DIARY FOR MAY.

1. Mon. *St. Philip and St. James.* Last day for County Treasurer to make up books and enter arrears, and to make yearly settlement. Last day, for apportionment of Gram. and Com. Sch. fund.
6. Sat. *St. John.*
7. SUN. *4th Sunday after Easter.*
11. Thur. Examination of Law Students for call to the Bar with Honors.
12. Frid. Examination of Law Students for call to the Bar.
13. Sat. Examination of Articled Clerks for certificates of fitness.
14. SUN. *Rogation Sunday.*
15. Mon. Easter Term begins. Articled Clerks going up for interim-examination to file certificates.
17. Wed. Interim-examination of Law Students and Articled Clerks.
18. Thur. *Ascension Day.* Last day for service for County Courts except York.
19. Frid. Paper Day, Q. B. New Trial Day, C. P.
20. Sat. Paper Day, C. P. New Trial Day, Q. B.
21. SUN. *Sunday after Ascension.*
22. Mon. Paper Day, Q. B. New Trial Day, C. P.
23. Tues. Paper Day, C. P. New Trial Day, Q. B.
24. Wed. Paper Day, Q. B. New Trial Day, C. P.
25. Thur. Paper Day, C. P. Open Day, Q. B.
26. Frid. New Trial Day, Q. B. Open Day, C. P.
27. Sat. Open Day.
28. SUN. *Whit Sunday.*
29. Mon. Paper Day, Q. B. New Trial Day, C. P. Declare for County Courts except York.
30. Tues. New Trial Day, Q. B. Paper Day, C. P.
31 Wed. Open Day, Q. B. New Trial Day, C. P.

The Local Courts' AND MUNICIPAL GAZETTE.

MAY, 1871.

GARNISHEE PROCEEDINGS IN THE DIVISION COURTS.

A correspondent calls our attention to this subject in connection with some remarks in Mr. O'Brien's annotation of the Division Courts Act of 1869, where it is said under section 9, "the residence of the garnishee would appear to decide not only the court where the claim against the garnishee is to be adjudicated upon, but draws to the same jurisdiction the judicial settlement of the account or dispute between the primary debtor and creditor."

The following case is then suggested:

A primary creditor obtains a judgment in court within the jurisdiction of which the garnishee resides against the primary debtor, residing within the jurisdiction of another court, for a cause of action which also arose in another division, but fails to obtain judgment against the garnishee. Both matters come on for trial at the same time—the claim against the primary debtor being fully determined before that against the garnishee.

There is nothing peculiar in this case, but it is suggested that by making use of this process and introducing a fictitious garnishee, (a very absurd suggestion, and which, if ever pursued, must result in a nonsuit and payment of all parties for their trouble, besides costs, under sec. 114 of Division Courts Act,) jurisdiction may be given to any court that the creditor may choose, and not that where the case would in ordinary course be tried. Possibly this might be done, but it is not likely to be a matter of common occurrence, and where it is done with the improper intent alluded to, it would result, in case the matter were properly brought before the judge, in the discomfiture of the creditor, in the shape of costs and delay in his suit.

The statute provides for two classes of cases, (1) "Where the primary creditor's claim is a judgment," and (2) "When judgment has not been recovered for the claim of the primary creditor;" but the latter class may be subdivided into cases where no action has been commenced, and where, though commenced, the suit has not gone to judgment. In the former case, the two clauses must, according to a strict interpretation of the Act, come on at the same court; but in the latter there is a difficulty in applying the Act in its strictest sense, for the original suit is already commenced in one court, and the Act, according to one construction, would necessitate the removal of this suit from that court to the court where the garnishee resides; but we hardly think that was the intention, whilst at the same time it certainly was the intention that all parties should be represented, if possible, at the court where the claim against the garnishee is to be adjudicated.

The heading of this article suggests to us to make some observations as to the general working of these garnishee clauses. Before doing so, we should like to hear what has been the experience of the clerks in some of the outer counties. We shall be glad to hear from some of our old friends on the subject, with a full expression of their views. It is those who have the daily practical working of such enactments as this who can throw most light on the subject. These remarks are also *apropos* of the recent attempt by some of those learned in the *higher* branches of the law to fritter away, for merely sentimental reasons, one of the most valuable parts of the Division Court system, the judgment summons process.

The Board of County Judges will probably meet so soon as the Chairman, who is now in

England on sick leave returns to Canada, and as they have under the 63 section of the Division Courts Act, the power to frame rules and make orders in relation to matters as to which doubts have arisen or may arise, or as to which there have been or may be conflicting discussions in any of the Division Courts, we think it well to postpone further remarks of our own and invite correspondents to lay before our readers any suggestions which may occur to them, as to the desirability of having questions under the Act, settled by legal sanction in a regular way.

PAYMENT OF EXECUTORS.

THIRD PAPER.

IV. *Privilege of executors and preference accorded to their compensation.*—In England a trustee and an executor will be allowed his expenses, even though he has a legacy as a reward for his trouble: *Wilkinson* v. *Wilkinson*, 2 Sim. & St. 237. In the case of an East Indian estate, where the executor had a legacy for his trouble, he was held disentitled to any commission; and he was not allowed, after a lapse of time, during which he had dealt in a contrary manner, to renounce his legacy and claim the usual compensation: *Freeman* v. *Fairlie*, 3 Mer. 24; see *Cockerell* v. *Barber*, 1 Sim. 23. In accord with this is the rule of the New York Revised Statutes, where it is laid down that when a provision shall be made by any will for specific compensation to an executor, the same shall be deemed a full satisfaction for his services in lieu of the statutory allowance, unless the executor shall renounce in writing all claim to the legacy: Tit. 3, Part ii, cap. 6, sec. 66. This rule has not been observed in this country; on the contrary, in *Denison* v. *Denison*, 17 Gr. 311, it is said that the executor being here entitled to compensation for his services, his acceptance of a legacy by way of compensation does not bar his right to further compensation in a proper case, where it is made to appear that the amount bequeathed is not a fair and reasonable allowance within the meaning of the statute; but if it is a sufficient compensation, then nothing more should be allowed.

Further, the executor is privileged to receive his commission before debts are paid; and in case of a deficiency of assets, he is to be preferred to all the creditors of the estate. This is upon the ground, that the allowance is for services which form part of the expense incurred in administering the estate, forming, therefore, a primary charge upon the assets before the payment of debts: *Harrison* v. *Patterson*, 11 Gr. 105, 112. It was held in *Anderson* v. *Dougall*, 15 Gr. 405, that a legacy by way of compensation to executors, though larger in amount than the sum which the court would have awarded for compensation, was entitled to priority over legacies which were mere bounties; and this for the reason that in cases of deficiency of assets, legacies for which there is valuable consideration are entitled to rank before others which are mere matters of bounty. This decision is, however, only applicable to cases in which the will in question has been made or republished after the passing of the statute giving the right to compensation.

V. *Right of compensation, and manner of allowing and apportioning the same.*

In the earliest case under the statute—*McLennan* v. *Heward*, 9 Gr. 279—it was held that, generally speaking, five per cent. was a fair commission to be allowed on all moneys collected and paid over, or properly applied; but that on all moneys received and paid over only under the compulsion of the decree in the administration suit (however honest the contention as to liability therefor may have been), no more than two-and-a-half per cent. should be allowed.

In fixing the quantum of allowance, regard should be had to the size of the estate, the care, judgment and circumspection required and exercised in its management, and the length of time over which the supervision extends: *Denison* v. *Denison*, 17 Gr. 310. Although the duties do not involve much manual or physical labour, and although a clerk has been employed, yet if they require and cause anxiety and watchfulness, skill and exactness, good judgment and honesty, all of which are rendered, then the allowance should be liberal: Per Vankoughnet, C., in *Proudfoot* v. *Tiffany*, cited in *Denison* v. *Denison*, 17 Gr. at p. 311. See *Matthews* v. *Bagshard*, 15 Jur. 977.

The present Chancellor has laid it down that regard should be had to the *amounts* passing through the executors' hands. In fixing the poundage payable to sheriffs on levying moneys under execution, the courts, both of common law and equity, have considered the amounts a proper element of consideration, allowing

the maximum percentage on small sums, and reducing the scale as the amount increases. This is a principle which may well be applied to executors' compensation. In the case in hand before the court, where it appeared that the estate was very large, and where there was no evidence of any particular trouble in the management, it was deemed reasonable to allow, for collecting and investing moneys upon mortgage up to $600, five per cent.; and for sums above that amount, three per cent. was thought sufficient: *Thompson* v. *Freeman*, 15 Gr. 384. In *Bald* v. *Thompson*, 17 Gr. 154, five per cent. was allowed on the purchase money, principal and interest, of lands collected; and it was said that in a special case, the executor might be allowed more for effecting sales of the property. In *Chisholm* v. *Bernard*, 10 Gr. 479, it was remarked by the court that five per cent. on moneys passing through the hands of the executor may or may not be an adequate compensation, or may be too much, according to circumstances. There may be very little money got in, and a great deal of labour, anxiety and time spent in managing an estate, where five per cent. would be a very insufficient allowance.

