

Justice Gwynne said: "A judgment of a Court of Justice is open to fair comment and criticism which may call in question its soundness in point of law, even though it be still open to revision upon appeal." (*In re Henry O'Brien*, 16 S.C.R., pp. 213 and 225).

My object in writing and publishing the article in question was intended as a humble contribution to "that fair criticism upon the public administration of justice which," Mr. Justice Strong says, "every one is entitled to write and publish."

I have too high a regard for the Bench, and too many respected friends upon it throughout the Dominion, to knowingly publish an unfair criticism upon their conduct. I need scarcely add that any misrepresentation of facts in such an article would weaken, if not utterly destroy, the author's intended effect.

This being my position, I am not concerned to explain, at any great length, the opening clause of my article, which Mr. Masters stigmatizes as "misleading as well as grammatically absurd." He at least has caught its meaning fairly well.

I was firing at two very different objects, which happened to be in a line, and apparently I pulled both triggers simultaneously. But I hit the Assistant Reporter. Now, while he is flapping the water so vigorously, I may safely reload, and after pursuing the more important object of my enquiry a little further, I shall return to him. The more important object is, of course, the case in question, and the points of law decided or discussed in it.

The opinion of any Supreme Court Judge is entitled to great respect, even though it be a mere dictum, and so I think it may be useful to briefly comment on the views taken by some of their Lordships in this case.

The Chief Justice, it will be remembered, based his judgment upon a release alleged to have been given by the plaintiff to the C. P. R. It was not pleaded, and although the defendants' solicitor knew all about it weeks before the trial, no application to set it up was made, nor evidence given of it.

A very similar question arose in *Edevain v. Cohen*, 41 Chy.D., 563, where an effort was made to set up a judgment against some joint tort feisors. North, J., refused to allow the amendment, and his decision was affirmed by the Court of Appeal (43 Chy.D., 187).

In giving the judgment of the Court, Cotton, L.J., said:—"It has been contended that a former judgment obtained in another action by these plaintiffs against other tort feisors engaged in this transaction was a bar to this action, and that the appellant was entitled to raise that point without any amendment of the pleading. . . . The contention of the appellant, however, is that he is only raising a point of law, not an issue of fact. But that is not so; the amendment would raise facts to enable a point of law to be relied upon, and those facts ought, according to the rule, to have been pleaded by the present appellant in answer to this action. Then it is said that the appellant ought to have liberty to amend his pleadings. An application to that effect was made to Mr. Justice North, and the learned judge, after he had heard all the evidence, refused leave to amend. That was done by him in the exercise of his discretion, and that fact alone, to my mind, is a strong reason to induce us now to refuse leave to amend.