DIARY FOR NOVEMBER.

1. Tues. *All Saints.*
5. Sat... Articles, &c., to be left with Sec. Law Society.
6. SUN. *21st Sunday after Trinity.*
13. SUN. *22nd Sunday after Trinity.*
16. Wed. Last day for service for County Court.
18. Frid. Examination of Law Students for call to the Bar.
19. Sat... Examination of Articled Clerks for certificate of fitness.
20. SUN. *23rd Sunday after Trinity.*
21. Mon. Michaelmas Term begins.
24. Thur. Last day for setting down and giving notice of re-hearing
25. Frid. Paper Day, Queen's B. New Trial Day, C. P.
26. Sat. Declaration County Court. Paper Day, Common Pleas. New Trial Day, Queen's Bench.
27. SUN. *1st Sunday in Advent.*
28. Mon. Paper Day, Q. B. New Trial Day, C. P.
29. Tues. Paper Day, C. P. New Trial Day, Q. B.
30. Wed. *St. Andrew.* Paper Day, Queen's Bench. New Trial Day, Common Pleas.

The Local Courts'
AND
MUNICIPAL GAZETTE.

NOVEMBER, 1870.

THE HON. WILLIAM HUME BLAKE.

It is our sad duty to record the death, at Toronto, on the 15th instant, of the Hon. William Hume Blake, Ex-Chancellor of Upper Canada, in his sixty-second year.

Although some years have passed since Mr. Blake retired from his position on the Bench, and thus practically severed his connection with the profession, we cannot permit the occasion to pass without a tribute to his memory.

He was born in the county of Wicklow, Ireland, on the 10th March, 1809, at Kiltegan. Of this parish, his father, the Rev. Dominick Edward Blake, who died at the early age of fifty from the same disease which has now carried off his son, was Rector. He was educated at Trinity College, Dublin, and was at first intended for the medical profession, having studied under Sir Philip Crampton. He subsequently thought of entering the Church, as in fact did his brother, the Rev. D. E. Blake, late Rector of Thornhill.

In 1832 Mr. Blake emigrated to Canada, and settled in the township of Adelaide, with other members of his family, having shortly before he left Ireland married his cousin, Catherine Hume, the grand-daughter of William Hume, M.P. for Wicklow, well known in his day as a loyal gentleman, murdered by the rebels in 1798.

He commenced the study of the law in 1834, in the office of Mr. Washburn; and though he began his legal studies later in life than is usual, he set to work with so much energy that he appeared to compress into a few years the work usually allotted to many.

He formed a partnership with Mr. Joseph C. Morrison, now the senior Puisne Judge in the Queen's Bench, and they were afterwards joined by the late Dr. Connor, who, as well as his partners, was also, in 1863, elevated to the Bench.

Though for several years one of the most able, fearless, eloquent and successful of advocates, Mr. Blake will be best remembered in his intimate connection with the Court of Chancery, as its first Chancellor. The reformation of this Court was undertaken by the Baldwin-Lafontaine Government, of which Mr. Blake was Solicitor-General, in 1843; and it was then established on its present footing mainly through Mr. Blake's exertions. He was naturally selected by his colleagues as the proper and most desirable person to fill the seat of Chancellor, to which he was appointed on the 30th September, 1849; and the wisdom of the choice was proved by the thorough and efficient manner with which he set to work to remodel and thoroughly renovate and reform the then existing system of Chancery practice in every branch and detail.

Mr. Blake was a warm politician of the Liberal school; and in those days when politics ran high, he was never accused of being lukewarm in his adherence to his party. In fact his temperament made him enter upon all he undertook—whether we speak of him in the heat of a political contest, in the halls of the legislature, or as an advocate identifying himself with the cause of his client—with a vehement energy which, though it sometimes made him enemies, gained even from them a grudging respect, and made him a reputation which out-lives the troublous times when he was best known to the public.

Whilst Sir Edmund Head was Governor General, Mr. Blake was appointed Chancellor of the University, and zealously and earnestly devoted himself to the task of raising the University to the honorable position which it now occupies. All who were brought in contact with him will bear testimony to the manner in which he discharged the duties of this office.