Thompson v. *Freeman* also lays down the principle that if the executor deals with the estate and settles claims in such a way that the sums upon which the commission is claimed do not actually pass through his hands, then the remuneration should be fixed, not by a percentage, but by a compensation commensurate to the labour, care and anxiety involved. See, upon this head, *Campbell* v. *Campbell*, 2 Y. & Coll. C. C. 607.

Where there are several executors, the one upon whom the chief burden of management rests may be entitled to twice as much compensation as his co-executor, and it will be left to the Master to apportion the commission among the recipients as they severally deserve: *Denison* v. *Denison*, 17 Gr. 311.

When the services extend over a considerable period, the commission should be allowed from time to time as earned, and credited thus upon the accounts, so as to reduce *pro tanto* the interest and perhaps the principal chargeable against the executor. If the account is not taken in this way, which is the strictly correct mode, then in some cases interest may be allowed upon the commission: *Denison* v. *Denison*.

After the Master has fixed the executor's remuneration, the court are very slow to interfere with his finding, unless he has been wrong in principle, or has been manifestly exorbitant or inadequate in his allowance. The general rule is—as laid down in *Knott* v. *Cutler*, 16 Jur. 754, S. C. 16 Beav.—that the quantum being entirely in the officer's discretion, the court will not entertain an appeal therefrom.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

CONVICTION FOR NOT PAYING TOLLS—C. S. U.C. CH. 49.—A conviction under Consol. Stat. U. C. ch. 49, sec. 95, stating that defendant wilfully passed a gate without paying and refusing to pay toll: *Held*, good. *Quære*, whether it would be sufficient to allege only that he wilfully passed without paying, without in any way shewing a demand.

Held, also, that the non-exemption of defendant, if essential to be alleged, was sufficiently stated in the conviction.

Held, also, the general form prescribed by Con. Stat. C. ch. 103, sec. 50, Sched. I. (1), being used, that it was clearly not requisite to shew that defendant was summoned or heard, or any evidence given.

Held, also, unnecessary to name any time for payment of the fine, as it would then be payable forthwith.

It was objected also; 1. That M., the keeper and lessee of the gate, had no authority to exact toll; 2. That the corporation had been dissolved; 3. That no board of directors had been appointed since 1866; 4. That if legally appointed they could not lease the gate; 5. That the lease to M. had expired; 6. That he could not take advantage of the penal clauses in the Act; 7. That it was not shewn that any tolls had been fixed: but *Held*, that these objections could not be taken, for where, assuming the facts to be true, the magistrate has jurisdiction, the conviction only can be looked at.

Held, also, as to objections 1. 4, and 6, that they were otherwise untenable; and as to Nos. 2, 3, and 5, that the existence of the corporation could not be enquired into on this application to quash the conviction.—*The Queen* v. *Caister*, 30 U. C. Q. B. 247.

SCHOOL TRUSTEES—JUDGMENT AGAINST—MANDAMUS TO LEVY RATE.—In 1862 the trustees of a school section issued their warrant to J. to levy a rate. One S., who was upon the roll, claimed

exemption as belonging to a Roman Catholic Separate School, and in 1868 recovered against J. in replevin for his goods which J. had seized. J. in 1866 sued the trustees of that year for indemnity, and recovered judgment, the action being defended. The trustees issued their warrant to levy a rate, including this judgment, and about $100 was levied and paid over to J., but many of the rate-payers refused to pay the proportion imposed for J's. claim. J. then, in 1869, having a *fi. fa.* on his judgment returned no goods, applied for a mandamus to the trustees to levy the balance due to him, none of these trustees having been trustees in 1866.

The application was refused, on the ground that the Court might enquire into the grounds of the judgment, and that the applicant was bound, but had failed, to shew clearly that it was recovered in a justifiable litigation.

Quære, however, whether apart from this the application could be granted, for the effect would be to levy a rate on a different body to pay the debt of a previous year.—*In re Johnson and the Trustees of School Section No.* 13 *in the Township of Harwich*, 30 U. C. Q. B. 264.

CRIMINAL LAW—INDICTMENT AGAINST RETURNING OFFICER AT ELECTION.—In an indictment against a deputy returning officer at an election, for refusing, on the requisition of the agent of one of the candidates, to administer the oath to certain parties tendering themselves as voters, the omission of the *name* of the agent from the indictment will vitiate it.

In the same indictment another count charged defendant with entering and recording in the poll books the names of several parties as having voted, although they had refused to take the oath prescribed by law:

Held, not an indictable offence, being a creature of the statute, which also prescribed the penalty and the mode of enforcing it.

Remarks upon the otherwise objectionable character of the indictment, in setting out in the inducement a copy of the poll book containing a number of names, while none were mentioned in the indictment itself, a reference being merely made to the "said list."—*Regina* v. *Bennett*, 21 U. C. C. P. 235.

INSOLVENCY—OFFICIAL ASSIGNEE—RIGHT OF ASSIGNEE TO GOODS SEIZED UNDER *fi. fa.*—The County Judge of a County in which no Board of Trade existed, appointed an official assignee for the County within three months after the Insolvent Act of 1869 came into force: *Held*, that such appointment was valid under section 31 of the Act, although a Board of Trade existed in an adjoining County, but had not appointed an assignee.

Quære, can a Board of Trade appoint an official assignee under section 31, *after* the lapse of three months from the time when the Act came into force?

When an assignment is made under the Insolvent Act of 1869, it is the duty of a sheriff, who has seized goods under a *fi. fa.* against the insolvent, to surrender the goods to the assignee, leaving the execution plaintiff to assert his privilege for costs, if any he has, in the proceedings in insolvency.

In pleading to a declaration, charging a sheriff with neglecting to make the money under a *fi. fa.*, an allegation that the execution debtor made an assignment under the Insolvent Act of 1869 to an official assignee for the County, appointed under the Act by the County Judge, and that the sheriff had surrendered the goods to the assignee, is sufficient without alleging that no Board of Trade existed in the County, or in an adjacent County, or that no assignee had been appointed by a Board of Trade; and it would be sufficient to aver that the assignment had been made to an official assignee for the County, without shewing how the assignee was appointed. —*Blakely* v. *Hall*, 21 U. C. C. P. 138

PRINCIPAL AND SURETY—LAPSE OF TIME—DESTROYED BOND—MUNICIPAL CORPORATION—SURETY FOR TREASURER.—One of the sureties for the treasurer of a municipal corporation being desirous of being relieved from his suretyship, the treasurer offered to the council a new surety in his place; and the council thereupon passed a resolution approving of the new surety, and declaring that on the completion of the necessary bonds, the withdrawing surety should be relieved; no further act took place on the part of the council, but the treasurer and his new surety (omitting the second surety) joined in a bond conditioned for the due performance of the treasurer's duties for the future, and the treasurer executed a mortgage to the same effect. The clerk on receiving these gave up to the treasurer the old bond, and the treasurer destroyed it; eight years afterwards, a false charge was discovered in the accounts of the treasurer of a date prior to these transactions:

Held, that the sureties on the first bond were responsible for it.

A surety to a municipal corporation for the due performance of the treasurer's duties is not relieved from his responsibility by the negligence of the auditors in passing the treasurer's accounts.

The fact of the treasurer having become re

duced in his circumstances after the auditing and passing of his accounts and before the discovery of an error in them, is no bar to a suit against the surety.—*The County of Frontenac* v. *Breden*, 17 Chan. 645.

SALE FOR TAXES—33 VIC. CH. 23, ONT.—DESCRIPTION.—It is not incumbent, under 33 Vic. ch. 23, Ont., for the tax purchaser, for the purpose of bringing himself within the protection of the first section of the Act, in cases where he has paid eight years taxes charged on the lands, to prove that the taxes so paid had been legally charged, but the production of the Treasurer's books, shewing that such taxes had been charged and paid, is sufficient.

Under that Act any person claiming under the tax purchaser may avail himself of the provisions of the Act.

The description in the Sheriff's deed was "75 acres of the front part of the West half of lot No. 5, in the 1st Concession of the Township of Winchester:

Held, sufficient under 7 Wm. IV. ch. 19.—*Fraser* v. *West*, 21 U. C. C. P. 161.

