DIARY FOR APRIL.

1. Sat. Last day for Collector to return roll to Treasurer. Clerks and Deputy Clerks of Crown and Master and Registrer in Chancery to make quarterly return of fees.
2. SUN. *Palm Sunday.*
3. Mon. County Court (York) Term begins.
7. Frid. *Good Friday.*
8. Sat. County Court Term ends.
9. SUN. *Easter Sunday.*
11. Tues. Last day for Master and Registrar in Chancery to remit fees to Provincial Treasurer.
16. SUN. *1st Sunday after Easter.*
23. SUN. *2nd Sunday after Easter. St. George.*
25. Tues. *St. Mark.*
29. Sat. Last day for Articles, &c., to be left with Secretary Law Society. Last day for Clerk to return occupied lands to County Treasurer.
30. SUN. *3rd Sunday after Trinity.*

The Local Courts'

AND

MUNICIPAL GAZETTE.

APRIL, 1871.

PAYMENT OF EXECUTORS.

SECOND PAPER.

It remains now to consider the scope and application of the enactment in the Consolidated Statutes of Upper Canada, and the rates of compensation which have been sanctioned thereunder by the Court of Chancery in the administration of estates. There are no reported decisions of the practice pursued in the Surrogate Courts; but there is little doubt that those tribunals follow the rules laid down by the Superior Court, in passing executors' accounts.

I. *Jurisdiction of Chancery as to compensation.*—In one of the first cases after the statute, Vankeughnet, C., laid down lucidly the grounds upon which his Court fixed the rates of compensation to executors. He says:

"Until the statute, no administrator, as such, could claim any allowance for his services. This rule, in regard to persons holding fiduciary relation, was established early in Courts of Equity, and was inflexible; but it was a rule forged, as it were, by the Court itself, and which the Legislature has broken.

"I have been asked whether the Court would refer it to the Judge of the Surrogate Court to fix the rates of remuneration. As a rule, this Court does not leave its work incomplete, nor ask the aid of other tribunals to perfect it. Seised of the subject-matter of litigation or dispute, it disposes of it entirely; and in this particular of remuneration, almost more than any other, the Court which has surveyed the conduct of the trustee, has taken the accounts, and has adjudicated upon them, is the most competent to form an opinion. Being relieved from the restriction which in this respect it had imposed upon itself, it will not seek elsewhere for an opinion as to whether remuneration should be allowed to the trustee for his labours, or what the amount of that remuneration should be:" *McLennan* v. *Heward*, 9 Gr. 279.

It has been the settled practice of the Court of Chancery for the Master, in passing the accounts of executors, to allow them compensation under the Statute, instead of putting the executors to the expense of procuring an order for such compensation from the Surrogate Judge. This new principle of compensation to executors being introduced, it became a principle of the law, which the Court of Chancery has uniformly acted upon in the administration of estates. It is now the duty of the Master, in taking accounts and making all just allowances, to make a just and proper allowance for such compensation, which he can better do, from his knowledge of the estate, than the Surrogate Judge: *Biggar* v. *Dickson*, 15 Gr. 233. It is not competent, therefore, for an executor, who is passing his accounts in the Court of Chancery, to intercept the judgment of the officer of this Court who has cognizance of the matter, by an application to the Surrogate Judge for an allowance. Any order made under such circumstances by the Surrogate will not be binding in the Court of Chancery as fixing the amount, but the Master must exercise his own judgment as to the propriety and reasonableness of the allowance: *Long* v. *Wilmot*, cited in 15 Gr. 236; and *Biggar* v. *Dickson*, 15 Gr. 233. By making such application to the Surrogate, pending a suit in Chancery, unnecessary expense is incurred, and the Surrogate cannot tell what the conduct of the executor has been, or in what manner he has administered the estate. At the instance of any party interested, the Court of Chancery will restrain any such application by the executor: *Cameron* v. *Bethune*, 15 Gr. 486.

It would seem, however, that if the parties have allowed the amount to be fixed by the Surrogate Judge, and make no objection thereto, the Court will adopt it. And the same result would follow if the allowance had

been made before the institution of the suit in Chancery: *Harrison* v. *Patterson*, 11 Gr. 105; see s. c., 7 Gr. 531.

II. *Scope of the jurisdiction.*—The Court will not extend this act to all trustees, but to those only who act under wills or testamentatory dispositions of property. In other cases the general rule applies as it obtains in England: *Wilson* v. *Proudfoot*, 15 Gr. 109. Soon after the act was passed, it was held that compensation was thereby authorized to trustees and other persons acting under wills in respect of real estate, as well as to executors in respect of personal estate. This has always been followed, and may now be regarded as the settled rule of the Court on this point: see *Bald* v. *Thompson*, 17 Gr. 157, 158.

III. *Grounds upon which compensation is allowed, or disallowed.*—In considering in what cases remuneration should be awarded, it is of value to bear in mind the considerations which influenced the Court formerly in refusing any allowance. One, if not the principal consideration was, that the trustee might not make his duty subservient to his interest—that he might not create work with which to charge and load the estate. If it was considered necessary to remove every temptation of this kind, by refusing all payment for such work, it may fairly be argued that it never could have been intended by the Legislature that the trustee should be paid when he had not done the work, or had done it in such a way as to prejudice the estate or benefit himself.

The statute means that for such portion of the duties as the executor has bestowed his care, pains, trouble and time upon, in the proper administration of the estate, he shall receive reasonable compensation. When he has neglected any portion of his duties, or has applied his care and pains in mal-administration, it would scarce be asked that in respect of it, however much trouble may be brought upon him thereby, he should receive any wages or reward. The Legislature did not intend that when an executor had been guilty of any misconduct he should be deprived of any remuneration whatever, even in respect of those partial services which had been faithfully rendered. The statute evidently contemplates and indeed provides for payment of work from time to time. Looking to the large powers which this act presumes to compel defaulting trustees and executors to make amends for their misconduct, it would not have been considered necessary to deprive them, any more than any other agent, of payment for what had been well done: *McLennan* v. *Heward*, 9 Gr. 279.

The compensation is for care, pains, and trouble, and time expended: hence as a general rule an executor should not be allowed commission on sums which he has not realised and with which he is chargeable in consequence of his neglect or other misconduct: *Bald* v. *Thompson*, 17 Gr. 154. In respect of all moneys disbursed by him, the executor should have his commission, and if disallowed by the master the court will rectify his finding in this respect: *Ib.* In no case will executors be entitled to any allowance for services performed for the estate by another person who acts gratuitously, unless it can be shewn that they had labour and trouble during the same time in the management: *Chisholm* v. *Barnard*, 10 Gr. 479.

The misconduct of an executor may be punished, not merely by charging him with interest and costs, but also by the disallowance of all compensation to him under the statute, his right to such compensation depending altogether upon the circumstances of the case, having regard to whether or not his conduct has been blameworthy: *Gould* v. *Burritt*, 11 Gr. 523. When an executor has retained moneys of the estate in his hands, and has been charged with interest and rests in passing his accounts, yet he will not be deprived of his commission if he acted in the exercise of his best discretion in keeping such moneys in hand: *Gould* v. *Burritt, ubi sup.*, and see *McLennan* v. *Heward*, 9 Gr. at pp. 284, 285; *Landman* v. *Crooks*, cited in 9 Gr. 285.

If the executor deal with the estate in a manner not authorized by the will, but yet in the event his dealings assume a shape sanctioned by the will, a commission may be allowed in respect of such transactions, if they have been as profitable as if the directions of the will had been strictly followed; but if less profitable, then no commission should be allowed: *Thompson* v. *Freeman*, 15 Gr. 384.

We shall in our next and last paper on this subject arrange the remaining cases under their appropriate heads.

Attention has at length been drawn, in the House of Commons, to a subject which must sooner or later, and the sooner the better, receive the careful attention of the Legislature. We speak of a Court of Admiralty for our inland seas. Years ago we urged the importance of some such measure as is foreshadowed — though in a feeble and imperfect manner—in the following resolutions, introduced by Mr. Street:

1. That it is expedient that power be given to attach ships and vessels for provisions furnished and repairs made to them, by a summary process.

2. That where there is no Admiralty Court or Admiralty jurisdiction, such process shall issue out of the County Court or Court of Inferior Jurisdiction.

3. That under such process proceedings may be had to judgment, and ships or vessels so attached may be sold thereupon.

4. That a Bill shall be founded on these resolutions, with the necessary forms of procedure thereon.

These resolutions were, after a debate, withdrawn; but the subject is too important, and the necessities of our marine too great, to allow it to be shelved for any length of time.

ACTS OF LAST SESSION.

An Act to amend the Act intituled "An Act respecting the Municipal Institutions of Upper Canada."

(Assented to 15th February, 1871.)

Her Majesty, &c., enacts as follows:—

1. Section 6 of the Act passed in the thirty-first year of Her Majesty's reign, chaptered thirty, is amended by adding the following words after the word "ward" on the third line of said section:—"When there are less than five wards, and of two councillors for each ward where there are five or more wards."

2. Sub-section 12 of section 296 of the Act passed in the session held in the 29th and 30th years of Her Majesty's reign, chaptered 51, is amended by striking out all the words after the word "Runners" in said sub-section.

