kaye as one of the trustees of "St. John's Hospice" Before one o'clock on the morning of the 16th she died, without having executed the codicil, and consequently the cheque was not presented.

Speed appeared for the trustees of "St. Scolastica's Retreat," and contended that a cheque could not be a *donatio mortis causa*, and that it amounted only to an authority to pay which was revoked by the death of the party giving it before presentation for payment. He referred to *Tate* v. *Hilbert*, 2 Ves. Jun. 111, and *Lawson* v. *Lawson*, 1 P. W. 441.

Bagshawe, for the trusteees of "St. John's Hospice," contended that a cheque did not differ materially from other instruments which had been held to be the subjects of *donationes mortis causa*. He referred to *Bouts* v. *Ellis*, 1 W. R. 297, 4 0, 4 D. M. G. 249, 17 Beav 121; *Witt* v. *Amis*, 8 W. R. 691, 1 B & S. 108; *Amiss* v. *Witt*, 33 Beav. 619.

Lord ROMILY, R.M., without calling for a reply said:—I think it is perfectly clear, both on principle and authority, that this is not a valid gift. Whenever a *chose in action* is given to a person on a death-bed, all the interest in it passes with the possession to the donee. This is the case with bonds or I O.U.'s The principle upon wnich the case of *Amis* v. *Witt*, was decided, as regards the deposit-note, was, that the bankers held certain money at the disposal of the donor, and she, by delivery of the note, gave the right to receive that money to the donee. But when a person gives a cheque he gives nothing but an order to deliver a sum of money, and the delivery must take place in the lifetime of the donor, or, no matter in whose hands the cheque comes, there is no gift at all.

This lady, on her death-bed, gives a cheque late at night, and dies before the bank opens in the morning, so that there is no chance of it being paid in her lifetime. Now, suppose she had said I have £600 bank-notes upstairs, bring them down and give them to A., and that is not done; by itself that amounts to nothing, and that is in principle exactly what she has done. In the cases which have come before me there was always a delivery. An I. O. U., instance, is an instrument which entitled the donee on delivery to sne upon it. When the cheque is paid before the death the case is different, as in *Bouts* v. *Ellis*, but it is quite certain that a mere delivery of a cheque not acted upon does not operate as a *donatio mortis causa*.

HASTINGS COUNTY COURT.

(*Before* W. FURNER, Esq., *Judge*.)

THE SOUTH-EASTERN RAILWAY COMPANY v. AINSLIE HARWOOD.

Important Railway case.

Quære, Has the holder of a third-class ticket a right to travel by any train to which a third-class carriage is attached?

Held, that were a particular train was marked in the time bills first and second only, a holder of a third-class ticket had no right to travel by it, although a third.class carriage was attached to the train for passengers between certain other distant stations..

[45 L. T. 406, Sept. 21, 1868.]

This was action for excess railway fare, 1*s*. 10*d*.

F. A. Langham for plaintiffs; and *Philbrick* for defendant.

Langham, in opening the case, said it was an important one, although the amount sought to be recovered was small. He stated that on the 16th May Mr Harwood took a third-class return ticket from Hastings to Tunbridge Wells, which was endorsed with the usual notice that it was issued subject to the by-laws, rules, and regulations of the railway company. Defendant went to Tunbridge Wells in the morning, and in the afternoon of the same day he presented himself at the railway station, and got into a carriage of the train which left London at 2. 15. That was an excursion train, running only on Saturday, commonly called the husbands' train, because gentlemen whose families were staying at Hastings made use of it. There were first, second, and third class carriages in the train, but immediately over the time at which it was stated to arrive at Tunbridge Wells first and second class was put. When Mr Harwood got into a third-class carriage he was detected, and was asked either to pay the excess fare, which was the difference between second and third class, or leave the carriage before the train started. He declined to do either. He (*Langham*) apprehended that the company's servants might have ejected him from the carriage; but they prferred to take a milder course, and allow him to ride. He submitted that defendant was bound by the statement made in the time table, and therefore had no right in the train. It might probably be said in defence that because it was a third-class carriage Mr. Harwood had a right to travel in it; but he apprehended that it was not so, because the company might for purposes of their own put a third-class carriage on any train they run, upon special or express trains, and it could not be pretended that an ordinary third-class passenger would have a right to travel simply because there was a third-class carriage in the train. He submitted that the contract must be determined by the ticket and by the time-table which they had published, and to which his notice was drawn at the time he took his ticket. Mr. Harwood had travelled by that train in the previous month, and was then cautioned that it was not a third-class train from Tunbridge Wells to Hastings, and that he had no right to do that which he did.