BY-LAW — ADOPTION BY MAJORITY — VOTING LIST OF VOTERS UNDER 29 & 30 VIC. CH. 51, SEC. 196, SUB-SEC. 7 — CONSTRUCTION. — *Held*, that the Statute providing for a poll to be taken for the passage of a by-law, which requires the assent of the electors of a municipality, requires only that the by-law shall be adopted by the majority of those qualified electors who actually do vote, and not of those entitled to vote.

Held, also, that the list which the Statute (29 & 30 Vic. ch. 51, sec. 196, sub-sec. 7) requires the Clerk of the Municipality to furnish the Returning Officer with is a list containing the names of all freeholders and tenants of realty assessed on the roll to an *amount sufficient* to entitle them to vote at *any* municipal election.—*Erwin* v. *Township of Townsend*, 21 U. C. C. P. 330.

ARSON.—The prisoner was convicted upon an indictment which contained two counts. The one was for setting fire to goods in a dwelling-house with intent to injure, and the other was for doing the same thing 'under such circumstances that if the building had been thereby set fire to the offence would have amounted to felony.'

The prisoner, from ill-will against the prosecutrix, broke up her chairs and other furniture, and making a pile of them on the stone floor of the kitchen of her lodgings, set fire to them, and had it not been for the exertions of the police the house would have been burned almost to a certainty.

The jury found in effect that the prisoner was guilty of setting fire to the goods with intent to injure the owner of the goods; but that he did not intend to injure the landlord, and that he was not aware that what he was doing would probably set the house on fire.

Held upon the 24 & 25 Vict. c. 97, ss. 3, 7, that the prisoner had been guilty of no offence, and therefore that the conviction must be quashed.—*Regina* v. *Child*, L. J. Rep. C. C. R. 1871.

DEED OF ASSIGNMENT — SOLICITOR'S LIEN.—The Court has no power to retain a deed which has been produced by a witness merely out of courtesy and to facilitate proceedings.

P., a witness, having a lien upon a deed, was asked by the Court to produce it. The deed was, upon its production, impounded by the Court.

Held, on appeal, that the Court had no power to retain the deed, even though it might be fraudulent.—*Re Till—Ex parte Parsons*, 19 W. R. 325.

CRIMINAL LAW.—A member of a firm, in order to cheat his partner, agreed with J. and P. to make it appear by false entries in the partnership books that P. was a creditor of the firm, and by these means to withdraw money from the firm, to be divided between them to the exclusion of the other partner. *Held*, that the agreement constituted a conspiracy, being a fraudulent combination to do acts which were wrongful, although not criminal.—*Regina* v. *Warburton*, L. R. C. C. 274.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

LAND TAKEN FOR THE ROAD.—Land subject to restrictions and formerly used as a grave-yard was taken for a street by authority of an Act of Parliament. *Held*, that the measure of the compensation to be given to the owner was the value of the land in its former character, not what would be its value to the person acquiring it.—*Stebbing* v. *Metropolitan Board of Works*, L. R. 6 Q. B. 37.

TENDER OF WRONG GOODS.—The plaintiff sold to the defendant cotton which was to be of a particular shipment, and in the ordinary way delivered marks of certain cotton as being such, and the defendant dealt with an assignee as if it were such; but, on discovery that it was not,

refused it; whereupon the plaintiff (a reasonable time in that behalf not having elapsed) tendered cotton of a proper shipment: this the defendant refused to accept, whereupon action was brought, and a verdict found for the plaintiff.

On a motion to enter a verdict for the defendant, on the ground that the plaintiff was estopped from making a second offer.

The Court held he was not.—*Tetley* v. *Shand*, L. J. Rep. 1871.

Dower—Fraud on Purchaser.—A man and woman lived together as husband and wife, the man having a wife living at the time; and land purchased in the man's name was paid for by the woman out of money of her own:

Held, that there was a resulting trust in favour of the woman.

Where for ten years a wife concealed from the public her relation to her husband, and allowed him to live with another woman as his wife under an assumed name—the real wife living in the neighbourhood and receiving from them her own support, it was held, that she was precluded from claiming dower out of land purchased during this period in the husband's assumed anme, and afterwards sold by him and his supposed wife to a purchaser who bought in good faith, and without any notice of the real relationship of the parties.—*Hoig* v. *Gordon*, 17 Chan. R. 599.

Lessor and lessee—Covenant to repair.—In an action by a lessee against his lessor for breach of covenant to repair the main timbers and roofs of the demised premises.

Held, that the lessee could not recover against the lessor for breach of covenant without having given him notice of repairs being required; that being a matter within the knowledge of the lessee, and not of the lessor. (Martin, B., *dissentiente*).—*Makin* v. *Wilkinson*, 19 W. R. 286.

Ambiguity.—Devise "to my nephew, Joseph Grant." The testator's brother had a son named Joseph Grant, and the testator's wife's brother also a son named Joseph Grant. *Held*, that there was a latent ambiguity, and that evidence was admissible to show which nephew was intended.—*Grant* v. *Grant*, L. R. 5 C. P. (Ex. Ch.) 727; s. c. 5 C. P. 380.

Common Carrier.—In a suit against common carriers for loss of goods, if the defendant show that the cause was the immediate act of God, *i. e.* an extraordinary flood, the onus of showing negligence is thereby cast on the plaintiff.

If the proximate cause of the loss was the flood, the defendants are not liable, even though the remote cause was their own negligence.—*Memphis & Charleston R. R. Co.* v. *Samuel Reeves*, Sup. Ct. U. S.—*Phil. Leg. Gazette.*

Appropriation of Payments.—The rule, that general payments are appropriated first to the earliest items on the other side of an account, does not entitle a surety to claim that a concealed item, which, from its not being known, the debtor had not been charged with, should be deemed to have been satisfied by the moneys which had from time to time been paid by the debtor, and which had when so paid been charged by both parties against the other sums received by the debtor on behalf of the creditor.—*The County of Frontenac* v. *Breden*, 17 Chan. 645.

Negligence — Escape of Rain-water from Pipe.—The plaintiff, who was the occupier of the lower floor of a stock of warehouses, the upper portion of which (including the roof) was in the occupation of the defendant, sought to recover compensation for damage done to his goods by the alleged negligence of the defendant in allowing rain-water to escape from the roof to the plaintiff's premises.

At the trial, it appeared that the roof of the building was supplied with the ordinary machinery for carrying off the water, viz.: a gutter, box, and vertical pipe leading to a cesspool; but that, a hole having been made in the box, apparently by rats, the water had escaped, and, instead of being carried off by the pipe, had found its way to the plaintiff's floor and destroyed his grain stored there to the extent of £90. It was also proved that only four days before the mischief occurred, the defendant had, according to his custom, caused the gutter, box, and pipe to be examined, when they were found to be all in order. Martin, B., ruled that there was no evidence of negligence on the part of the defendant, and the verdict was accordingly entered for him.

The Court held that there was no evidence of negligence, and that there was no implied contract or duty on the part of the defendant to provide against injuries arising from such a cause as had led to the mischief sustained by the plaintiff.—*Carstairs* v. *Taylor*, L. J. Rep. Exch. 1871.

Note—Renewal.—The defendant accepted the plaintiff's bill, and the plaintiff gave him a written promise that, if any circumstances should prevent him from meeting the bill, the plaintiff would renew it. The defendant was prevented from meeting it, and within a reasonable time after it became due applied to the plaintiff to renew it; he refused. *Held* (Cleasby, B., dis-

senting), that this was a good defence to an action on the bill.—*Millard* v. *Page*, L. R. 5 Ex. 312.

BREACH OF PROMISE.—The defendant promised to marry the plaintiff upon the death of the defendant's father. An action was brought while the father was still alive, but the defendant had positively refused ever to marry the plaintiff. *Held* (MARTIN, B., dissenting), that there was no breach of the contract.—*Frost* v. *Knight*, L. R. 5 Ex. 322.

STATUTE OF FRAUDS.—The defendant, being chairman of a local board, asked the plaintiff whether he would lay certain pipes; the plaintiff said, "I have no objection to do the work if you or the local board will give me the order." The defendant said, "You go on and do the work and I will see you paid." The work was not authorized by the board, and they refused to pay forit. *Held*, that the defendant's contract was that he would be answerable for the expected liability of the board, and that this was a promise, within the Statute of Frauds, to be answerable for the debt of the board although the board was never indebted.—*Mountstephen* v. *Lakeman*, L. R. 5 Q. B. 613.

ONTARIO REPORTS.

COMMON PLEAS.

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

TAYLOR v. THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF VERULAM.

Trespass—Lots with double-fronts—Road unauthorized by by-law.

Where half lots, under the double-front system of survey, did not correspond or meet in any point, and land was taken by the municipality from the plaintiff's lot, in order to make a road to join the side line road allowances, without the passage of any by-law for the purpose,

Held, that there was no power so to do, and that trespass would lie against the municipality.