3. Sub-section (*a*) of sub-section 6 of section 246 of the said Act is repealed, and the following is substituted in lieu thereof:—"Upon any person, for the non-performance of his duties, who has been elected or appointed to any office in the corporation, and who neglects or refuses to accept such office, unless good cause be shown therefor, or takes the declaration of office, or afterwards neglects the duty thereof, and."

4. The council of every municipality may pass by-laws for preventing and removing any obstruction upon any roads or bridges within its jurisdiction.

5. Sub-section 8 of section 299 of the said Act is amended by adding thereto the following: — "And for acquiring and assuming possession of, and control over, any public highway or road in an adjacent municipality (by and with the consent of such municipality, the same being signified by a by-law passed for that purpose), for a public avenue or walk; and to acquire from the owners of the land adjacent to such highway or road, such land as may be required on either side of such highway or road, to increase the width thereof, to the extent of one hundred feet or less, subject to the provisions of section 325 of this Act, and to other provisions of this Act relating to arbitration."

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

7. Section 341 of the said Act is amended by adding after the words "Separating two townships in the county," the following:—"And over all bridges crossing rivers, over five hundred feet in width, within the limits of any incorporated village in the county, and connecting any highway leading through the county."

8. Section 342 of said Act is amended as follows, by adding thereto the following words: "And further the County Council shall cause to be built and maintained in like manner all bridges on any river over five hundred feet in width, within the limits of any incorporated village in the county, necessary to connect any public highway leading through the county," and may pass a by-law for the purpose of raising any money by toll on such bridge to defray the expenses of making and repairing the same.

9. Sub-section 3 of section 344 of said Act is amended by adding thereto after the words "Townships of the county," the words "Or any bridge required to be built or made across any river, over five hundred feet in width, within any incorporated village in the county, connecting any public highway leading through the county."

10. Sections 301 and 302 of the said Act shall apply to towns and incorporated villages as well as to cities; provided always that the right of appeal as provided by the said 301st section shall be to the judge of the county court.

11. Sub-section 2 of section 301 of said Act is amended by inserting the following words after the word "sidewalk," in the sixth line: "or any bridge forming part of the highway."

12. Section 302 of the said Act is amended by adding to the end thereof the following proviso:

"Provided also, that in cases where the council of any city or town shall decide to contribute at least half of the cost of such local improvement, it shall be lawful for the said council to assess and levy in manner provided by the 301st, 302nd, 303rd, 304th and 305th sections of this Act, from the owners of real property to be directly benefited thereby, the remaining portion of such cost without petition therefor, unless the majority of such owners representing at least one-half in value of such property shall, within one month after the publication of a notice of such proposed assessment in at least two newspapers published in such city or town, petition the council against such assessment."

13. Sub-section 12 of section 341 of said Act is repealed, and the following substituted therefor:

"It shall be the duty of County Councils to erect and maintain bridges over rivers forming township or county boundary lines; and in the case of a bridge over a river forming a boundary line between a county and a city, such bridge shall be erected and maintained by the Councils of the county and city; and in case the Councils of such county or city, or the Councils of such counties, fail to agree on the respective portions of the expense to be borne by the several counties, or city and county, it shall be the duty of each Council to appoint arbitrators, as provided by this Act, to determine the amount to be so expended, and such award as may be made shall be final."

14. The following sub-section is added to section 280 of said Act:

"Whenever any stream or creek in any township is cleared of all logs, brush or other obstructions to the town line between such township and any adjoining township into which such stream or creek flows, the Council of the township in which the creek or stream has been cleared of obstructions may serve a notice in writing on the head of the Council of the adjoining township into which the stream or creek flows, requesting such Council to clear such stream or creek through their municipality; and it shall be the duty of such last named Council, within six months after the service of the notice as aforesaid, to enforce the removal of all obstructions in such creek or stream within their municipality to the satisfaction of any person whom the Council of the county in which the municipality whose Council received the notice is situate shall appoint to inspect the same."

15. Section 243 of the said Act is amended, by adding "or thirty duly qualified electors of any municipality" after the word "council" in the first line."

16. Any by-law which shall be carried by a majority of the duly qualified voters voting thereon, shall, within six weeks thereafter, be passed by the Council which submitted the same."

17. Section 27 of the said Act is repealed, and the following enacted in lieu thereof:

"In case of a township laid out by the Crown in territory forming no part of an incorporated county, the Lieutenant-Governor may, by proclamation, annex the township, or two or more of such townships, lying adjacent to one another to any adjacent incorporated county."

18. Section 153 of the said Act is amended by inserting after the word "aforesaid" in the first line, the following words: "as well as the assessment rolls, voters' lists, poll books, and other documents in the possession of or under the control of the clerk."

19. Sections 29 and 35 of chapter thirty of the Act passed by the Legislature of Ontario in the thirty-first year of Her Majesty's reign shall be and the same are hereby repealed.

An Act to amend the Assessment Act of Ontario, passed in the thirty-second year of the reign of Her Majesty, chaptered thirty-six.

(Assented to 15th February, 1871.)

Her Majesty, &c., enacts as follows:—

1. That sub-section 25 of section 9 of the Act passed in the 32nd year of Her Majesty's reign, and chaptered 36, be repealed.

2. That sec. 84 of the said Act be amended by inserting after the word "township" in the first line, the words "town or village."

3. That sec. 86 of the said Act be amended by inserting after the word "townships," "towns and villages."

4. That sec. 150 of the said Act be amended by erasing the letter "B" in the second line, and inserting therefor the letter "C."

An Act relative to Unpatented Lands sold for Taxes.

(Assented to 15th February, 1871.)

Her Majesty, &c., enacts as follows:—

1. Whenever the proper officer or officers having by law the power or authority to make or execute deeds on sales of lands for taxes shall heretofore have made or executed, or shall hereafter make or execute any deed purporting to grant, sell or convey any land or portion of land, the fee of which is in Her Majesty, or purporting to grant, sell or convey the interest therein of any locatee or purchaser from the Crown, and such deed shall recite or purport to be based upon a sale for taxes of such land or interest, the Commissioner of Crown Lands may act upon and treat such deed as a valid transfer of all the right and interest of the locatee or purchaser from the Crown, and of every person claiming under him, in, or to such land or portion of land to the grantee named in such deed, and may cause a patent for such land to be issued to such grantee on completion of the original conditions of location or sale, unless such deed shall be questioned before a court of competent jurisdiction by some person interested in such land within three months after the passing of this Act, or within three months after the making of such deed, and unless notice of such

deed being so questioned, shall within the respective times aforesaid be given to the Commissioner of Crown Lands.

2. This Act shall not apply to any deed based or purporting to be based upon a sale for taxes made prior to the first day of January, 1868.

3. Nothing in this Act contained shall interfere with the authority of the Commissioner of Crown Lands under "The Public Lands Act of 1860," to cancel the original sale, grant or location, of any such land.

SELECTIONS.

MARRIAGE BY REPUTE.

The case of *Hill* v. *Hibbit* is sure to interest the public. It is full of incident, sensational, and highly spiced and has also some interest for the lawyer, we do not mean that any new principle is enunciated or any old principle developed, but the judgment of the Lord Chancellor in respect to the validity of the marriage of Eliza Phillips and James Hay brings into strong light the elementary doctrine of the English law of marriage.

The main facts are these: Hay met Phillips in London, and they cohabited; but, as the Lord Chancellor remarked, it is clear they were not married in England. They went to Scotland, where Hay introduced Phillips as his wife, and she was treated as his wife by the members of his family. Hay went to America. Phillips followed. In America Phillips used her maiden name, as it is alleged, for the purpose of earning her living. Phillips (said the Lord Chancellor) was plainly of unsound mind, and of a family subject of insanity; she was subject to fits, and, though perfectly sane for some time, liable to fly off at any moment. She was for some years in a lunatic asylum. Hay visited England, met Harriet Hibbit, cohabited with her for one night, subsequently met her in America, and was publicly married to her. Was this a valid marriage? Or was it interdicted by the connection between Hay and Phillips?

That there was a marriage according to the Scotch law there can be no doubt, because there was no mere repute, but there was also acknowledgment. Hay introduced the woman to his family as his wife, and she was received as his wife. This would appear to settle the case. No act of the man or of the woman can have the force of a divorce. A marriage by consent cannot be dissolved by consent. Yet it is true that in penal cases, such as bigamy, the prior marriage cannot be proved by mere repute. If Eliza Phillips had remained in a sound state of mind, the Lord Chancellor intimated that the case might have had a different complexion, because she would then have countenanced the idea that she had never been married. Certainly it would be a cruel hardship for a woman who is publicly married to find that her marriage is invalid, and her offspring bastards, because the man had years before lived in Scotland with some other woman as his wife, that woman having resumed the use of her maiden name. On the other hand, it is difficult to understand how a marriage by consent, being at law a valid marriage, can be dissolved by the acts of the man or woman, or by their joint assent. Divorce is extremely easy in some American States, but divorce by consent, without the intervention of a Court of Law, has not yet been admitted anywhere. It is more difficult to establish a consensual marriage by mere repute than by repute and acknowledgment; but we apprehend that, the marriage being established, it is in law as binding and lasting as any other marriage.—*Law Journal.*

WRETCHED TRUSTEES.