James Barnes Cordle, ticket collector at Tunbyidge Wells station, deposed that on the 16th he was on duty on the arrival of the train from London, and saw defendant in a third-class carriage. He asked him to pay the difference from third to second class, 1*s.* 10*d.*, and told him it was only a third class train from London. Defendant refused, and was allowed to go on because the train should not be detained. He saw defendant in a similar train on the 4th April, and gave him notice that it was not a third class train from Tunbridge Wells.

Cross-examined.—I cautioned him on the 4th April, as well as Mr. Hughes, the station master. He then refused to pay, and referred to a case which he said had been previously decided. I did not show him the time-table.

Re-examined.—The time-tables were publicly posted on the platform.

Alfred Penfold, assistant ticket collector at the Tunbridge Wells station, was about to be called, when.

Philbrick said he would save the time of the Court by admitting that he travelled by the train and had a third class ticket.

Mr. Hughes, station-master at Tunbridge Wells, produced a time-table, and stated that the train in question was only a first and second class train from Tunbridge Wells.

Philbrick, for the defence, submitted that his client was perfectly justified in travelling by the train in question, notwithstanding the caution which he received. He apprehended that by the contract, Mr. Harwood was entitled to return by the class for which his ticket was issued at any time he thought proper. If his Honour decided against him the public would never be safe in travelling unless they made themselves acquainted with all the time-tables that were issued, and that if they did that they would not want anything else to do.

His Honour ruled that the time-tables were part of the contract, and that defendant was bound by them.

Philbrick said his contract was to take a third class ticket and ride by a third class carriage, and he submitted that defendant had a right to ride by the train in question.

His Honour said certainly not, if the time-table stated that it was not third class from that particular station. A complaint was made to him and excess fare was demanded, and he had previously travelled in the same way and been forewarned that he was wrong.

Verdict for the plaintiffs

When the judge was about to retire, at the close of the business,

Defendant came forward, and addressing His Honour, said he should be much obliged if he would grant him a case for a Superior Court.

His Honour said he could not do it when the claim was only 1*s.* 10*d.*

Defendant then went on to say His Honour had previously decided contrary to his decision that day, and that it was the previous decisions which induced him to defend the case. The decision was given in this locality, and was dead against the one given that day.

His Honour.—No such thing, sir; and you are an impertinent fellow to stand up there and say so.

Defendant.—I have a letter from a party at Rye where you tried the case before. If you will not eat your own words you must abide by it. [Defendant here produced a letter, which he said was from Mr. Vidler, of Rye.]

His Honour.—Do you suppose that I am to be bound by that?

Defendant.—Excuse me for being plain, I consider I have a right to be so. You said, "If you have a third-class ticket and see a third-class carriage, get into it." Those are your own words.

His Honour.—Who says that I said that? It is not true.

Defendant.—I can prove it is true.

His Honour.—It is very impertinent of you to stand there and say so. If you do not sit down I will commit you for insult, and send you to Lewes; that is the way I shall treat you. I say it is not true. Every case must stand upon its own merits. I do not know what Mr. Vidler's case was, but in your case I am perfectly satisfied.—*Law Times.*

UNITED STATES REPORT.

SUPERIOR COURT OF PENNSYLVANIA.

JOHN CAMPBELL ET AL. v. THE COMMONWEALTH.

A disturbance or interruption of a meeting of school directors assembled in discharge of their public duties is indictable at common law, although not punished by any act of Assembly.

Certiorari to Court of Quarter Sessions of Westmoreland County.

Laird & Hunter for complainants.

A. A Stewart contra

The opinion of the Court was delivered at Pittsburgh, Nov. 16, 1868, by

READ, J.—The second count of the indictment charges that the defendant did wilfully and maliciously disturb and interrupt a certain meeting of the School Directors of St. Clair township, in said county—they, the said school directors—being then and there lawfully assembled for the purpose of discharging their duty as school directors for the said township of St. Clair, and the question is whether the offence so charged is a misdemeanor at common law.

"The only remaining breach of public order and tranquility," says Mr. Bishop in his Commentaries on the Criminal Law, Vol. 1, p. 982, "to be here pointed out, is the disturbance of public meetings. When people rightfully assemble for worship, or assemble in their town meetings and the like, and probably in all cases, where they came together in an orderly way for a lawful object; those who unlawfully interrupt them are indictable at the common law. It has been said that in England the statutes which were there passed were necessary to protect dissenters, on account of an assembly by them not being lawful, while it is equally admitted that in this country, where all forms of worship are favored, they are not required"

In *Respublica* v. *Teischer*, 1 Dall. 338, Chief Justice McKeen says: "But it seems to be agreed that whatever amounts to a public wrong may e made the subject of an indictment."