[21 U. C. C. P. 154.]

SPECIAL CASE.

The action was for certain alleged trespasses committed under the authority and by the direction of the defendants, under the following circumstances: The plaintiff was owner in fee of lot 19, in 9th concession of the township of Verulam, in the county of Victoria, which township was surveyed with double-front concessions, and the lands were described in half lots, east and west halves, as mentioned in sec. 28 of ch. 93, Consol. Stat. U. C. There was an allowance for road or communication line, according to said survey, on the north side of each of said halves of lot 10, and between said halves there was a jog of about 90 rods.

The alleged trespasses consisted in an attempt, under defendants' authority, to force a road along the centre of the concession, for the purpose of joining the ends of the allowance for road, such road to be 33 feet on each side of the centre of the said concession, and plaintiff's fences were taken down for the purpose, defendants claiming the right so to do without the passing of a by-law to open a new road, under the general powers given them by the Municipal Acts, or paying any compensation for the land taken for such road.

The question was whether defendants had such right.

C. S. Patterson appeared for the plaintiff.

D. B. Read, Q.C., for the defendants.

GWYNNE, J.—I know of no principle of law, nor was any urged upon us, which could justify the contention of the defendants that they have any power to make the road complained of otherwise than under a by-law passed in due form of law for the purpose of opening a new road. Our judgment, therefore, on this special case is for the plaintiff, with 1*s.* damages, and full costs of suit, as agreed upon.

HAGARTY, C. J.—The trespass has been committed under a misapprehension of the meaning of the 28th section of U. C Consol. Stat. ch. 93. The section merely prescribes a mode of determining the boundary, and has no effect upon roads. It says that "a straight line joining the extremities of the division or side lines of any half lot in such concession, drawn as aforesaid shall be the true boundary of that end of the half lot which has not been bounded in the original survey." But for the "jog" the road allowance along the north side lines of the east and west halves of 10 would have been a continuous straight line. Because half lots under the double front system of survey happen not to correspond, or if they did not meet in any point, we see no reason for taking land from the next lot to make a road to join the side line road allowances. The Statute gives no sanction to such a course.

GALT, J., concurred.

Judgment for plaintiff.

COMMON LAW CHAMBERS.

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

THE QUEEN v. PATTEE.

Sci. fa. to repeal a patent—Fiat of Attorney General—Who to grant.

A *sci. fa.* to set aside a patent was issued at the instance of a private relator without the fiat of either the Attorney General of the Dominion or of Ontario having been first obtained.

Held, 1. That a fiat was necessary.

2. That the Attorney General of Ontario was the proper authority to grant the fiat in such a case.

[Chambers, January 5, 1871.—*Mr. Dalton.*]

A writ of *sci. fa.* was issued at the instance of John Lough, to set aside a patent, granted on the 12th August, 1870, to Gordon Burleigh Pattee; on the ground that the patent was contrary to law, in that Pattee was not the first and true inventor of the invention, for reasons which it is unnecessary to state at length.

Certain proceedings were taken on this writ, the regularity of which was questioned; and finally the defendant obtained a summons calling

on John Lough, the relator in this case, and the Attorney-General for Canada, to show cause why the writ of *sci. fa.* in this cause, and the service thereof, and declaration, and rule to plead, should not be set aside on the ground, amongst others, that no fiat of the Attorney-General for Canada, or of the Attorney-General for Ontario, was filed before the issue of said writ, or at any time since, and that said writ issued without authority, and that all subsequent proceedings in this cause have been had without proper authority therefor; or why all further proceedings in this cause should not be stayed until a fiat or warrant of the Attorney-General shall have been filed authorizing the proceedings in this cause.

R. A. Harrison, Q. C., for the relator, John Lough, showed cause.

S. Richards, Q. C., for the defendant, supported the summons.

C. Robinson, Q. C., appeared for the Attorney-General of the Dominion.

Mr. DALTON.—In the opinion which I have come to, it is not necessary to detail minutely the proceedings. I will assume that there has been an appearance in the suit, or what justified the plaintiff in supposing that there was an appearance. As soon as conveniently could be, after discovering that no fiat of the Attorney-General had been obtained, and without any further step in the defence, the defendant has moved to set aside the *scire facias*. I think that, for such a cause, which goes to the authority for the whole proceeding, he has a right to move, at almost any stage, upon first discovering the defect of authority; and I do not imagine that anything would take away that right but the acquiescence of the defendant himself, either express or implied, which must of course be after he had become aware of the want of authority.

There are two important questions:—first, is a fiat necessary? and, secondly, if so, by what authority should it be granted?

Before the statute of Canada, 1869, cap. 11, the books and the actual practice shew that a fiat was necessary. By the Consolidated Act of Canada, cap. 34, the proceedings to be had upon the writ of *scire facias* were directed to be according to the law and practice of the Court of Queen's Bench in England; and Con. Stat. U. C. cap. 21, sec. 14, also makes the fiat necessary. By the English practice, not only is it necessary to the institution of proceedings, but the Attorney-General has the control of the case throughout, and may at any time enter a *nolle prosequi*: Hindmarch, 396.

But Mr. Harrison contends that section 29 of the Act of 1869 supersedes the former statutes and practice, and is now in itself the complete enactment we must look to, as to this remedy by *scire facias;* and it was with this belief that he issued the present writ without a fiat. That section enacts that any person desiring to impeach a patent may obtain a sealed and certified copy of the patent, and of the petition, &c., and may have the same filed in the particular court according to his domicile, which court shall adjudicate on the matter, and decide as to costs; that the patent, &c., shall then be held as of record in such court, so that a writ of *scire facias* under the seal of the court, grounded upon such record, may issue for the repeal of the patent for legal cause, if upon proceedings had upon the writ the patent shall be adjudged void.

Now Mr. Harrison contends that this clause supersedes the old law, and gives the absolute right to any person desiring to impeach a patent to issue and proceed upon a *scire facias* without the leave of any one; and he instances several known proceedings where the name of the Queen is used by a private prosecutor as of course.

Mr. Richards, on the other hand, contends that the short terms in which the *scire facias* is mentioned, are used with reference to the known practice as to such a writ, existing at the time when the Act was passed, and that the process is therefore subject to all the old established conditions.

By the use of the name of the Queen, the prosecutor is placed in this position of advantage: he cannot be subjected to a *non-pros.;* he cannot be non-suited; the defendant cannot demur to evidence; it is doubtful whether a bill of exceptions will lie to the charge of the judge; if the defendant obtains judgment, he is not entitled to costs; and—what strikes me as more important still—the prosecutor can go into the box and establish his own case as a witness, but the defendant in a Crown case cannot be examined in his own behalf. When it is considered that this proceeding is very often taken by a person who himself claims the right to the invention in the patent he is attacking, it certainly seems a peculiar state of things that one of the rival claimants can be a witness and the other cannot.

The fiat is not a mere form, then, but a matter of substance; and it is very necessary that some authority should exist to control the exercise of the power which it confers, and to guard against its abuse.

Now, the 29th section of the Act of 1869 does *not*, it seems to me, give the person desiring to impeach a patent the *right* to issue a *scire facias;* it certainly does not do so in terms. It gives him the right to record the patent, "so that a writ of *scire facias may* issue for the repeal of the patent." But on whose authority is it to issue? As the clause does not expressly say that *he* may do it, and it is not only formally but substantially a suit of the Queen, it seems to follow, even without regard to the previous known practice, that it can only be on the authority of the Attorney-General that the writ is to issue. So that I agree with Mr. Richards. Consistent with this is the repealing clause of the act of 1869. It repeals cap. 34 only in so far "as it may be inconsistent with this Act." Now, the provision of sec. 20 of cap. 34, that the proceedings upon the *scire facias* shall be "according to the practice of the Court of Queen's Bench in England," is not inconsistent with the Act of 1869, but in furtherance of it. Therefore, whether Mr. Harrison is right or not in contending that cap. 21, Con. Stat U. C. is inapplicable to a patent issued under the Act of 1869 because it is not issued under the great seal, I think a fiat was necessary for this writ of *scire facias*.

But whose fiat?

It may provoke a smile that an officer of the court, in deciding a matter of practice, should incidentally consider a question under our constitution, which is of some importance in itself, and is a part of larger questions. It is of little

matter, however, where it may begin; it must come to the decision of the court. I was told, when I suggested the question on the argument, that it was very doubtful whether the Minister of Justice or the Attorney-General for Ontario be the proper authority to grant a fiat in such a case. I must therefore suppose it is doubtful, though I myself cannot see the grounds for doubt. I cannot think that *two* authorities exist, *either* of whom may grant it. Some one authority, and one *only*, must answer here the position of the Attorney-General in England in respect of this matter.