If you are a trustee, and you entertain a doubt as to the title of your alleged *cestuis que trust*, what ought you to do? Our student, fresh from the study of Mr. Lewin, would answer: "Pay the money into Court under the Trustee Relief Acts." This is a good answer so far as it goes. But suppose that your doubt or difficulty turns out to be an unreasonable one, you may be ordered to pay the costs of the payment into Court. How then are you, being an unlearned person, to find out whether your doubt or difficulty rests on a sound foundation, or is a creature of the merest imagination? The student will answer: "Take counsel's opinion." That reply, which on its face is wise and prudent, may lead the unlucky trustee into worse mischief. For here is the *dictum* of Vice-Chancellor Stuart in *Gunnell* v. *Whitear*, in the current number of our Reports:—"A trustee *ought not to consult counsel as to the right of his cestuis que trust.* If he has any reasonable difficulties and doubts as to their title, he should pay the trust money into Court under the Trustee Relief Acts. He is not to consult counsel as to the title of his *cestuis que trust.*" Of course his Honour did not mean that such an act would be improper or indecorous, but that costs would not be allowed. But if the trustee is not to consult counsel, how is he to know whether his doubts are reasonable or not? We confess that this *reductio ad absurdum* fairly staggers us. The only possible solution is that, in the eye of equity, every trustee undertakes to bring to bear upon the duties of his office such an amount of legal knowledge and skill as will enable him to decide whether or no reasonable doubts do exist as to the rights of his *cestuis que trust*; and if this rule is to prevail, we think it only fair that trustees should have distinct notice thereof. Perhaps the learned Vice-Chancellor had in his mind the celebrated case of *Jenkins* v. *Betham*, 15 C.B. 168, in which the Court of Common Pleas held that a person who holds himself out as a valuer of ecclesiastical property is bound to know, and to value according to the principle laid down in *Wise* v.

Metcalf, 10 B. & C. 299. The analogy is not precise, because surveyors generally pursue a profitable calling, whereas trustees, like the victims of the ancient ordeal, walk among hot ploughshares, and very often stumble against them.—*Law Journal.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

FIRE—INJURY CAUSED BY—LIABILITY OF DEFENDANT.—One M. agreed to burn and clear off the timber on defendant's fallow at a certain price per acre. While the work was in progress the defendant, who lived on the place, came occasionally to see how it was getting on, and advised him to set fire to the log heaps. M. told defendant that a brush fence, which extended to the corner of plaintiff's land, might take fire, but defendant said it would make no difference. M. then fired the heaps, and went home, two or three miles off, intending to return in a few days, when the heaps should be ready for branding. During his absence the fire spread to the plaintiff's land and burned his fences, &c. The jury having found for the plaintiff on the charge of negligence:

Held, that M. upon the evidence was not an independent contractor, over whom defendant had no control, but rather a workman in his employment and subject to his directions; and that defendant was responsible.

Quære per Wilson, J., whether if M. had been such contractor the defendant would have been liable.—*Johnston* v. *Hastie*, 30 U. C. Q. B. 232.

CORPORATION—POWER TO BORROW—8 VIC., CH. 82.—*Held*, that the Roman Catholic Bishop of Sandwich, incorporated by 8 Vic., ch. 82, as "The Roman Catholic Episcopal Corporation of the Diocese of Sandwich in Canada," had no power to borrow so as to bind his successor; and therefore that the plaintiff, having lent money to such Bishop, which was used in the construction of the episcopal residence and for the purposes of the Church, and taken security for repayment under the corporate seal, was not entitled to recover against the corporation.

The Bishop was described in the instrument as "R. C. Bishop of Sandwich." *Held*, that this variance from the corporate name was immaterial.—*Ruitz* v. *The Roman Catholic Episcopal Corporation of the Diocese of Sandwich*, 30 U. C. Q. B. 269.

ACTION BY HUSBAND AND WIFE—DISTRESS UPON WIFE'S GOODS — EVIDENCE — MARRIED WOMAN'S ACT.—A woman had long been in possession of chattels said (but not proved) to have been left to her by her deceased husband, and using them with her children. She then married the co-plaintiff. These goods were seized by a creditor of his on a claim alleged to be for rent but not proved:

Held, that her title before marriage was *primâ facie* sufficient, and after her second marriage the goods were protected, under the Married Woman's Act, against her second husband's creditors.—*Corrie et al.* v. *Cleaver et al.*, 21 U. C. C. P. 186.

RAILWAY COMPANY—NEGLIGENCE — EVIDENCE FOR JURY.—A railway company's servants, having cut the grass on the banks of the line, left it there fourteen days during extremely hot and dry weather. Soon after the passing of a train a fire broke out in one of the heaps of cut grass; it then extended up the bank to the hedge, and from the hedge to a stubble field, across the stubble field and an intervening road to the plaintiff's cottage. An unusually high wind was blowing at the time. The cottage was situated 500 yards from where the fire broke out.

Held (confirming the decision of the Common Pleas), that there was evidence of negligence (BLACKBURN, J., *dubitante*), and that if there was negligence it was no answer for the company to say that the damage was greater than could be anticipated.—*Smith* v. *The London and South Western Railway Company*, 19 W. R. 230.

JURISDICTION OF CIVIL BILL COURT—COSTS—COMMON LAW PROCEDURE ACT.—Section 97 of the Common Law Procedure Act, 1856 (Ireland), enacts that "if in any action of contract . . . . where the parties reside within the jurisdiction of the Civil Bill Court of the county in which the cause of action has arisen the plaintiff shall recover less than £20," he shall not be entitled to costs.

Held, that a railway company "resides" in every county in which it has a ticket office.

Held further, that "cause of action" means "entire cause of action," and therefore, where a contract made in county C. was broken in county M., in which the plaintiff and defendant resided, that the cause of action did not arise in county M. within the meaning of section 97 of Common Law Procedure Act (Ireland), 1856.—*McMahon* v. *Irish North Western Railway Co.* 19 W. R. 212.)

ALTERATION IN NOTE.—Where a blank in a note had, after signing and delivery by the maker, without his consent, been filled so as to increase

the amount, and not be detected by inspection, *held*, that the maker was answerable for the full face of the note, as altered, to any *bona fide* holder for value in the usual course of business.—*Garrard* v. *Hadden*, 7 C. L. J. 112; *Pittsburgh Legal Journal.*

PARTNERSHIP.—Where one partner contributed money to the common stock, and the other his time and skill, and the whole was lost: *held*, that the partner contributing the money could not recover any part of his loss from the other.—*Everly* v. *Durborow*, 7 C. L. J. 113; *Legal Gazette.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

INSOLVENCY—PERSONAL ACTIONS—RIGHTS OF ASSIGNEE.—The plaintiff, having held the defendant in the suit to bail, recovered a verdict for slander, for enticing away and detaining his wife, and for assaulting her. Before recovering judgment he made an assignment under the Insolvent Act, and he then sued the bail on their recognizance, not having yet obtained his final discharge. The defendants set up the rights of the assignee. *Held*, on demurrer, that the plaintiff was entitled to recover, for the causes of action being for purely personal wrongs did not pass to the assignee.

Semble, also, that the proceeds of the suit when recovered could not be claimed by the assignee, and that he therefore could not in any way interfere with the suit.—*White* v. *Elliott and Mooney*, 30 U. C. Q. B. 253.

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32 VIC. CHAP. 6. SEC. 126, O.—SALE UNDER TREASURER'S WARRANT—LIABILITY OF COUNTY.—Section 126 of the Assessment Act, Ont., 32 Vic. ch. 6, directs that when the County Treasurer is satisfied that there is distress upon any lands of non-residents in arrears for taxes, he shall issue a warrant *under his hand and seal* to the collector of the municipality to levy. The warrant was tested "Given under my hand and seal, being the corporate seal;" and the seal bore the same form, emblem, legend, &c, as the County seal. The collector sold the plaintiff's goods under it, but it was not shewn to have been authorized by the County Council, nor had they received the proceeds of the sale:

Held, that they were not liable in trespass or trover.—*Snider* v. *The Corporation of the County of Frontenac*, 30 U. C. Q. B. 275.

MUNICIPALITIES DIVIDED BY A RIVER—LIMITS OF EACH—CONVICTION FOR PASSING TOLL-GATE.—The limits of the city of London were defined by the proclamation setting it apart as all the lands comprised within the old and new surveys of the town of London, together with the lands adjoining thereto lying between the said surveys and the river Thames, producing the northern boundary line of the new survey until it intersects the north branch, and the eastern boundary line until it intersects the east branch, of the river:

Held, that the city limits extended to the middle of the river; and that a conviction by county magistrates for passing the toll-gate on the city side of the river was therefore bad, as the offence was out of their jurisdiction.

Where two properties or municipalities are divided by a river or highway, the limit of each is, *primâ facie*, the centre of the river or road.—*In re McDonough*, 30 U. C. Q. B. 288.

ROAD ALLOWANCES—PASSAGE OF BY-LAW BY MUNICIPALITY—LIABILITY OF TIMBER LICENSEES FOR TRESPASSING ON.—*Held*, affirming the judgment of the Court of Common Pleas, 20 C. P. 369, that municipal corporations are entitled to the timber and trees growing upon the original road allowances, though, in order to dispose thereof by sale, or to prevent or punish trespassers, a by-law or by-laws must necessarily be passed; and that therefore an action will lie at their suit under the circumstances set forth in the head-note to the case in the Court below.