Here these school directors were lawfully assembled and in discharge of duties of great importance to the public, and to disturb and interrupt them is an act injurious to the public and a public wrong, and of course indictable at common law, although not punished by any Act of Assembly.

The objections to the form of the indictment, if there was anything in them, came too late.

The court were therefore right in sentencing the defendants.

Judgment affirmed.

CORRESPONDENCE.

Quashing conviction—Chairman and Justices at Quarter Sessions—Respective positions.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN, — At a late Court of Quarter Sessions, an application was made to quash a conviction made by two Justices of the Peace against A, for obstructing B when performing labour on the highway. A made an affidavit of the fact of his being convicted, and also swore that the Justices had no jurisdiction. The notice of appeal appeared to have been regularly served. No record of the conviction was returned by the convicting Justices, neither did they or the complainant appear.

On this affidavit of the appellant, the court, against the opinion of the chairman, quashed the conviction and ordered the complainant to pay costs.

It is the first instance that I am aware of in which a court has, on affidavit, quashed a conviction, when neither the record or a copy of it was before the Justices.

The complainant had no power to compel the Justices to return the record of conviction, neither had the Court of Quarter Sessions; yet the Justices assumed the power to compel the complainant to pay the costs of the appeal.

The best of the joke is that when the notice of appeal was served, the convicting Justices became alarmed and gave a written notice to A that the conviction had been abandoned and would not be acted upon, and this previous to his attending the court.

Since the sitting of the court, the convicting Justices have been into town to the County Attorney, to see if the order for the payment of the costs could not be set aside, and they were told that they must apply to the Court of Queen's Bench in Term. Please insert this with your comments thereon.

Yours, J. P.

January 1, 1869.

[We think the Justices acted without authority in quashing this conviction. There was nothing before them to quash, the conviction, not having been returned to the Sessions. There is another view of the case, which it is important to notice, assuming that the County Judge was the acting chairman, and it is this: if the Justices set at naught the opinion of the chairman upon a point of law, their conduct was most presumptuous. It is simply absurd for magistrates to set up their opinion in matters of law against that of the County Judge; and if the law gives them power to pronounce on questions with which, such as this, they are in all probability profoundly ignorant, it is time some changes were made to prevent the recurrence of such acts.]—EDS. L. J.

Attorneys' Fees in Division Courts.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I see in the last *Law Journal*, under the head of "General Correspondence," and over the signature of "An Attorney," a letter tending to bring into disrepute one of the most popular, and deservedly so, young Judges in Ontario, considering his age and experience. Since he has been appointed to the Bench he has become beloved and esteemed by the people of his County generally. No person can be more conversant with the case referred to than your subscriber. One of the complaints mentioned in "Attorney's" letter was an action brought by the bailiff of the Second Division Court of a County near Toronto, on the grounds of a breach of covenant on a bond. A jury was called by the plaintiff. It appears that an agreement was made with "Attorney" by defendant's brother to defend the suit. The brother swore at the trial that he agreed with "Attorney" for six dollars to carry the case through and win it; that "Attorney" got a note for the six dollars, and that the note was paid. The case referred to was left to arbitration at the request of defendant's attorney, and the award was given in favour of the plaintiff. The attorney at once applied for a new trial, and supported the application for a new trial by his own affidavit, and before the day of hearing it appears he saw the defendant, and got something like a written retainer to attend the hearing, although by the evidence of the defendant's brother it was originally agreed that "Attorney" was to carry the suit through and win it for the six dollars. The Judge

gave the defendant a new trial on paying the costs of the day into Court. The defendants were present at the hearing, and afterwards settled the award with the plaintiff, together with all costs. Hence the trial for costs referred to. The Judge, after patiently hearing the case through, and, contrary to the defence set up, that the attorney had agreed to carry the case through for six dollars, and that he was entitled to no more, came to the conclusion that the retainer was a new contract, and gave his judgment, as "Attorney" says, for six dollars. By giving the above an insertion in the next *Law Journal* you will oblige,

Yours, &c., J. T.

January 1st, 1869.

REVIEWS.

THE LONDON QUARTERLY—THE EDINBURGH REVIEW—THE WESTMINSTER REVIEW—THE NORTH BRITISH REVIEW AND BLACKWOODS MAGAZINE. The Leonard Scott Publishing Company, 140 Fulton Street, New York.