The British North America Act, section 92, enacts that, "In each Province the Legislature may exclusively make laws in relation to matters coming within the class of subjects next hereinafter enumerated, that is to say [after twelve other heads], 13, Property and civil rights in the Province; 14, The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

These sections express the powers of the Legislature of Ontario.

Then as to the Executive, section 135 enacts, "that until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities or authorities, at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver-General, by any law, statute or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the discharge of the same or any of them." So that, as is consistent and natural, the executive and legislative functions of the Government of Ontario seem to be co-extensive.

The words of this statute have been well weighed. But what definition of "property and civil rights" can exclude the right of enforcing a civil remedy in the courts? To lawyers, that seems the practical proof and test of all right: without it, at any rate, no other right is of any real value. And further, there is attributed to the local jurisdiction, "the administration of justice in the Province, * * * including procedure in civil matters." Then if the legislative and executive powers as to "property and civil rights in this Province," and "the administration of justice," and as to "civil proceedings in the Courts," are in the Government of Ontario, can it be thought that any other authority is for the present purpose indicated, than that of an officer of Ontario responsible to its Legislature? For let it be borne in mind that he who has the discretion to grant has also the discretion to withhold, and that it is only by *scire facias* that a subject in Ontario, aggrieved by a patent wrongly issued, can seek the remedy of its avoidance.

I desire not to amplify; but other reasons, in and out of the Act, point to the conclusion that the Attorney-General of Ontario is the authority that must grant or refuse the fiat which is necessary to the real plaintiff here to pursue this remedy. I shall not be understood as speaking of the case where the crown itself seeks to avoid a patent; I speak only of the present case, where a subject domiciled in Ontario seeks to avail himself of the peculiar privileges of the Crown to assert his own private interests.

I think the proper order is that, upon payment of the costs of this application, and filing a fiat of the Attorney-General of Ontario—which may be done *nunc pro tunc*—this summons be discharged. Upon failure to do this within two calendar months, that the writ and all proceedings be set aside with costs, to be paid by the relator.

Order accordingly.

COUNTY COURT OF NORFOLK.

(*Reported by* HENRY ELLIS, ESQ., *Barrister-at-Law.*)

CLEMENS QUI TAM V. BEMER.

Returns of convictions—C. S. U. C. cap. 124—How affected by the Law Reform Act of 1868, and by 32-33 Vic. caps. 31 & 36.

Returns of convictions and fines for *criminal* offences being governed by the Dominion statute 32-33 Vic. cap. 31, sec. 76, and not by the Law Reform Act of 1868, are only required to be made semi-annually to the General Sessions of the Peace.

Semble, that the right to legislate upon this subject belongs to the Dominion Parliament, and is not conferred upon the Provincial Legislatures by the B. N. A. Act, 1867.

[St. Thomas—*Hughes*, Co. J.]

This was a penal action, brought against a magistrate for not returning a conviction.

The declaration alleged that, before and at the time of the trial and conviction thereinafter mentioned, and from thence hitherto, the defendant was a justice of the peace in and for the said county of Elgin; and that theretofore, and subsequently to the 1st day of January, 1870, to wit, on the 5th day of February, 1870, the hearing of a certain charge and complaint against the now plaintiff, for unlawfully assaulting and beating one Mary McLoud, and the trial of the now plaintiff upon the said charge and complaint, were duly had and took place within the said county of Elgin, before the now defendant, as and being such justice of the peace as aforesaid; and which trial and hearing were so had and took place under a certain law in force in this Province giving jurisdiction in the premises to the defendant as such justice; and at and upon such hearing and trial, and within the said county of Elgin, the now defendant, as and being such justice as aforesaid, duly and in due form of law convicted the now plaintiff of the said offence so charged as aforesaid; and upon and by such conviction, and within the said county, imposed upon the now plaintiff a certain fine and penalty of, to wit, twelve dollars, for the said offence; which said conviction took place before the second Tuesday in March, 1870: yet the defendant, so being such justice as aforesaid, did not, on or before the second Tuesday in the month of March, in the year last aforesaid, make to the clerk of the peace of the said county of Elgin a return of such conviction, or of such fine or penalty, in writing under his hand in the form or to the effect prescribed by the statutes in that behalf, or any return thereof whatsoever, on or before the said second Tuesday in the month

of March, in the year aforesaid; but wholly refused and neglected so to do, although a reasonable time after such conviction, for making any and every such return as aforesaid, had elapsed before the said second Tuesday in the month of March, in the year last aforesaid; contrary to the form of the statutes in such case made and provided: whereby, and by force of the said statutes, the now defendant forfeited for his said offence the sum of eighty dollars: and thereby, and by force of the said statutes, an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have of and from the now defendant the said sum of eighty dollars; yet the defendant hath not paid the said sum of eighty dollars, or any part thereof. And the plaintiff claims, as well for himself as for our lady the Queen, eighty dollars.

The defendant pleaded not guilty by statute (21 James I, cap. 4, sec. 4), on which the plaintiff joined issue.

A verdict was found for the plaintiff.

McDougall for the defendant, moved in arrest of judgment, on the ground that the declaration shewed no cause of action under C. S. U. C. cap. 124, and there was no proof of defendant having incurred a penalty under that or any other statute.

Kains showed cause.

HUGHES, Co. J.—At the time of the trial of this cause, and at the argument of the rule nisi, I was strongly inclined to the view that the plaintiff had the right to maintain this action against the defendant, on the grounds that it was not in the province of the Dominion Parliament to repeal Con. Stat. U. C. cap. 124, that being a statute not affecting the criminal law or criminal procedure; and that it was exclusively within the jurisdiction of the Provincial Parliament to alter, amend or repeal that statute, or substitute another in its place; because the fines referred to therein might affect the revenue of the Province, or of the municipalities therein, and it was merely passed to protect the Provincial revenue, by compelling minor magistrates, such as justices of the peace, who are appointed by the Provincial Government, to account for and pay over fines received by them under summary convictions. (*Vide* subsec. 15 of sec. 92, British North America Act, 1867.)

After a more attentive perusal of the British North America Act of 1867, I am induced to come to the opposite conclusion, and to view the matter differently. The intention of the Ontario Legislature, when passing the 4th subsection of the 9th section of the Law Reform Act of 1868 (in the absence of direct expression), may fairly be presumed to have been merely to so amend Con. Stat. U. C. cap. 124, as to relate to cases not criminal, or for enforcing any law of the Province made or to be made in relation to matters coming within any of the classes of subjects enumerated in section 92 of the B. N. A. Act, 1867, over which the Provincial Legislature has exclusive jurisdiction to make laws.

By the 14th subsection of section 92 of the B. N. A. Act, 1867, the administration of justice in the Provinces, including the constitution, maintenance and organization of Provincial courts, both of civil and criminal jurisdiction, is conferred upon the Provincial Legislature.

The declaration in this case sets forth that the conviction referred to, as made by the defendant, the return of which he ought to have made, was the imposition of a fine for an assault and battery; and inasmuch as that cannot be in any sense considered as what the statute means by "the administration of justice," it is in my opinion in every sense to be regarded as appertaining to the criminal law and the procedure in criminal matters. A summary proceeding before a justice of the peace is authorised for a common assault or battery (when it is requested by the prosecutor), *i.e.*, for what would otherwise be triable by indictment as a misdemeanor, and be ranked as a criminal offence. No authority other than the Dominion Parliament could deal with it. The procedure and forms for the prosecution and conviction of offenders in such cases are laid down, a return of the conviction by a given time is prescribed, and a certain consequence is to follow a neglect of making that return. We find the whole subject, from the complaint to the return of the conviction, dealt with by the criminal Acts of 1869, passed by the Dominion Parliament. (*Vide* 32-33 Vic. cap. 20, sec 43, and cap. 31.) I can only regard an assault and battery as a criminal offence, although triable summarily; and therefore, by the 27th subsection of the 91st section of the B. N. A. Act, 1867, anything connected with the prosecution or its consequences must belong to the exclusive authority of the Parliament of Canada, and could not be dealt with by the Provincial Parliament.

By the Law Reform Act of 1868 (sub-section 4 of section 9), the Con. Stat. U. C. cap 124, was only amended, not repealed: the returns of summary convictions and fines by justices of the peace were required to be made quarterly to the clerk of the peace, instead of to the Courts of General Sessions of the Peace. I therefore consider the reasonable construction to be placed on that amendment, as expressive of the intention of the Legislature, to have been to confine the 4th subsection of the 9th section of the Law Reform Act of 1868 to convictions and fines for the classes of subjects enumerated in sub-section 15 of section 92 of the B. N. A. Act, 1867, as to cases, not criminal, over which the Provincial Legislature has control, and that that Legislature did not thereby assume to act beyond the scope of its powers, or to legislate concerning returns of convictions in criminal cases.