Held, also, that the licenses granted to the defendants in this case did not authorize them to cut and carry away the timber and trees from the road allowances in question.—*The Corporation of the Township of Barrie* (*Respondents*) v. *Gillies et al*, (*Appellants*), 21 U. C. C. P. 218.

ONTARIO REPORTS.

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., Q.C. *Reporter to the Court.*]

ALLAN v. GARRATT AND WILLIAMSON.

(*Continued from page* 46.)

Now when did this instrument become an effective and operative deed under the statute to bind non-assenting creditors? Certainly not until about three weeks before the trial, and then only by being signed by the insolvents themselves.

In the case of *Sellin* v. *Price*, L. R. 2 Ex. 189, referred to in the argument, the defendant executed a deed under the 192nd section of the English Bankrupt Act of 1861. It purported to be made between the debtor, of the first part, a surety, of the second part, and the several per-

sons whose names or firms are set forth in the schedule thereto, thereafter styled creditors, of the third part. It recited that the creditors had agreed to accept a composition of 5s. in the pound, to be secured by the joint and several promissory notes of the debtor and his surety: that the composition was payable to non-executing and non-assenting creditors; and that the promissory notes had been deposited with the surety, to be held by him, in trust to deliver the same to such last-mentioned creditors respectively, on demand, as the surety by the deed acknowledged. In consideration of the premises, each of the said creditors of the debtor, who should be bound by the deed, released the debtor absolutely, reserving rights against sureties. It was declared that the deed was intended to operate under section 192 of the Bankruptcy Act of 1861. No schedule was annexed. The plaintiff had brought an action against defendant on the 2nd June, in which judgment was signed on the 18th June. The deed was executed by the defendant on the 16th June, registered on the 20th, and gazetted on the 22nd June. On the 28th, the goods were seized under a *fi. fa.* issued in the suit. A summons was taken out to set aside the execution on the 3rd July. On this the sheriff was directed to withdraw, on the defendants paying £30 into court, to abide the order of the Court.

At the hearing of the summons a doubt was suggested whether the absence of the schedule did not vitiate the deed, since without a schedule there were no parties of the third part. A schedule was afterwards added to the deed. In giving judgment *Kelly*, C. B., said: "We are of opinion that the annexation of the schedule to the deed after execution and registration, the schedule having thus become a part of the deed itself, altered the deed in a material particular, and made it void." Here the annexation of the schedule was considered an alteration of the deed, so far as to make it void.

In *Scott* v. *Berry*, 3 H. & C. 966, there where no persons who signed the deed as parties of the third part, but they were referred to in describing the parties in the deed as follows, "and the several other persons whose names are hereto subscribed and seals affixed, of the third part." The Court held, as none of the creditors, parties of the third part, had signed the deed, none of them could sue on it, and all the creditors, those who assented as well as those who did not, were placed on an equal footing, and the party of the second part was trustee for and could sue equally for all. The requisite number required by the statute having assented to the deed, it was held good.

We may then conclude from these two cases, that although it is not necessary that the parties of the third part should sign the deed, yet if they are referred to in a schedule to be annexed to it, if such schedule is not annexed when the deed is signed, annexing it afterwards so alters the deed that it becomes void.

In the case before us the deed when filed was clearly inoperative as a deed to bind the defendants. It was not such a one as the statute contemplated. It should have been a deed executed by the defendants, and by a majority in number of the creditors to whom debts were owing, amounting respectively to $100.

This imperfect and inoperative deed was filed before the 25th of November, 1868, in the Insolvent Court, and the defendant's discharge under it allowed towards the latter part of December. In Hilary Term, 32 Vic., February, 1869, the matter was argued on the appeal from the decision of the county judge, and judgment was given at the sittings after that term, on the 6th March, 1869. The case was taken down to trial at the Assizes held in Belleville in the spring, April, 1869, and the only thing done to perfect the deed was the signing of it by the defendants, apparently without leave of the court below to take it off the file for that purpose, or apparently re-filing after it was so signed, and no attempt was made to have it re-executed by the other parties to the deed after it was signed by the defendants.

Under the authorities I do not think that this can be considered a deed which binds the plaintiff. There surely must be some time at which the insolvent may be considered as bound by the instrument he sets up as his discharge. He cannot be permitted, when a plaintiff goes on with a suit satisfied that the defendant has no legal discharge, to set up as valid the one that has been declared void, and which has remained on file during the whole period after it was declared void down to the time of trial, and which has been altered without the knowledge or consent of the plaintiff or the authority of the court. This would be encouraging a very loose and unsatisfactory mode of disposing of the claims of creditors. If after this instrument in question had been declared void the Court of Insolvency had allowed it to be taken off the files to be signed by the defendants, and re-executed by the other parties to it, and afterwards it had been re-filed, I am not prepared to say that if due diligence had been used it might not be set up as an answer to the plaintiff's claim, and be allowed to be so set up as a defence under a plea *puis darrein* continuance, if the re-execution of the deed occurred after the plea, or against the further prosecution of the action if completed before the filing of the plea.

There is a case referred to in the Weekly Notes of 21st May, 1870, at page 138, *Birks et al.* v. *Clarke* (since reported, L. R. 5 Ex. 197), where the composition deed was not held to prevail against a non-assenting creditor, because there was an unreasonable delay in executing the deed. There the proposition was made on the 28th of May, and the deed was not executed until the 7th of August. Here the assignment in insolvency was made on the 4th of July; the composition deed was dated on the 8th of August, and was not signed by defendants until some time in March following.

I think the plaintiff as a non-assenting creditor is not bound by the terms of this deed, both because it does not provide for the payment of individual debts, and because it was not properly executed, either as to the parties executing, or within the proper time.

I do not think the plaintiff can successfully contend that the assenting creditors are not bound by the terms of the deed, because they may have executed it by their copartners, or by procuration. It seems to me if they accepted the composition under the deed they ratify the deed, and cannot afterwards object that it has

not been properly executed, and if they cannot object I fail to see how the plaintiff can.

I do not understand that the plaintiff having proved his claim before the assignee prevents him going on with this action at law. *Thorne* v. *Torrance*, in Appeal, 18 U. C. C. P. 29, refers to many of the authorities on the subject.

After the plaintiff proved his debt before the assignee and ranked on his estate for it, it would seem rather strange if he were allowed to contend that Thomas was not a properly authorised person to whom an assignment could be made under the statute, and still more strange that he should be allowed to do this after having accepted and obtained the order of this court to set aside the discharge allowed in the Insolvent Court, with costs to him, the plaintiff, to be paid out of the insolvents' estate: *Newton* v. *The Ontario Bank*, in Appeal, 15 Grant 283.

As to the question of payment of money into court, the precedents from compositions under the English Bankruptcy Act do not apply. The provision in the deeds under that statute usually is, that when the composition is paid it shall operate as a discharge, and until default made the agreement in the deed may be set up as a bar to any action against the insolvent. Under section 9 of our Act of 1864, the deed shall bind all the creditors as if they were parties to it, and the discharge therein agreed to shall have the same effect as an ordinary discharge as therein provided.

By sub-section 3 the consent discharges the insolvent from all liabilities whatever, except as are thereinafter excepted. The indenture set up by the defendants, if properly executed and binding, would, in and by its terms, discharge and release the defendants from all debts, claims and demands whatsoever, against them, and provable against their estate.

I therefore see no difficulty, if the release is binding, in amending the pleadings so as to make it a complete defence.

As, however, I have arrived at the conclusion that the plaintiff is not bound by the deed of composition and release, the verdict will be entered for him for the amount of the note and interest, less the amount paid into court.

In conclusion, I think I may with propriety repeat the language of Baron Piggott in concluding his judgment in *Martin* v. *Gribble*, 3 H. & C. at p. 638: "It is unpleasant to give judgment upon a mere technical point of law, without regard to the merits of the case, and it is desirable that the Legislature should pass a short Act embodying a form of deed of composition to be used on all occasions, so as to put an end to these much vexed questions."

The verdict should be entered for the plaintiff for $127.14, being the note and interest to 1st April, 1869, $155.69, less the amount paid into court, $28 55.

WILSON, J.—The plea was not proved which alleges that if there were no separate creditors of the insolvents.

I was not disposed to interfere on appeal with the decision of the learned Judge in Insolvency, who had, when the matter was before him, decided that Williamson had no separate creditors: see 28 U. C. Q. B. 266. But as the question comes directly before this court, exercising a primary and original judgment, for myself I think there was such separate liability.

As to the subsequent execution of the deed by the insolvents, I think it was rightly done.

I see no reason why, when a grantor has not executed a deed by inadvertence, it may not, at any time after it has been delivered to the grantee, be perfected by him. It would take effect from that time. No do I see any reason why a grantee who has not executed the deed at the time of its delivery might not execute it at any time afterwards.

In both these cases the parties who subsequently executed were and are parties named in and identified by the deed, which distinguishes them from the case where the annexation of the schedule was held to be an alteration of the deed; for in that case the parties to the deed were not named or identified at the time the deed was executed by the grantees, and they only became known and ascertained when, at a subsequent time, the schedule was added.