In 1862, ill-health compelled the Chancellor to resign his seat on the Bench; but though

he was afterwards appointed one of the judges of the Court of Appeal, he was never able to undertake any judicial duties. He sought relief from the painful disease (gout) which afflicted him by a journey to a milder climate, from which he returned only a few months before his death.

Though the Law Society desired that the remains of one so eminent in the profession should be paid the highest mark of respect by them as a body, the funeral was, at the earnest wish of the bereaved members of his family, quite private, though numerously attended.

RIGHTS AND LIABILITIES OF OFFICIAL ASSIGNEES.

The case of *Archibald* v. *Haldan*, decided by the Queen's Bench during last Easter Term, is one of considerable interest to official assignees, and indeed to all those who are in any way connected with proceedings in insolvency.

The action was brought by a mortgagee against an official assignee, for the wrongful taking and detention of certain chattels covered by the plaintiff's mortgage, and the two leading questions raised upon the argument were:

1st. Whether an official assignee is a public officer within the meaning of Con. Stat. U. C. c. 126, and is, under section 10 of that statute, entitled to notice of action; and 2ndly. Whether a mortgage creditor of the insolvent can sue an official assignee who has sold the mortgaged chattels among the other effects of the insolvent.

As to the first of these questions, Wilson, J. held, that though the tendency of the English cases, and the dictum of Best, C.J., in *Haly* v. *Mayor of Lyme*, 5 Bing. 91, are in favor of considering a sheriff, or even a bishop, or a clergyman in certain cases, as public officers (and an official assignee would surely come within such a category); yet, by the decisions of our own courts a sheriff has been held to be without the scope of the statute when acting even as an officer of the court in a civil suit between private parties (*Mc Whirter* v. *Corbett*, 4 U. C. C. P. 203), and that, by at least a parity of reasoning, official assignees cannot be considered public officers within the meaning of the act, and are not therefore entitled to notice of action.

As to the second question, after quoting the 50th section of the Insolvent Act of 1869, which had been cited during the argument as an insuperable bar to the plaintiff's right of action, and which declares that

"Every interim assignee, guardian and assignee, shall be subject to the summary jurisdiction of the court or judge in the same manner and to the same extent as the ordinary officers of the court are subject to its jurisdiction, and the performance of their respective duties may be compelled, and all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property upon, in, or to any effects or property in the hands, possession or custody of the assignee, may be obtained by an order of the judge on summary petition in vacation, or of the Court on a rule in term, and not by any suit, attachment, opposition, seizure or other proceeding of any kind whatever; and obedience by the assignee to such order may be enforced by such judge or court under the penalty of imprisonment as for contempt of court or disobedience thereto, or he may be dismissed, in the discretion of the court or judge:"

The learned judge went on to remark:

"The words, 'all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property, upon, in or to any effects or property in the hands, possession, or custody of the assignee, may be obtained by an order of the judge on summary petition, and not by any suit,' appear to me to apply to proceedings between creditors, parties to the insolvency proceeding, or who have it in their power to become parties thereto. In that respect it is like the private forum, established by arbitration between the Trustees of the Savings Bank and its depositors: *Crisp* v. *Bunbury*, 8 Bing. 394, referred to in the argument.

"The statute cannot prevent (unless by the very plainest words, which I think have not been used) a person who is not a creditor at all, and whose property, lands, goods, money and other effects have been wrongfully taken as the property of the debtor, from pressing his redress in the ordinary courts of law."

The section above quoted, like too many others upon our statute book, appears to stand greatly in need of judicial interpretation if not of legislative amendment.

If, on the one hand, as appears from the judgment, no meeting of the creditors was ever called, and the sale was made by the official assignee on his own responsibility, and without authority from either the creditors or the judge, it certainly would be unjust that the

mortgagee should have no right of action against the person by whom his property was thus disposed of.

But if, on the other hand, that meeting of the creditors was called which the act expressly enjoins, (and nothing was alleged to the contrary either in the pleadings or upon the argument,) but the mortgagee, who, for all that appears, was unquestionably a creditor of the insolvent, refused to come in and prove his claim with the rest, it is a very great and unreasonable hardship for the assignee to be subjected to the inconvenience and expense of a suit at law, for acts within the scope of his legal authority, and even in the discharge of a duty imposed upon him by Statute, and executed according to his best skill and judgment.