If it were competent for the Dominion Parliament to legislate concerning the summary trial of criminal offences, and lay down the procedure therefor, I apprehend it was also competent for them to deal with the return of the convictions and its results, to prescribe their legitimate conclusions, and to affix or impose any penalty for non-observance of what was laid down. With that power, as a necessary consequence, must follow the jurisdiction to alter, amend or repeal any existing law affecting the same subject, for the purpose of assimilating the criminal laws of the whole Dominion. I cannot therefore understand that the Dominion Legislature has jurisdiction over a given subject up to a certain point, and that the Provincial Legislature has the right to step in and begin legislation where the Dominion Parliament has left off. The jurisdiction to legislate and deal with any given subject must be entirely under the control of the one or

the other, and not under the piecemeal authority of both. If it were otherwise, the statute law of the country would assume such a fragmentary character that in a few years we should find it difficult to wend our way through its perplexities.

By referring to the Dominion statute of 1869, 32, 33 Vic. cap. 36, schedule B, we find cap. 124 of the Con. Stat. U. C. wholly repealed, except section 7 (which section 7 relates to returns to be made by sheriffs): with this saving, however, in the second paragraph of section 1, "such (repeal) shall not extend to matters relating solely to subjects as to which the Provincial Legislatures have, under the B. N. A. Act, 1867, exclusive powers of legislation, or to any enactment of any such Legislature for enforcing, by fine, penalty or imprisonment, any law in relation to any such subject as last aforesaid." So that until the passing of 32 & 33 Vic. caps. 31 and 36, by the Dominion Parliament, the Con. Stat. U. C. cap. 124, for all purposes of the subject in controversy in this suit, remained unrepealed and unchanged, in so far as any return of a conviction or fine for a *criminal* offence was concerned, or for any offence dealt with by the criminal law of the Dominion Parliament, or whereby the procedure in criminal matters was prescribed. None but the Dominion Parliament could amend, alter or repeal it, and that for all purposes set forth in the 15th subsection of the 92nd section of the B. N. A. Act, 1867; and as to any subject referred to in the second paragraph of section 1 of the Dominion statute 32 & 33 Vic cap. 36, the Con. Stat. U. C. cap. 124, and the Law Reform Act, 1868, remained unrepealed.

The Con. Stat. U. C. cap. 124, required the return of the conviction to be made to the next ensuing General Quarter Sessions of the Peace, and the 76th section of the Dominion statute, cap. 31, prescribed that a return of convictions should be made by the justices of the peace to the next ensuing "General Sessions of the Peace;" and as the Law Reform Act, 1868, limited the number of sessions of the Court of General Sessions of the Peace to two in each year, instead of four, as formerly, I think the defendant was only bound by law to make a return to the General Sessions of the Peace next after the conviction, which would be the 14th day of June, 1870; and as the allegation in the declaration is that he did not make the return before the second Tuesday in March, 1870, and as there was no allegation made which would bring the case within the provisions of the Dominion statute of 1870, 33 Vic. cap. 27, sec. 3, I think the judgment should be arrested.

The defendant was not bound to return the conviction or fine so soon as the second Tuesday of March, 1870, or before the 14th day of June, in that year.

But supposing the foregoing not to be the correct view of the respective powers of our Legislature, and supposing Con. Stat. U. C. cap. 124 not to be fitly classed with the criminal law or criminal procedure, then I should assume the position, that by the 91st section of the B. N. A. Act, 1867, general powers of legislation are conferred upon the Dominion Parliament, "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces;" and without restricting those general terms, it is therein declared, "for greater certainty," to what the exclusive legislative authority of the Parliament of Canada extends. I think, therefore, that by that general power, the Dominion Parliament had the exclusive right to alter, amend or repeal Con. Stat. U. C. cap. 124, and to substitute other enactments in its place; because there is no subsection of the 92nd section, under which it may be held that the exclusive power to legislate upon that subject is conferred upon the Provincial Legislatures; for I cannot see how it belongs to the subject of "property and civil rights" (subsec. 13), or to "the administration of justice" (subsec. 14), or "the imposition of punishment, by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matters coming within any of the classes of subjects enumerated in that section" (subsec. 15); nor is it concerning a matter of a merely local or private nature in the Province (subsec. 16). The rule to arrest the judgment must therefore be made absolute.

Rule absolute to arrest judgment.

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.

(Continued from page 64.)

F. W. Macdonald, of the Ontario Bar (who was allowed to conduct the case for the claimants by the courtesy of the Commissioner and counsel for prisoner), for claimants:

The evidence of Smith is corroborated in every particular by witnesses produced on the part of the claimants, except as regards the actual commission of the offence, of which he is the only one who can give evidence. With regard to the *alibi* attempted to be proved, that was most effectually disposed of by the evidence of the conductor of the train on which Edward Primrose was brakesman; and as the evidence of the witnesses for the defence all point to the same day, it is evident that they are speaking of a day other than the first day of April, or are committing wilful perjury.

The Extradition Treaty provides that the prisoner shall be extradited on such evidence of criminality as, according to the laws of the State of New York, would justify his apprehension and committal for trial: 1st vol. Brightley's Digest, p. 270, sec. 7; 6 Opinions of Attorney-General, 207; 14 Howard's Supreme Court Rep. 193, 144; 3 Wheeler's Cr. Cases, 482.

The rule of evidence is prescribed by the Treaty: 4 Opinions of Attorney-Gen., 330, 201. If, after the examination of complainant and witnesses on both sides, it appears that an offence has been committed, and that there is probable cause to believe the accused guilty, the commis-

sioner must commit for trial: Rev. Stat. N. Y., p. 709, sec. 25; Barbours's Cr. Law, 567.

The true enquiry is, whether the whole evidence has furnished reasonable and probable cause for believing that prisoner is guilty of the alleged crime or offence. If it does, he should be committed: 1st vol. Arch. Cr. Pleadings, 45, note. When the commissioner or magistrate is convinced that the facts as proved do not furnish probable cause for believing prisoner guilty, he ought to discharge him; but, on a question of facts entirely, if he should have a reasonable doubt, he ought to commit prisoner for trial, as it is the province of a jury to decide questions of fact. But if not entirely satisfied that prisoner is guilty, yet if the circumstances proved are positively suspicious, and such as to render his guilt probable, and the crime be an indictable offence, he should commit: Swan's Justice, 482; 1 Burr's Trials, 11, 15; 4 Dallas, 112. That degree of evidence is not required which would be necessary for the conviction of the party. The commissioner must ascertain whether there is reasonable ground to believe that the party accused may have committed the crime: Barbour's Cr. Law, 565.

It must be proved, 1st, that an offence has been committed; 2nd, that it is within the Treaty; 3rd, that there is reasonable and probable cause to believe prisoner guilty.

1st. The offence charged is robbery. As to its commission, we have the depositions taken at London before the police magistrate there, properly certified, &c., which are in themselves evidence of the fact that a crime has been committed, and that the accused is the person who committed the same: 1 vol. Brightley's Digest, 270; 2 Ib. 134. There is also the evidence adduced on the part of the claimants, which is positive.

2nd. The crime charged is robbery, and is within the Extradition Treaty.

3rd. The evidence, as a whole, furnishes reasonable and probable cause sufficient to warrant the committal of the accused for trial. Before the commissioner can come to the conclusion to discharge the prisoner, he must be satisfied that the case made out by the claimants is so entirely displaced by the evidence on the part of the defence, that there can be no doubt of the innocence of the accused.

The defence set up is purely an *alibi*, which must be strictly proved in the face of the evidence on the part of the prosecution, and must be so overwhelming in all its parts as at once to carry conviction with it. Is it so in this case?—or rather, is not the *alibi* so completely met as to fall to the ground? There is an evident attempt to get in false testimony to sustain the theory of the defence. If proved false in part, does not suspicion attach to the rest?

There is no process to compel the attendance of witnesses, and it is a difficult matter to induce parties to attend in a foreign country to give evidence, the natural inclination of parties being to refrain from giving evidence against neighbours. The claimants have experienced this difficulty in this matter.

It is ridiculous to suppose that Smith should endeavour to throw suspicion on prisoner, and at the same time state that so many persons were at Lively's, any one of whom could disprove his allegations if untrue.

No evidence of good character was adduced on the part of the defence.

As to conflicting evidence, &c., see *In re Bennet G. Burley*, 1 U. C. L. J., N. S., 46, 48, 49, 50; *Ex parte Martin*, 4 U. C. L. J., N. S., 198; *Regina* v. *Reno & Anderson*, Ib. 815, 821.