In this case the debtors were named in and parties to the deed, by being described as parties to it of the first part in the premises. When they executed the deed they were only perfecting it, not altering it in any way.

If the deed had been registered in its imperfect form, the subsequent perfecting of it would not have perfected the registration. It would require to be registered anew. So, if this deed had required any confirmation by the creditors, or assignee, or judge, before it was to have effect, the deed would not have been operative if not executed properly at the time of such confirmation of it, and the subsequent execution of it would not make valid the previous confirmation. There would have to be a fresh confirmation after the completion of the deed.

But this deed required nothing of the kind. It was intended to take effect just as it is expressed in the body of it, and to be executed by those therein named. That which was so intended to have been done, and which was not done on one day, may be done on another, and therefore I think the deed was rightly executed, and became a perfect and valid instrument by the execution of it by the debtors.

There is, however, something else to be considered. The Act of 1864, sec. 9, sub sec. 2, required the deed to be deposited with the assignee, who was to give notice thereof by advertisement, and the creditors were allowed six juridicial days after the last publication of the notice to object to it. If they did not object the deed might be acted on. If any creditor did object to it, the assignee was not to act on the deed until it was confirmed by the judge.

Now this deed would require, since its execution by the debtors, to be dealt with in this manner to make it effectual, and as that has not been done the debtors can make no use of what was done upon or in respect of the deed in its imperfect form, as applicable to the deed in its completed state.

I agree therefore in the conclusion to which the learned Chief Justice has come.

MOWAT, J., concurred with the Chief Justice.

Rule absolute.

In re Harbottle and Wilson.

Coroner's inquest—Medical witness—Fees of.

Where a coroner, under C. S. U. C. ch. 125, summoned a second medical practitioner as a witness at an inquest, and to perform a *post mortem* examination, but it was not shewn that such practitioner had been named in writing and his attendance required by a majority of the jurymen, as provided for by sec. 9, a *mandamus* to the coroner, to make his order on the county treasurer for the fees of such witness, under sec. 10, was refused.

Semble, that on an application for such *mandamus*, the county treasurer as well as the coroner must be called upon.

[30 U. C. Q. B. 314.]

In Michaelmas Term last, *Robinson*, Q.C., obtained a rule *nisi* calling on George Wilson, a coroner of the county of Brant, to shew cause why a peremptory writ of *mandamus* should not issue, commanding him to make his order on the treasurer of the said county in favour of Robert Harbot le, for the payment of $10, fees due to the said Harbottle, being a qualified medical practitioner, for attendance as a witness upon an inquest held by said coroner, &c., and for the performance of a *post mortem* examination, &c, on or about the 29th of May last, in obedience to the order of the said coroner, issued and served upon the said Harbottle, for such attendance and the performance of such examination, and why the said coroner should not pay the costs of the application.

The application was based on the affidavit of the applicant, who swore that the coroner did, on or about the 29th day of May, 1869, cause him to be served with the order annexed to his affidavit, signed by the coroner: that on or about the said 29th May, at the request of the coroner, he attended and made a *post mortem* examination of the deceased, and reported and gave evidence before the coroner and jury on the 31st May: that he requested the coroner several times since the inquest to give him an order for $10, being his fees, on the treasurer of the county: that the coroner refused to give him such order: that he was a duly qualified practitioner, &c., and had not received any order for his fees, or any part thereof.

The order attached to the affidavit bore no date, and was as follows:

"*Coroner's inquest at Mount Vernon, upon the body of Ida Derry.*

By virtue of this order, as coroner for the county of Brant, you are required to appear before me and the jury, at Mount Vernon, on the 29th day of May, 1869, at five o'clock, P.M., to give evidence touching the cause of death of Ida Derry, and make a *post mortem* examination of the body, and report thereon at the said inquest.

(Signed) George Wilson,
Coroner.

To Dr. Aikman.
To Dr. Harbottle."

The applicant also filed the affidavit of one Joseph Gilmour, who swore that he was present on or about the 29th June, 1869, and heard Harbottle request the coroner to give him an order on the treasurer for his fee: that the coroner promised to give the order if he, Harbottle, would call in an hour and a-half: that they accordingly called, and that the coroner did not give the order. He also swore that the coroner admitted that he did not examine on oath Dr. Aikman, referred to in the order to attend, as to whether he was a registered practitioner, and that Harbottle represented that Dr. Aikman was not then registered. Also two other affidavits of persons, who swore that on or about the 2nd July, 1869, they heard Harbottle request the coroner to give him the order, and that he refused to do so.

During this term, *A. S. Hardy*, for the coroner, shewed cause, and filed a number of affidavits. The coroner swore that, finding that the deceased had not been attended during her illness and at her death by any duly qualified practitioner, he directed that a *post mortem* examination should be made by a Dr. Aikman, a physician and surgeon, to the best of his knowledge and information a legally qualified medical practitioner, practising his profession in the township, &c., and caused a summons under the statute to be issued to him: that Dr Aikman duly made the *post mortem* examination, and that the same was not made by the applicant: that while the same was being made, or immediately before, Harbottle through the constable in charge, requested permission to be present, as he understood, merely as a spectator: that he consented; and that Harbottle rendered no professional services at the inquest, to his knowledge or by his order or direction: that after the *post mortem* examination Harbottle applied to said constable to be summoned as a witness on the adjourned inquest, and that he added his name to the summons already issued to Dr. Aikman, and told the constable that he might be present to testify: that Harbottle also applied to him, the coroner, personally, stating that he wished to give evidence at the adjourned inquest: that he did not understand or suppose that he would require or expect compensation for so doing, or for being present at the *post mortem* examination, and that his applications were not made with that view, but for the purpose of observation, and of bringing him before the public, he being a young practitioner; and he swore that he would not have consented to his being present at the inquest on any other supposition: that after the examination of Dr. Aikman, he asked the jury whether they, or a majority of them, desired further medical testimony: that the jury unanimously refused to direct or request that another medical practitioner should be summoned: that as Harbottle was anxious to be called, he told him he might give his evidence, which he did, but that it was done not at the request of the jury, and solely in compliance with his, Harbottle's, former request to be permitted to do so. He swore that he gave Dr. Aikman the order for his fee of $10 immediately after the inquest, and before any proceedings herein, which Harbottle well knew, and that he was advised and believed that he had no lawful authority to give more than one order without the request of the jury. He denied, as stated by Joseph Gilmour in his affidavit, that he promised to give an order to Harbottle, but stated that he said he was willing to do so if he could shew he was lawfully entitled to it.

The constable in charge corroborated the affidavit of the coroner as to the circumstances under which the applicant attended the inquest, and stated that he had not been summoned at the time of the *post mortem* examination: that after that he requested the constable to subpœna him to give evidence before the jury: that he

told the coroner of his request, and so the applicant's name was added to the order that had been served on Dr. Aikman, and that the jury refused to hear further evidence after hearing Dr. Aikman.

Dr. Aikman also swore that Harbottle rendered no professional and scarcely any other assistance at the *post mortem* examination, and what he did do was at his request, and could have been done by any one: that Harbottle expressed himself to the effect that he wanted to be present at the examination with a view to his own information; and that he, Aikman, obtained his order for $10 on the day after the inquest

Other affidavits were filed, and in reply the applicant filed a number of affidavits in support of his application, made by jurors and others. It is not necessary that they should be set out for the purposes of the judgment, as the material facts upon which the decision of the Court turns appear in the affidavits already referred to.

Robinson, Q C., supported the rule, citing Con. Stat. U. C., ch 125; *In re Askin and Charteris*, 18 U. C. Q B 498; *In re Fergus and Cooley*, 18 U. C. Q. B. 341.

MORRISON, J, delivered the judgment of the Court.

Under sec. 8 of ch. 125. Consol. Stat. U. C., if the coroner finds that the deceased was not attended at his or her last illness or death by any legally qualified medical practitioner, the coroner may issue his order, according to a form in the Act, for the attendance of any such practitioner in actual practice near the place where the death happened, and may direct a *post mortem* examination by the medical witness so summoned. And by the 9th section, whenever it appears to the majority of the jury at the inquest that the cause of death has not been satisfactorily explained by the evidence of the medical practitioner, &c, such majority may name to the coroner in writing any other practitioner or practitioners, and require the coroner to issue his order, in the form set out, for the attendance of such last-mentioned pratitioner or practitioners, and for a *post mortem* examination, &c.; and the coroner is subject to a penalty if he refuses. And by the 10th section, when any such practitioner has attended in obedience to any such order as aforesaid, he shall receive for such attendance, if without a *post mortem* examination, $5, if with, $10, &c.; and the coroner shall make his order on the treasurer of the county in which the inquest was holden in favour of such practitioner, for the payment of such fees, and such treasurer shall pay the sum mentioned in such order to such medical witness, &c.