In other columns we publish an advertisement showing the terms on which these Reviews or any of them can be had from the New York Publishers. No educated man, and no man who takes any interest in the world of thought should be without these Reviews. The price at which they are offered by the Leonard Scott Publishing Company, places them within the reach of all. In Politics the Whigs lean on the *Edinburgh Review*. The *London Quarterly* is the organ of moderate Conservatives. The *Westminster* is the organ of Liberalism both in Church and State. The *North British* which is Whig in Politics, was for many years the organ of the Scottish Free Church. *Blackwoods Magazine* equals the more sedate quarterlies in its Literary and Scientific Departments. But the chief attractions of *Blackwood* are the clever papers that from time to time appear on its pages, from the pens of well known authors whose productions afterwards appear in book form. Bulwer and Mrs. Oliphant have written much of late in its pages. Lever, up to the time of his death was also a frequent contributor. The influence of the Reviews is world wide. Thought is not the product of any one nation, and mind speaks to mind in all parts of the world through the pages of these Reviews.

APPOINTMENTS TO OFFICE.

LIEUTENANT GOVERNORS.

THE HON. WILLIAM PEARCE HOWLAND, C. B., to be Lieutenant Governor of the Province of Ontario. (Gazetted July 18, 1868.)

THE HON. LEMUEL ALLEN WILMOT, to be Lieutenant Governor of the Province of New Brunswick. (Gazetted July 18, 1868.)

JUDGES.

THE HON. WILLIAM HENRY DRAPER, C. B., late Chief Justice of Upper Canada, to be the Presiding Judge of the Court of Error and Appeal for Upper Canada, now the Province of Ontario. (Gazetted October 31, 1868.)

THE HON. WILLIAM BUELL RICHARDS, late Chief Justice of the Court of Common Pleas for Upper Canada, to be Chief Justice of Upper Canada in the room of the Hon. William Henry Draper, C.B. (Gazetted Nov. 21, 1868.)

THE HON. JOHN HAWKINS HAGARTY, late a Puisne Judge of Her Majesty's Court of Queen's Bench for Upper Canada, to be Justice of the Court of Common Pleas for Upper Canada, in the room of the Hon. William Buell Richards (Gazetted November 21, 1868.)

THE HON. ADAM WILSON, late a Puisne Judge of the Court of Common Pleas for Upper Canada, to be a Puisne Judge of Her Majesty's Court of Queen's Bench for Upper Canada, in the room of the Hon. John Hawkins Hagarty. (Gazetted November 21, 1868.)

JOHN WELLINGTON GWYNNE, of Osgoode Hall and of the City of Toronto, in the Province of Ontario, one of Her Majesty's Counsel learned in the Law, to be a Puisne Judge of the Court of Common Pleas for Upper Canada, in the room of the Hon. Adam Wilson. (Gazetted Nov. 21, 1868.)

COUNTY JUDGES.

ROBERT DENNISTOUN, of Osgoode Hall and of the Town of Peterborough, in the Province of Ontario, Esq., Barrister-at-Law, to be Judge of the County Court of the County of Peterborough, in the said Province, in the place and stead of Robert M. Boucher, Esq., deceased. (Gazetted July 18, 1868.)

POLICE MAGISTRATES.

ABRAHAM DIAMOND, Esquire, of Osgoode Hall, Barrister-at-Law, to be Police Magistrate of the Town of Belleville, in the room and stead of Smith Bartlett, deceased. (Gazetted September 19, 1868.)

ALEXANDER SUTTON KIRKPATRICK of Osgoode Hall, Esquire; Barrister-at-Law, to be County Attorney and Clerk of the Peace in and for the County of Frontenac, in the room and stead of R. M. Wilkison, Esquire, deceased. (Gazetted August 22, 1868.)

COUNTY CROWN ATTORNEYS AND CLERKS OF THE PEACE.

JOHN DEWAR, jun., of Osgoode Hall, Esquire, Barrister-at-Law, to be County Attorney and Clerk of the Peace for the County of Halton, in the room and stead of G. T. Bastedo, Esquire, deceased. (Gazetted August 22, 1868.)

REGISTRARS.

THOMAS HALL JOHNSON, of Pembroke, in the County of Renfrew, Esquire, to be Registrar for the unorganized District of Nipissing, in the room and stead of Richard O'Reilly, deceased. (Gazetted Sept. 12, 1868.)

Lord Campbell tells how, at the opening period of his professional career, soon after the publication of his "Nisi Prius Reports," he on circuit successfully defended a prisoner charged with a criminal offence; and how, whilst the success of his advocacy was still quickening his pulses, he discovered that his late client, with whom he held a confidental conversation, had contrived to relieve him of his pocket-book, full of bank-notes. As soon as the presiding judge, Lord Chief Baron Macdonald, heard of the mishap of the reporting barrister, he exclaimed, "What! does Mr. Campbell think that no one is entitled to *take notes* in court except himself?"—*Jeaffreson.*