When the court enters upon the consideration of evidence for defence, a trial of fact has begun, and it is the peculiar province of a jury to determine questions of fact. If the prosecution make out a good *prima facie* case, and evidence on the defence throws doubt upon it, it is the province of a jury to pass upon it.

It is certainly due to the citizens of the United States that they should be protected against murderers, and those who attempt to commit murder, and against pirates, robbers, &c., and that these men should be extradited on the demand of a foreign government, where the crime was committed, and there punished.

GEORGE GORHAM, U. S. Com.—The prisoner's extradition was asked for upon two charges, one of murder and the other of robbery, both at Westminster, Province of Ontario, and Dominion of Canada. The person murdered is said to have been John Dunn, and the robbery was from the person of John Smith, and both deeds are alleged to have been done on April 1st, 1870.

Aside from the complaint made before the Canadian magistrate, and the warrants issued thereon against this prisoner, there is no evidence to warrant me in holding Thomas Primrose upon the charge of murder; and as that is not sufficient, he is discharged from custody upon that charge.

Upon the charge of robbery, a long and exhaustive examination has been had, and every facility afforded both to the British Government and to the prisoner.

It is not necessary to review the testimony at length. Smith, the complainant, was produced, and swore positively that he was robbed, as charged, by Primrose, on the evening of April 1st, 1870; and the defence offered is, that at the hour when the crime is alleged to have been committed, Primrose was in London, and so far from the scene of the robbery that its commission by him was impossible. The prisoner's brother, a brakesman on a working train of the Great Western Railway, testified to having left his train at London, at the close of work, about four o'clock in the afternoon of April 1st, and having been in company with prisoner nearly all the time after that, until nine o'clock in the evening, and that one Gagan was with them; and Gagan is produced, and makes a similar statement. A young boy, another brother of the prisoner, testified to seeing the prisoner and Gagan and Edward Primrose in London, as detailed by Edward.

If these statements be true, Thomas Primrose did not commit the crime; but I am not satisfied of the truth of these stories.

The prosecution have produced the conductor of the train upon which Edward Primrose was employed, and he has shown his time-book (kept by all conductors); and I am satisfied that on the first of April Edward Primrose did not reach London till about eight o'clock, and that either he and Gagan and the lad are mistaken in the

day of which they speak, or have committed wilful perjury. Smith, too, is borne out in his statements by other witnesses, who swore to seeing prisoner at the place of the alleged robbery about the time in question.

My duty is simply that of a committing magistrate, and I am only to enquire whether there is probable cause to believe that the crime of robbery has been committed; and if so, whether there be like cause to believe that the prisoner committed the crime. I am not to try issues of fact: this is the exclusive province of a jury, with which I have neither the right nor the inclination to interfere.

The fact that if held for extradition, the prisoner is to be taken away from this country, to be tried in the courts of a foreign power, ought not to influence my decision one way or the other. I have entire confidence that the accused will receive a fair trial in Canada: to suppose otherwise woule be unjust and discourteous.

The Extradition Treaty should be construed liberally and fairly to the prisoner; and while every reasonable opportunity should be given 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.

In this case I cannot have any doubt but that had the crime been committed in my own country, any magistrate would deem it his duty to commit the prisoner to await the action of a grand jury; and, entertaining such views, I cannot deny the application of the British Government.

The prisoner will therefore be recommitted to the custody of the Marshal, to await the granting of a warrant of extradition by the President.

REVIEWS.

THE COMMON LAW PROCEDURE ACT AND OTHER ACTS RELATING TO THE PRACTICE OF THE SUPERIOR COURTS OF COMMON LAW AND THE RULES OF COURT, WITH NOTES. By Robert A. Harrison, Esq., D. C. L., Q. C.— Second Edition — Toronto: Copp, Clark & Co. London: Stevens & Haynes, 1870.

We have noticed the receipt of the various numbers of this work, as they from time to time appeared, and we hailed with pleasure the last one, which, giving us the index and table of cases, &c., enabled us to have the book bound and put in a shape for daily reference.

When the first edition of Mr. Harrison's work was given to the public, it was received as a boon by the profession here, welcomed with words of commendation by our Judges, and called forth the most flattering notices from the legal press in England, where sharp criticism is the rule, and where, though Colonial productions may have a courteous reception, they do not escape the probe of the critic. However, it stood the test, and this was the more creditable to the Editor when it is remembered, that his work was prepared principally before he devoted himself to the general practice of a lawyer's office. Knowing this and knowing the extent of his experience and industry, and the position he has won for himself since the first edition was published, we looked with confidence for even a greater measure of success for the second, and in this we are not disappointed.

On examining the notes we find that they are more condensed than in the first edition, arising partly from the fact that doubtful points which were then discussed at length, are now settled by judicial interpretation; and this process of expunging matter of discussion and substituting the authoritative decisions of the Courts, will account for the fact that while in the present edition there is *nearly double* the matter to be found in the first edition, the book itself is no larger, and equally if not more convenient for use—and here we may remark that considerable space has been gained and the look of the volume much improved, by making the notes the whole width of the page.

As it now stands, the work is eminently useful for reference as an annotated edition of the acts contained in it, and as compared with other similar works on the same subject, the volume before us is by far the most complete. But is not not merely an annotated edition of an act; it is, in addition, a collection of treatises on different subjects, exhausting the cases decided in the English, Irish and Canadian Courts. To explain this, the reader will find that on page 105 *et seq.*, the practice as to change of venue is fully discussed. Upon reference to note *r*, page 169, there will be found full notes on equitable pleadings, occupying no less than eight pages of closely printed matter; and again on turning to the Rules, we find on page 630 *et seq.*, a short but comprehensive and compact *resumè* of the law respecting security for costs—and these are only a few out of many instances that could be referred to under this head.

As to the merits of the work itself it is scarcely necessary for us to add our meed of praise to that accorded to the first edition by all parties who have had occasion either to criticise or to use it, but we can say that the

present edition is in every respect superior to the first, as well as to the number of acts annotated, as to the number of decisions collected and analysed and the mode of arranging them, the compactness of the information given and the correctness of the citations and authorities, the number of which is immense, there being no less than over 8,500 cases referred to throughout the work. Of one thing the editor may well feel no little gratification, namely, that when in the prior edition he hazarded an opinion as to what the decision would be likely to be on any doubtful point, or suggested an interpretation of any clause in the act, the views expressed have in every instance within our knowledge been borne out by judicial authority.

The contents are: The Common Law Procedure Act (Con. Stat. U. C. cap. 22); Writs of Mandamus and Injunction (Con. Stat. U. C. cap. 23); Absconding Debtors (Con. Stat. U. C. cap. 25); Ejectment (Con. Stat. U. C. cap. 27); The Common Law Procedure Amendment Acts (Stat. Can. 29, 30 Vic. cap. 42, and Stat. Ont. 31 Vic. cap. 24); Executions against Goods and Lands (Stat. Ont. 31 Vic. cap. 25). The Law Reform Act (Stat. Ont. 32 Vic. cap. 6); The Law Reform Amendment Acts (Stat. Ont. 33 Vic. cap. 7, and Stat. Ont. 33 Vic. cap. 8); Regulæ Generales (as to Attorneys, Practice, Pleadings, and Miscellaneous).

American Law Review. April, 1871. Boston: Little, Brown & Co., 110 Washington Street.

The contents of this number are as follows: The North Eastern Fisheries; Expert Testimony; The Bar Association of the City of New York; Digest of the English Law Reports; Selected Digest of State Reports; Digest of Cases in Bankruptcy; Book Notices; List of Law Books Published in England and America since January, 1871; Summary of Events; Correspondence, &c.

The first is a long and well written, but to our minds not a convincing article, containing some rather startling propositions on a subject which has been already largely discussed in all its bearings.

The reviewer commences by referring to the following provisions of the different treaties relating to the subject:—

Article III. of the treaty of peace, concluded Sept. 3, 1783, is in these words:

"It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coasts of Newfoundland as British fishermen shall use, but not to dry or cure the same on that island; and also on the coasts, bays and creeks of all other His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands and Labrador, as long as the same shall remain unsettled; but as soon as the same, or either of them, shall be settled, it shall not be lawful for said fishermen to dry or cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

The writer then goes on to say:—

"The treaty of peace signed at Ghent, Dec. 24, 1814, was silent upon the subject of the fisheries. A correspondence soon thereafter arose, in which the American Government maintained the position that all the rights secured to citizens of the United States in 1783 were still subsisting, notwithstanding the intervening war of 1812; while the British cabinet insisted that all these liberties were swept away at the outbreak of hostilities between the two countries. The convention signed at London, Oct. 20, 1818, was the result of these opposing claims. Article I. thereof is as follows:—

"Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of any kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coasts of Newfoundland from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks from Mt. Joly on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast. And that the American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbors,

and creeks of the southern part of the coast of Newfoundland, hereinbefore described, and of the coast of Labrador: but as soon as the same, or any portion thereof, shall be settled, it shall not be lawful for said fishermen to dry or cure fish at such portion, so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America, not included within the above-mentioned limits. *Provided,* however, That the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter, of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as shall be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby secured to them."