The existence of a legal right or obligation is the foundation of a writ of *mandamus*, and the applicant here must make out that there is a legal obligation on the coroner to make the order he demands. Now the alleged obligation or right arises under the statute, and in order to make the rule absolute, we must be satisfied, first, that the coroner had authority and was bound to make the order required by the applicant, an order the payment of which we could hereafter enforce if resisted by the county treasurer; and in this latter respect, what was suggested by my brother Wilson during the argument seems to have great force, namely, that the county treasurer should have had notice of this rule; for even if we granted this application it might turn out eventually to be fruitless, for we take it that the county treasurer might nevertheless resist payment of it successfully if he could shew that it ought not to have been made. Assume, for argument, the case of collusion between a medical witness and the coroner, or the coroner taking upon himself to summon half a dozen practitioners, and making such order to each of them. The public, in such a case, would be grossly defrauded if the county treasurer could not resist the payment of such orders made under such circumstances; so that upon the ground of want of notice to the county treasurer alone, I am inclined to hold that the application ought not to be granted. However, irrespective of that objection, the writ cannot be granted.

It is quite apparent that the intention of the Legislature, with a view of protecting the public against unnecessary charges at inquests, was to restrict the coroner to the summoning of only one medical witness for the purpose of giving testimony as to the cause of death, and if necessary, to make a *post mortem* examination, for which services, certain fees were limited, and that no other medical witness should be summoned so as to entitle him to those fees unless a majority of the jury, under the circumstances mentioned in the 9th section, *named in writing* one or more other practitioners, and *required* the coroner to summon them to give testimony, &c. In that case it was the duty of the coroner to summon the so-named practitioner or practitioners, the statute providing that the practitioner summoned by the coroner, and the other or others named by, and summoned at the request of the jury, should be entitled to the fees fixed by the Act.

Now it is quite clear, first, that the coroner did originally summon one medical gentleman, Dr. Aikman, under the 8th section, and that that gentleman, in pursuance of the coroner's order, attended and made a *post mortem* examination, and afterwards gave testimony before the jury, and it also appears that he was summoned previous to any attendance of Dr. Harbottle, and for the payment of the fees for such examination by Dr. Aikman, the coroner made his order, the day following the inquest, on the county treasurer. Such being the case, the coroner had no authority to summon the applicant, or any other person, and to make an order under the statute to entitle him to fees, unless the applicant can shew that a majority of the jury named him to the coroner in writing and required his testimony, under the provisions of section 9; —the naming in writing by the jury being intended no doubt as a check on the coroner, as well as an authority and voucher to justify the making the additional order or orders on the county treasurer.

It is not shewn or pretended that to the majority of the jury in question the cause of death was not satisfactorily explained, or that the jury named the applicant in writing, or requested his evidence. We therefore fail to see any ground upon which we can command the coroner to make the order in question.

On the argument, Mr. Robinson partly pressed the case on the ground that as his client received an order to attend, and being bound to observe it, he was entitled to the fees allowed. If he

has any remedy, it is not by an application of this nature. Assume it to be admitted that the coroner, after he had summoned Dr. Aikman under the statute, and obtained his services, ordered the attendance of the applicant, that fact alone is unimportant, and makes no difference so far as this application is concerned, because the coroner did that which he was not authorized to do, and his doing so is no reason why we should saddle the public with a charge not within the statute. We would never command the doing of an act where the conditions precedent required by the statute to that act being done are wanting.

It is unnecessary to refer to the numerous affidavits filed, except to notice that the coroner swears positively that he never intended to have the applicant in attendance at the inquest as a medical witness, or to make a *post mortem* examination, but the presence of the applicant was solely at his own request, and that the insertion of his name in the summons to Dr. Aikman was also done at his suggestion, and after the *post mortem* examination.

We think the rule should be discharged with costs. It is much to be regretted that for so trifling a matter so much expense should have been incurred, but from the affidavits filed I fear it is the result of professional and personal feeling, which is too frequently seen in matters where medical men are engaged.

Rule discharged with costs.

CHANCERY.

(*Reported by* ALEX. GRANT, ESQ., *Barrister-at-Law, Reporter to the Court.*)

ALLAN v. CLARKSON.

Insolvent Act—Mortgagee—Pressure.

In 1869 C. lent money to N. on an express agreement that it was to be secured by mortgage on certain property; and on the 3rd July following the mortgage was given accordingly; and on the 2nd August the mortgagor became insolvent.

Held, that the mortgage was valid.

[17 Chan. Rep. 570.]

Appeal from the report of Mr. Turner, the accountant.

Fenton, for the appeal.

Mulock, contra.

On the 3rd Oct. V. C. Strong gave judgment as follows:—I am of opinion that the report ought not to be disturbed. There is no doubt if the witnesses Timothy Botsford, Bogert and Nelson Botsford are to be believed—and I must accept the finding of the accountant as to their credibility as conclusive—that the money which the impeached mortgage was given to secure was actually lent and advanced in April 1869 by Charles Botsford to the insolvent, upon the express agreement that it was to be secured by this mortgage, which was subsequently given on the 3rd of July following. Further, this loan was made under such circumstances that it constituted a valid and subsisting legal debt due from Nelson to Charles Botsford at the date of the mortgage, and a legal debt unimpeachable upon any ground of equity, for whatever may have been the ultimate disposition of the money by Nelson Botsford, it was advanced upon a contract for the loan of money on the credit of Nelson Botsford, and in reliance upon obtaining security of the mortgage.

I could come to no other conclusion upon the facts without contravening the judgment of the accountant as to the veracity of witnesses whom he saw examined. Then there being this debt for money lent, contracted in April, and on the 3rd of July the mortgage was given at the request of Timothy Botsford, acting as agent for his brother Charles, and in fulfilment of the promise made at the time of the loan; and on the 2nd August, 1869, the insolvency followed. Upon this state of facts it is contended that this mortgage is void or to be avoided under some of the provisions contained in the subdivisions of sec. 8 of the Insolvency Act of 1864. I am clear that none of these enactments invalidate this mortgage. Under sub-sec 4 of sec. 8 such a transaction as this taking place 30 days next before the attachment, is to be presumed to be made in contemplation of insolvency; but this presumption is one which may be rebutted, and the cases of *The Royal Canadian Bank* v. *Kerr*, 17 Gr. 47, decided in this Court, and *Newton* v. *The Ontario Bank*, 15 Gr. 283, in the Court of Appeal, and *Bills* v. *Smith*, 11 Jur. N. S. 157, shew that an act which is the result of pressure on the part of a creditor is not to be considered as having been done in contemplation of insolvency. The evidence here shews clearly that there was sufficient pressure to take this case out of the 1st, 3rd, and 4th sub-sections of the statute. Further, if the law is correctly laid down in Griffith & Holmes on Bankruptcy, at page 1097, it would appear that the agreement to give this security upon the faith of which the money was lent relieves it from any taint of illegality, for it is there said: "If there is any contract to give security to a given creditor, or anything in the nature of a duty pre-existing, then the mere fact of impending bankruptcy will not render it fraudulent;" and the law is also so stated at page 81 of the same treatise. I have no hesitation, therefore, in determining that the giving of this mortgage was not with intent to defraud creditors, or in contemplation of insolvency within the meaning of the Act of Parliament.

As to sub-sec. 2 of sec. 8, I am of opinion that it does not apply to such a case as the present, inasmuch as it cannot be said that this mortgage injures or obstructs creditors; but even if the clause were applicable, the Court in applying the very stringent provisions it contains would be at liberty to impose such terms as might seem just; and these, I think, would be simply that Charles Botsford ought to be redeemed.

I think the appeal must be dismissed with costs.

COMMON LAW CHAMBERS.

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

THE TOWNSHIP OF WALSINGHAM v. THE LONG POINT COMPANY.

Assessment—Appeal—Statute labour.

An island forming part of a municipality, but situated in no road division, and deriving no benefit from the roads of the municipality, having been assessed for statute labour, the owners appealed to the County Judge on the grounds of over assessment, and that the property was not liable to statute labour.

On an application to restrain proceedings before the Judge, *Held*, that though a County Judge has authority to increase or reduce an assessment, or to rectify errors in or omissions from the roll, the question of liability for statute labour is beyond his jurisdiction. A writ of prohibition was accordingly granted.

[Chambers, Nov. 24th, 1870—*Galt, J.*]

A summons was obtained on behalf of the Township of Walsingham calling upon the Long Point Company, and the judge of the County Court of the County of Norfolk, to shew cause why a writ of prohibition should not issue, prohibiting and restraining the said judge and the said company from proceeding before the said judge in the matter of an appeal by the said company from the Court of Revision for the Township of Walsingham, so far as the said appeal relates to statute labour, and the liability of said company to perform statute labour in road division No. 4 in said township: on the ground that the said judge had not and has not any jurisdiction to entertain such appeal, so far as the same relates to statute labour.

By a resolution passed by the Municipal Council of Walsingham, on the 21st February, 1870. it was resolved that road division No. 4 should be held to include the whole of Long Point, and that all persons, either resident or non-resident on said Long Point, liable to perform statute labor, should perform the same in said road division No. 4 unless commuted for in money, in which case the proceeds thereof should be expended in the said division No. 4, until otherwise ordered by the Council. The Long Point herein mentioned was the property of the Long Point Company, and it appeared from the papers filed on this application that this was the first time that the property in question was included in any road division or assessed for statute labour. In making up the assessment roll for this year, the assessors served a notice of assessment, stating the number of acres to be 14,300, the value to be $8,500, and the number of days of statute labour 30, in accordance with the rate established by sec. 83 of 32 Vic., ch. 36.