ROYAL MARRIAGE ACTS.

We follow the example of a legal cotemporary in England in referring to the legislation which affects the approaching marriage of the Princess Louise to the Marquis of Lorne. It may be that it is not a matter which touches us very closely, but we are glad to feel that the time has not yet come when we can look with indifference upon a ceremony which, though it is to take place so many thousand miles away, is still of much significance in itself and of interest to the subjects of a hereditary limited monarchy.

Much has been said and written about the evils of the law, which, as is generally supposed, has prevented a member of the royal family from marrying a subject, but there is much misapprehension as to the effect of the statutes on the point; nor can it be denied that the practice which has prevailed for so many years has some points to recommend it, although productive of some evil; and it may truly be said that in nothing except in the sound of the title is the English nobleman inferior to the petty German princes who have been taken as husbands for the princesses of England.

But we must not wander from the point. The English *Law Journal* gives the following sketch of the legislation affecting Royal Marriages:—

"It was not till the reign of Henry VI. that any legislation took place with the view of controlling marriages contracted by members of the royal family; but the occasion of the marriage of Katherine, mother of Henry VI., with Owen Tudor, a private gentleman, the statute 6 Henry VI. was passed. That statute prohibited the marriage of a Queen Dowager without the consent of the King for the time being, the reason quaintly assigned being 'because the disparagement of the Queen shall give greater comfort and example to other ladies of estate who are of the blood royal more lightly to disparage themselves.' In the reign of Henry VIII., when kings' wives 'began to multiply on the face of the earth,' Parliament took upon itself to control, to some extent, the marriages of some members of the royal family. The statute 28 Hen. VIII., c. 18, made it high treason for any man to contract marriage with the King's children, his sisters or aunts *ex parte paterna*, or the children of his brethren or sisters. This statute went but a small way to effect the purpose contemplated by the legislature; for by the letter of the Act the King's sons, or brothers, or uncles would be excluded from the provisions of the Act. These statutes are now matter of history; indeed the 28 Hen. VIII. c. 18, was repealed by the 1 Edw. VI. c. 12. The Act now in force, commonly known as the Royal Marriage Act, is the 12 Geo. III. c. 11. That statute provides, by section 1, that no descendant of the body of his late Majesty King George II., male or female (other than the issue of princesses who have married, or may hereafter marry, into foreign families), shall be capable of contracting matrimony without the previous consent of His Majesty, his heirs or successors, signified under the Great Seal and declared in Council (which consent to preserve the memory thereof is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the Privy Council); and that every marriage or matrimonial contract of any such descendant, without such consent first had or obtained, shall be null and void to all intents and purposes whatsoever. Section 2 provides that, in case of any such descendant of the body of his late Majesty King George II., being above the age of twenty-five years, shall persist in his or her resolution to contract a marriage disapproved of or dissented from by the King, his heirs or successors, then such descendant, upon giving notice to the King's Privy Council (which notice is hereby directed to be entered in the books thereof), may, at any time after the expiration of twelve calendar months after such notice given to the Privy Council as aforesaid, contract such marriage, and his other marriage with the person before proposed and rejected may be duly solemnised without the previous consent of His Majesty, his heirs or successors; and such marriage shall be good as if this Act had never been made, unless both Houses of Parliament shall, before the expiration of the said twelve months, expressly declare their disappro-

bation of such intended marriage. The last section of the Act provides that any person who shall wilfully solemnise or assist at the celebration without such consent shall incur the penalties of a præmunire.

"We had occasion to recite these provisions of the legislature about four years ago, on an occasion less auspicious than the present, but we venture to repeat them now in order that the precise state of the law may be better understood. There is one criticism upon the Royal Marriage Act, 12 Geo. III., c. 11, which may be made, and which seems to us to show that the Act must be amended at a future date. The only descendants of George II. exempt from the Act are 'the issue of princesses who may have married, or may hereafter marry, into foreign families.' Therefore the children of the Crown Princess of Prussia, of Princess Louis of Hesse, of Princess Christian of Schleswig-Holstein, and of the Princess Teck will be exempt from the Act. But as the Marquis of Lorne cannot be held to be a member of a foreign family, it would seem that the issue of his marriage with the Princess Louise will be subject to the Act, and that the Crown may, at a future day, enjoy the right to dictate its wishes as to any matrimonial alliance sought to be formed by the house of Campbell."