Article I. of the "reciprocity treaty," signed June 5, 1854, so far as it is important to quote, is as follows:—

"It is agreed by the high contracting parties that, in addition to the liberty secured to the United States fishermen by the above-mentioned convention of Oct. 20, 1818, of taking, curing and drying fish on certain coasts of the British North American colonies therein defined, the inhabitants of the United States shall have in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind except shell-fish on the sea coasts and shores, and in the bays, harbors, and creeks, of Canada, New Brunswick, Nova Scotia, Prince Edward's Island, and the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish. *Provided,* That in doing so they do not interfere with the rights of private property or with British fishermen."

"Article V. provides that the treaty is to remain in force ten years after it goes into operation, and further until twelve months after either party gives a notice terminating the same. It was terminated in March, 1866, by the United States Government."

After stating his views of the rights of American fishermen upon the basis of the treaty of 1818, the writer goes on to argue that the effect of Article III. of that treaty, which he calls a renunciatory clause on the part of the United States, was removed by the reciprocity treaty of 1854, although the latter was abrogated by the American government itself, as already stated. The argument used is ingenious, but the same reasoning would seem to prove not only that the treaty of 1818 was at an end, but also that of 1783, which would of course be proving rather too much. In fact, considering all the circumstances and the motives leading to the repeal of the Reciprocity Treaty, the position taken on behalf of the Americans, is not altogether unlike that of an individual taking advantage of his own wrong—a course of procedure which has become chronic with the government of the United States, and which they seem to think has become legalized for their benefit, by custom and prescriptive right.

The conclusion at which the writer arrives is doubtless sufficiently satisfactory to his readers in the United States:—

"Article III. of the treaty of 1783, is therefore in the nature of an executed grant. It created and conferred at one blow rights of property perfect in their nature and as permanent as the dominion over the national soil. These rights are held by the inhabitants of the United States and are to be exercised in British territorial waters. Unaffected by the war of 1812, they still exist in full force and vigor. Under the provisions of this treaty American citizens are now entitled to take fish on such parts of the coasts of Newfoundland as British fisherman use, and also on all the coasts, bays, and creeks of all other of his Britannic Majesty's dominions in America, and to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, the Magdalen Islands and Labrador."

We trust that the labours of the Joint High Commission at Washington may make the dispute between the countries matter of historical interest rather than a source of irritation.

CANADIAN ILLUSTRATED NEWS. George Desbarats, Montreal.

Amongst the recent numbers of the *Canadian Illustrated News* is one which contains some excellent pictures of the marriage ceremony of Her Royal Highness Princess Louise and the Marquis of Lorne. We are glad to see that a Canadian Illustrated Journal has achieved such a measure of success, and we certainly think that M. Desbarats, the very enterprising Editor, deserves the thanks

of the community for having projected and kept up this paper, which bids fair at no distant day to rival the *Illustrated London News* or the *Graphic*. There is no doubt but that M. Desbarats paper far surpasses any of the Illustrated Journals of our American neighbours, and should be well encouraged, which will tend further to its improvement.

LEGAL GAZETTE. Philadelphia.

A recent number contains an eloquent defence of Mr. David Dudley Field, the well-known lawyer and law reformer in New York, from an article in the *Westminster Review* on the corrupt subserviency of some members of the United States judiciary to certain members of the Bar there. In the course of the article the writer takes occasion to indulge in a little of the Anglo-phobia with which our neighbours are afflicted, saying that the British "are signally unjust to everything American." The complaint that this country has generally made has been that the English are singularly partial to certain American institutions simply because seen at a distance, but at all events these remarks are singularly irrelevant, when the writer on the same page states, that the objectionable article was written by a *Boston lawyer*.

The salaries of the Judges of a State Court are not liable to United States income tax. Congress has no power to impose such a tax upon the government machinery of a Sovereign State.

A JURYMAN FINED. — Judge Ludlow, of the Court of Common Pleas of Philadelphia, in sentencing a *white* man to pay a fine of $200 for refusing to serve upon a jury with a colored man at the present term, said: "I am sorry to see such an exhibition in a court of justice. While it is painful for me to inflict punishment upon you, it is necessary to teach you where you are and what duty you owe. I shall be compelled to imprison you until the fine is paid. You must understand, sir, that the law of the land has made the colored man your equal in the jury box, and while you may not be pleased with it, you must obey the law. I shall order you into custody until you pay your fine, and I shall also impose an additional fine of $200 every time you refuse to serve."

A Chicago legal paper says that "a case was recently decided in Illinois upon the question of admitting atheists as witnesses in court. The testimony of a well-to-do merchant of that neighborhood was objected to on the ground that the witness was an atheist. This the witness admitted, but affirmed at the same time that he considered an oath binding on him. The judge decided that, under the constitution, no one could be denied any civil right or privilege on account of his religious opinions." A cotemporary remarks that they would have thought the objection was that the witness had *no* religious opinions.

LEGAL APHORISMS.—The defendant's counsel, in a breach-of-promise suit, having argued that the woman had a lucky escape from one who had proved so inconstant, the judge remarked that "what the woman loses is the man as he ought to be." Afterward, when there was a debate as to the advisability of a marriage between a man of 49 and a girl of 20, his lordship remarked that "a man is as old as he feels; a woman as old as she looks.—*Bench and Bar.*

APPOINTMENTS TO OFFICE.

REFEREE IN CHAMBERS.

THOMAS WARDLAW TAYLOR, of the City of Toronto, Esquire, Barrister-at-Law, to be Referee in Chambers of the Court of Chancery for Ontario. (Gazetted February 25th, 1871.)

NOTARIES PUBLIC.

PETER PURVES, of the Town of Brantford, Gentleman, Attorney-at-Law. (Gazetted January 14th, 1871.)

FRANK C, DRAPER, and WILLIAM MULOCK, of the City of Toronto, Esquires, Barristers-at-Law, and BENJAMIN V. ELLIOT, of the Village of Exeter, Esquire. (Gazetted January 28th, 1871.)

STEPHEN GIBSON, of the Town of Napanee, JAMES WATSON HALL, of the Town of Guelph, and JOHN ELLEY HARDING, of the Village of St. Marys. (Gazetted February 4th, 1871.)

WILLIAM HENRY BARTRAM, of the City of London, Gentleman, Attorney-at-Law. (Gazetted 18th Feb., 1871.)

WILLIAM LYNN SMART, of the City of Toronto, Esquire, Barrister-at-Law, JOHN McCOSH, of the Town of Paris, Gentleman, Attorney-at-Law, and JAMES W. MARSHALL, of the Township of Euphrasia. (Gazetted 4th March, 1871.)

WILLIAM NORRIS, of the Town of Ingersoll, GEORGE MARTIN RAE, of the City of Toronto, GEORGE DENMARK, of the Town of Belleville, Esquire, Barrister-at-Law, FRANCIS W. LALLY, of the Town of Barrie, WM. BOGGS, of the Town of Cobourg, Gentlemen, Attorneys-at-Law, and DAVID EWING, of the Village of Dartford. (Gazetted 11th March, 1871.)

JAMES LAMON, of the Village of Uxbridge, and GEO. SIMMIE PHILIP, of the Town of Galt, Gentlemen, Attorneys-at-Law. (Gazetted 25th March, 1871.)

WILMOT RICHARD SQUIER, of the Town of Goderich, GEORGE MOUNTAIN EVANS, of the City of Toronto, and JAMES ALEXANDER McCULLOCH, of the Town of Stratford. (Gazetted 8th April, 1871.)

SAMUEL SKEFFINGTON ROBINSON, of the Village of Orillia, Gentleman, Attorney-at-Law. (Gazetted 15th April, 1871.)

EDMUND HENRY DUGGAN, of the Village of Meaford, and MICHAEL HEUSTOF, of the Town of Chatham, Esquires, Barristers-at-Law. (Gazetted 22nd April, 1871.)

THOMAS DAWSON DELAMERE, of the City of Toronto, WM. McKAY WRIGHT, of the City of Ottawa, Esquires, Barristers-at-Law, and JOHN R. ARKELL and FRANCIS CLEARY, of the Town of Windsor, Attorneys-at-Law. (Gazetted 29th April, 1871.)