From this assessment the company appealed to the Court of Revision, who dismissed the appeal, and thereupon the company appealed against the decision of the Court of Revision to the judge of the County Court on the following grounds:—

1. That the property of the said Long Point Company is not liable for the performance of statute labour on the grounds that it is in no road division in the said township, and that no roads are within a reasonable distance thereof, upon which statute labour can be performed, and that the assessment of the same for statute labour is contrary to law.

2. That the property of the said Long Point Company is over-assessed, and at a higher proportionate rate than other property in the said township of Walsingham.

3. That the assessment of the said company's property is excessive, and improper, and unlawful.

4. That the proceedings of the said Court of Revision were unlawful and imperfect.

This appeal was heard by the learned Judge on the 20th of June, and on the 9th of July he gave judgment reducing the assessed value of the lands of the company to $7,000, and directing that the statute labour assessed against the lands of the company should be struck out, and the assessment roll of the said township amended accordingly. This judgment was as follows:—

The matter of appeal may be substantially divided into two heads.

1st. Our assessment on the value of the property.

2nd. The liability of the property of the company as situated to be assessed for statute labour.

As to the first point, it appears from the evidence that the property of the company was assessed for $5,200 in 1868, that being the first year of their ownership. In the following year it was raised to $7,000, when a general increase was made in the assessed value of all the property in the township. This year, (1870), it is again sought to be raised to $8,500, although the evidence shows that no general increase has been made in the assessed value of the property in the municipality, but if anything, rather a decrease. It seems that the ground is kept as a shooting and trapping preserve, where game and fur are protected, and that it is unremunerative to the proprietors in a pecuniary point of view, costing them more yearly than the revenue derived from it.

From the evidence of value and other matters proved, I am satisfied that $7,000 is the full assessable value of the said property, and I therefore reverse the decision of the Court of Revision upon that point, and decide, and direct, that the said property shall be assessed for the sum of $7,000, and no more, and that the assessment roll of the township be amended accordingly.

As to the second point, I find that the property of the Company consists of an island composed of land and marshes, the nearest part of which is three or four miles, and the farthest part twenty-five miles from the road division in which the council has placed it. I find that no roads built over the main land would be of any service, value or benefit to the property of the company. It does not, therefore, seem reasonable or just that the property should be laid under a burthen, which will, under no circumstances, produce a benefit to them; and upon examining the Assessment Act, and the Municipal Institutions Act, while I find that power is given to municipal councils to divide the municipality into road divisions, I also find that every resident shall have the right to perform his whole "statute labour, in the statute labour division in which his residence is situated, unless otherwise ordered by the municipal council," (see sec. 89), and also, "in all cases, when the statute labour of a non-resident is paid in money, the municipal council shall order the same to be expended in the statute labour division, where the property is situated, or where the said statute labour tax is levied," (see sec. 88). It seems to me, therefore, that the council, though they have the power to regulate and make the road divisions, must exercise such power in a reasonable manner, and that it would be unjust and absurd to contend that they have the power to order a man to come twenty-five miles to perform his statute labour, or that they can so make road divisions, that property can be taxed for roads which cannot by any possibility be of any service, value or benefit to the property. Such contention is certainly unreasonable, and it appears to me totally at variance with the spirit and intention of the Assessment Act.

I therefore reverse the decision of the Court of Revision on the second point also, and direct

that the statute labour assessed against the lands of the said company, be struck out, and the assessment roll of the said township, amended accordingly. And I direct the respondents to pay the costs of this appeal.

GALT, J.—There is no question as to the jurisdiction of the learned Judge to reduce the amount of the assessed value of the lands, but the point raised on the present application is whether he had any jurisdiction to entertain the question as to the liability of the company to statute labour. It is to be observed that the dispute was not as the number of days statute labour assessed for. That is regulated by the 83rd section, and is a mere matter of computation on the assessed value of the property: but the point in dispute was the liability to perform statute labour at all, and this in my opinion is not the subject of appeal, either to the Court of Revision or from their decision. Section 60 of the Assessment Act of 1869 regulates the proceedings for the trial of complaints; sub-section 1 is as follows:—"Any person complaining of an error or omission in regard to himself, or having been wrongfully inserted on or omitted from the roll, or as having been undercharged or overcharged by the assessors in the roll, may personally, or by his agent, within fourteen days after the time fixed for the return of the roll, give notice in writing to the clerk of the municipality, that he considers himself aggrieved for any or all of the causes aforesaid." Sub-section 2 is: "If a municipal elector thinks that any person has been assessed too low or too high, or has been wrongfully inserted on or omitted from the roll, the clerk shall, on his request in writing, give notice to such persons and to the assessor, of the time when the matter will be tried by the court, and the matter shall be decided in the same manner as complaints by a person assessed." These are the only sub-sections to which it is necessary to refer in considering this question, and from these it appears to me that the subject matters of complaint are confined to overcharge and undercharge as respects value, and the entry or omission of a person on the roll. These then are the only matters from a decision upon which an appeal lies to the County Judge. There can be no appeal as regards the question of statute labor as a separate and distinct complaint for the reason already given, namely, that the amount of statute labour is regulated by the assessed value of the property by section 83. I am, therefore, of opinion that the learned Judge had no jurisdiction to decide the question as to whether the company were properly entered on the assessment roll as liable for statute labour. By section 332 of the Municipal Act of 1866, authority is given to township councils to pass by-laws "For regulating the manner and the division in which statute labour or commutation money shall be performed and expended," and if such by-law is unjust or improper, steps should be taken to have it quashed. The municipal council of the township of Walsingham did by the resolution of the 21st of February, 1870, regulate the manner and the division in which statute labour as regards the land in question should be performed, and while that resolution remains in force, I do not see that either the Court of Revision or the Judge of the County Court has any power to amend the roll by striking out the statute labour.

Let the writ issue as regards the statute labour.

Prohibition granted.

UNITED STATES REPORTS.

Before U. S. Commissioner GEORGE GORHAM, Esq.

Reported for the Law Journal by F. W. MACDONALD, Esq., *Barrister-at-Law.*

IN THE MATTER OF THE APPLICATION OF THE CANADIAN GOVERNMENT FOR THE EXTRADITION OF THOS. PRIMROSE, A FUGITIVE FROM JUSTICE.

Extradition—Robbery—Holding accused without process—Proceedings before U. S. Commissioner—Questions of fact for jury—Reasonable and probable cause—Trial by foreign courts.

On the 1st day of April, 1870, at Westminster, Ontario, one John Smith was assaulted and robbed by Thomas Primrose and others. Primrose fled, and was, on the 9th day of August, 1870, arrested in Buffalo, and immediately thereafter brought before Judge Burrows, on a writ of *habeas corpus*, and his discharge asked for, on the ground that he was detained without legal process. He was, however, held under this writ until the 27th day of December, 1870, on evidence being adduced that an application was being made by the Canadian Government for his extradition; and on that day, a mandate for his examination having arrived from the President, the writ was discharged, and prisoner taken into the custody of the United States Marshal, on a warrant issued by United States Commissioner Gorham.

Certified copies of depositions taken in Canada were filed with the Commissioner, and evidence adduced *pro* and *con*.

Held by Commissioner: 1. That his duty was merely that of a committing magistrate, and that he had only to enquire whether there was probable cause to believe that the crime of robbery had been committed, and that accused committed the crime.

2. That questions of fact were the exclusive province of a jury.

3. That the fact that Primrose, if held for extradition, is to be taken away to be tried in the courts of a foreign country, ought not to influence his decision one way or the other.

4. That he had entire confidence that accused would receive a fair trial in Canada: to suppose otherwise would be unjust and discourteous.

5. That the Extradition Treaty should be construed liberally and fairly to the prisoner; and while every reasonable opportunity should be given to the foreign power seeking the benefit of the treaty, the prisoner should not be remanded for trial unless there be a *prima facie* case against him, which is not overborne by the evidence adduced on his part.

[Buffalo, U.S., Dec. 20, 28, 1870.]

The prisoner, Thomas Primrose, was charged with having, on the evening of the 1st day of April, 1870, at Westminster, county of Middlesex, Ontario, in company with others, assaulted and robbed one John Smith, and of being accessory to the murder of one John Dunn. He was arrested in Buffalo in August last; and was subsequently brought before Judge Burrows, of that city, on a writ of *habeas corpus*, and his discharge asked for, on the ground of illegal detention, no process having been issued for his arrest. But in view of an application having been made for his extradition by the Canadian Government, and evidence as to that fact being given, he was from time to time remanded to jail, to await the mandate from the President for his examination before a United States commissioner; which mandate subsequently arriving, addressed to United States Commissioner George Gorham, informations were thereupon laid before the commissioner, charging the said Thos. Primrose with the said offences of robbery and murder; and the commissioner issued his warrant, ad-

dressed to the United States Marshal, commanding him to take the said Primrose into his custody upon the said charges, and bring him before the said commissioner for examination thereon. The above facts having been made appear in a return to the said writ of *habeas corpus*, the same was thereupon discharged, and the examination of the said Thomas Primrose, upon the charge of the robbery of one John Smith, was then proceeded with before the said commissioner, counsel for claimants declining to offer evidence upon the charge of murder.