SELECTIONS.

DEGREES OF NEGLIGENCE.

The distinction between the various degrees of negligence is a doctrine which has been affirmed from the earliest period of the common law. It was, however, received from the civil law without question; and, there being comparatively little opportunity for tracing the history and origin of the civil law further back than the days of Justinian, this distinction has always rested upon an apparently arbitrary foundation,* and has of late been very seriously called in question. Indeed we may say that the general disposition of legal critics has for some years been in favor o ignoring the classification of negligence into degrees as unpractical and useless. The first criticism of this kind which we find in the reports is contained in an opinion of Lord Denman, delivered in 1843, in which he says, "When we find gross negligence made a criterion to determine the liability of a carrier, who had not given the usual notice, it could perhaps have been reasonably expected that something like a definition should have been given to the expression. It is believed further, that in none of the numerous cases on this subject is any such attempt made; and it may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists" (*Hinton* v. *Dibbin*, 2 Q. B. 646, 661). This was followed by Baron Rolfe in *Wilson* v. *Brett*, (11 M. & W. 113), who, in an action against a gratuitous bailee, told the jury that he could see no difference between negligence and gross negligence,—that it was the same thing with the addition of a vituperative epithet, and further, that the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it. The jury finding for the plaintiff, under these instructions, the court refused to grant a rule for a new trial: Lord Abinger saying, "We must take the summing up altogether; and all that it amounts to is that the defendant was bound to use such skill in the management of the horse as he really possessed." In *The New World* v. *King* (16 Howard, 474), Curtis, J., expressed considerable doubt as to whether any distinction between degrees of negligence could be usefully applied in practice. In *Perkins* v. *New York Central Railroad Co.* (24 N. Y. 207), Smith, J., said, "The difficulty of defining gross negligence, and the intrinsic uncertainty appertaining to the question as one of law, and the improbability of establishing any precise rule on the subject, render it unsafe to base any legal decision on distinctions of the degrees of negligence;" and he also approved the *dictum* of Lord Denman before quoted. In *Wells* v. *New York Central Railroad Co.* (24 N, Y. 181, 190), Sutherland, J., after reviewing the doctrine of degrees of negligence at some length, dismissed it by saying that the classification might be philosophically correct, but was impracticable, and that attempts to make it useful and practicable had produced confusion and made it mischievous. In *Grill* v. *General Iron Screw Collier Co.* (Law Rep. 1 C. P. 612), Willes, J., approved of the *dictum* of Baron Rolfe above cited, and said, "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really an absence of such care as it was the duty of the defendant to use." In support of this view he cited *Beal* v. *South Devon Railway Co.* (3 H. & C. 337); but in that case the court said, "It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief

* It is, however, a grave mistake to suppose that any of the principal rules of the civil law are arbitrary. Nothing is better understood than that the Code of Justinian was simply the reduction to form of pre-existing treatises on the law and every section of that code is to be considered as the mature result of the experience, argument and deliberation of hundreds of years preceding. The classification of care and negligenee into three degrees was not invented by Tribonian, but had been found necessary by the practical experience of generations before him, and had doubtless been the subject of repeated discussions, such as are now required to determine the question as a new proposition. Undoubtedly this does not prove that the conclusion reached by the Roman lawyers was correct; nor, even if it was correct then, does it *necessarily* follow that the same classification is adapted to the wants of modern society. But the nature of a bailment is the same in all ages; and there is a strong presumption that rules which were developed by Roman experience, as necessary for the government of such transactions, cannot be safely discarded in our own times. Certainly they must not be set aside, summarily and with contempt, as not evolved from practical experience, simply because we have lost the record of the experience upon which they were founded.

Baron, in the Court below, when he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them.'" And in the same case in which Mr Justice Willes expressed the opinion above cited, Montague Smith, J., said, "The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence."