The following copies of the original information, taken before Lawrence Lawrason, Esq., police magistrate, at London, and warrant issued thereon, duly certified to be true copies by the said police magistrate, were filed with the commissioner on behalf of the claimants:

CANADA, Province of Ontario, County of Middlesex. To wit. } I, Lawrence Lawrason, of the City of London, in the County of Middlesex, in the Province of Ontario, and Dominion of Canada, one of Her Majesty's Justices of the Peace in and for the said County, do hereby certify that the paper writing annexed hereto, and marked A, is a true copy of the original information or deposition, taken before me, by John Smith, on complaint against Thomas Primrose and others for the crime of robbery: and I further certify that upon the laying of such information or deposition, I did issue a warrant for the arrest of the said Thomas Primrose and others therein mentioned: and I certify that the paper writing hereto annexed, marked B, is a true copy of the warrant so issued by me as aforesaid, and that the same was duly delivered into the hands of Thaddeus VanValkenburgh, a constable for the said County, to be by him executed according to law: and I further certify that the said original information or deposition is in my possession, and that the said constable has the said original warrant. And I also certify that the annexed copies of deposition and warrant are hereby properly and legally authenticated, so as to enable them to be received in evidence, in the tribunals of Canada, of the criminality of the person charged therein of robbery.

Given under my hand, at the City of London, in the Province of Ontario, and Dominion of Canada, this 26th day of September, A D. 1870.

(Signed) L. LAWRASON,
J. P. & P. M.

and further certified by the principal diplomatic or consular officer of the United States resident in Canada, as follows:

CANADA, Province of Quebec, City of Montreal. } I, William H. Calvert, of the City of Montreal, Dominion of Canada, Vice-Consul-General of the United States of America, and being the principal diplomatic or consular officer of the United States of America at present residing in Canada, do hereby certify that Lawrence Lawrason, of the City of London, in the County of Middlesex, Province of Ontario, and Dominion of Canada, Esquire, was, on the first day of April, in the year of our Lord 1870, and from that time up to the present has continued to be, and still is, a Justice of the Peace in and for the County of Middlesex, in the said Province of Ontario, and, as such Justice of the Peace, was and is duly authorized to hear all complaints of felony and misdemeanor, and take informations, and grant warrants thereon: and I do hereby further certify that he is by the laws of Canada authorized to sign and issue such warrants as such Justice of the Peace. And I do further certify that the annexed copies of information or depositions, warrant and certificate, are properly and legally authenticated, so as to entitle them to be received in evidence, in the tribunals of Canada, of the criminality of the person charged therein of robbery. And I do further certify that the signature, L Lawrason, to the annexed certificate, is in the proper handwriting of him the said Lawrence Lawrason.

Given under my hand and seal of office, at the City of Montreal, in the Province of Quebec, and Dominion of Canada, this fifth day of Oct. 1870.

(Signed) WM. H CALVERT,
Vice-Consul-General.

Evidence was adduced on the part of both claimants and prisoner. On the part of the former it was proven that on the evening of the 1st day of April, 1870, one John Smith was at a tavern, kept by one Lively, at Westminster, in the county of Middlesex, Ontario, in company with a pensioner named Dunn, who had that day drawn his pension-money. The prisoner and several other persons, charged as his accomplices in the subsequent robbery, were also there, drinking with Smith and Dunn, according to Smith's evidence, who says that about half-past seven o'clock that evening he started to go out of the tavern, and was followed by the prisoner, who insisted upon seeing him (Smith) home; that after he had proceeded about three rods from the door of the tavern, he was caught from behind and pinioned; that prisoner raised his (Smith's) arm, and forced it back so as to cover his mouth, bending his head back; he says he was also struck on the head with something; his pockets were then searched, and some money and articles extracted therefrom. Upon regaining an upright position, he recognised prisoner, who still had hold of his arm. After being robbed he was allowed to go at liberty, and at once made his way to the London police station, and there stated to the chief that he had been robbed at Westminster, and was afraid Dunn would share the same fate. The chief declined interfering in the matter, as Westminster (which is divided from London by Clarke's Bridge) was not within his jurisdiction. A man named Hughes testified that he passed Lively's tavern at six o'clock on the evening in question, and saw prisoner and Smith there, as also those charged as prisoner's accomplices. The chief of the London police corroborated Smith's evidence as to the complaint made by him, and further stated that Smith, although he appeared to have been drinking, told a straight story. This, together with evidence that prisoner had not been seen in London or thereabouts since the robbery, closed the case of claimants.

The defence set up was, that Primrose was not on the Westminster side of Clarke's Bridge from five o'clock until half-past nine o'clock on the evening of the first day of April, and therefore could not have committed the offence charged. A man named Gagan stated that he was with prisoner on the London side of the bridge all that time; Albert, a brother of prisoner, said he saw Gagan and prisoner on the London side of the bridge that evening; and Edward Primrose

another brother, stated that he was a brakesman on the Great Western Railway, and that on the day in question his train (a construction train) arrived at London from Windsor about four o'clock, p.m, and on going on to the platform of the station he met his brother (the accused) and Gagan, and remained with them until half-past eight o'clock, p m, with the exception of an interval from a quarter past five o'clock to six, p.m., when he was at tea. Other evidence was adduced to show that Smith was not at Lively's when the alleged robbery took place. On this evidence rested the case for the defence.

In rebuttal, counsel for claimants produced the conductor of the train on which Edward Primrose was brakesman, and he testified that on the day in question he started from Windsor with his train at 10 50 a m., and did not arrive at London until 8 25 p.m.; and that Edward Primrose was with him on said train all that time, as one of his brakesmen. He also produced his time-book (kept by all conductors), in which entries were made each day of the departure and arrival of his train at each station, which bore out his testimony, and in which Edward Primrose's name was entered as brakesman on the day in question.

This closed the evidence on both sides, the taking of which had extended over several months, and on the 20th December last the case was argued before the said commissioner.

J. Cook, of Buffalo, counsel for the prisoner, moved for his discharge:—

As to the fact of the robbery having been committed, the claimants must rely altogether upon the evidence of Smith; and such being the case, Smith's evidence was contradicted in so many particulars by the evidence on the part of the defence, that it was unsafe to place implicit reliance upon it. The facts disclosed raise a very strong suspicion, if not presumption that Smith had robbed his friend Dunn, and in order to avert suspicion had accused the prisoner and other parties of the crime alleged. The commissioner must be satisfied, first, that an offence had been committed; second, that Primrose is the guilty party. The evidence produced on the part of the defence prove a complete *alibi*, and a sufficient doubt is raised as to the guilt of prisoner to entitle him to a discharge. If the commissioner should find against the prisoner he does not simply commit him to the courts of the United States, as a proper case to be presented to a grand jury of said courts, but his decision is of vastly more importance, as he would commit him to be taken to a foreign land, to be dealt with by strangers, amongst whom might be one who might regard his own safety as depending upon a conviction of the prisoner. If prisoner is extradited upon the suspicious testimony of Smith, uncorroborated as it is, where is the protection which the Government of the United States guarantees to those who are entitled to it?—for it has been well observed, that if this doctrine were to prevail, the liberty and character of every man in the country would be placed at the mercy, not of the examining magistrate (for he would have to assume that he had no discretion), but of any corrupt and infamous individual who might think proper to make a positive oath that a felony had been committed by the person whom he accused. The commissioner is to judge of the credit to be given to the witnesses who are produced to sustain the charge, and it is his duty to discharge the accused unless he is entirely convinced that there has been a *prima facie* case made out against him.

(*To be continued.*)

CORRESPONDENCE.

Will making in the Ontario Legislature.

To the Editors of the Law Journal

Gentlemen:—As I hear the Parliament of Ontario are making and changing the wills of testators, I wish to enquire of you whether it would probably be of any use for me to apply to that Honourable body to supply a deficiency in my father's will. The elder brothers of the family and my sister had each their farms given them many years ago by proper deeds, but my father kept the homestead in his own hands until his death, and disposed of it by will to my younger brother and myself, who had worked the farm from our boyhood after our brothers left home, and took care of him in his declining years, but he unfortunately got a neighbor to prepare the will, which the lawyers say is all right in every respect, except, that *there is but one attesting witness.* Do you think the Parliament would pass an act to make the will valid notwithstanding? If not, why should they not as well as change the will of the late Mr. Goodhue, of London.

Yours, &c., Neil McKellar.

[The difficulty is not so much to know what the members of the Legislature of Ontario, who have just returned to their homes, *would* have done, but rather what they *would not* have done—at least, so far as private Bills is concerned.

In the case put, there would be some show of reason for passing an Act to make the will valid, for it would probably be carrying out the wishes of the testator; whilst in the Goodhue case the collective wisdom, justice and equity of Ontario not only did not carry out the testator's carefully expressed intention, but did exactly the reverse. They felt so alarmed, however, as to the lengths this kind of legislation might lead *their successors*, and so ashamed of their part in it, that immediately after passing the Goodhue Act they passed another, giving power to the Judges to report to the House "in respect of any estate Bills, or petitions for estate Bills, which may be submitted to the Assembly." As far as precedents are concerned, there are enough and to spare for our correspondent's comfort.]—Eds. L. J.