After much consideration and examination, we have come to the conclusion that the root of the whole controversy on this point lies in the assumption, on one side, that the meaning of the word negligence is the want of that care which the law requires, and, on the other side, that its meaning is simply the want of *some* care, whether more or less,—whether required by law, or not so required. In short, if "negligence" means in all cases "*culpable* negligence," the controversy is at once decided, and degrees of negligence should no more be heard of. But this would not abrogate the distinction between degrees of *care*; and the argument in favor of drawing such distinctions, and recognizing them in the law, remains unaffected by any thing which the courts have said in respect to degrees of *negligence*. It is not worth while to discuss the question whether negligence must necessarily mean culpable negligence; for that is a question which has no practical application, except where a contract is made stipulating for or against liability for negligence, or where a pleading alleges negligence. It has been generally held in such cases that the word negligence is sufficient to cover all its degrees;* and this ruling may very well stand, without affecting the general question, because it is obvious that in such cases the word negligence is used in the sense of *culpable* negligence. And, with two exceptions, all the cases in which the distinction between degrees of negligence has been mentioned with disapproval have been cases which presented simply this question. The two exceptions referred to were both of them cases in which the judge before whom the cause was tried declined to define gross negligence to the jury, and instructed them particularly what the defendant was bound to do or not to do.† It was contended by the unsuccessful parties in those cases that the judge ought to have left to the jury the question whether or not the defendant had been guilty of *gross* negligence. This the court in *banc* overruled, and, as we think, very properly. If degrees of care and negligence are to be recognized, they must be reduced to some legal definition; and the courts ought not to leave juries to determine the naked question whether a party has or has not been guilty of "gross negligence," any more than they would leave a jury to determine whether an ouster has been committed, or whether a base fee exists, or any other question containing a technical legal phrase. The court should determine, as a question of law, whether the defendant was bound to exercise great or slight care, and should be prepared to instruct the jury as to what circumstances would constitute sufficient care on the part of the defendant. Phrases having a technical meaning in law should never be left to a jury without full explanation.

The distinctions between degrees of care and negligence has been recognized in so many cases, both before and since the decisions and *dicta* which we have mentioned above, that we shall not pretend to state more than a few of them. Thus for example it has been uniformly held that a plaintiff is not debarred from recovering, by reason of his contributory negligence, unless he has failed to take ordinary care for his own protection, and that his failure to use great or unusual care, in other words, his slight negligence, would not affect his right to recover.*

And it is an established rule in Illinois, and some other States, that a plaintiff, who has been guilty of only slight or ordinary negligence, that is, of the want of *ordinary* care only. can recover notwithstanding this, if the defendant has been guilty of gross negligence.†

The necessity of distinguishing between the kinds of care which must be taken by various persons, under different circumstances, is also fully recognized in numerous cases, of which *Nicholson* v. *The Erie Railway Co.* (41 N, Y, 525) is the latest type.* In that case the plaintiff's intestines were injured by reason of

* *Bissell* v. *N. Y. Central Railroad Co.*, 25 N. Y. 442. But the reverse was held in *Illinois Central Railroad Co.* v. *Read*, 37 Ill. 484. See also *American Express Co.* v. *Sands*, 55 Penn. St. 140; *Pennsylvania Railroad Co.* v. *Henderson*, 51 Penn. St. 315.

† *Wilson* v. *Brett*, 11 M. & W. 113; *Grill* v. *General Iron Screw Collier Co.*, Law Rep. 1 C. P. 600.

* *Ernst* v. *Hudson River R. R. Co.*, 35 N. Y. 9, 26; *Beisiegel* v. *N. Y. Central R. R. Co.*, 34 N. Y. 622, 628, 632; *Fero* v. *Buffalo, &c., R. R. Co.*, 22 N. Y. 209; *Cook* v. *N. Y. Central R. R. Co.*, 3 Keyes, 476; *Johnson* v. *Hudson River R. R. Co.*, 6 Duer, 633, 645; affirmed, 20 N. Y. 65; *McGrath* v. *Hudson River R. R. Co.*, 32 Barb. 144; *Willis* v. *Long Island R. R. Co., Id.* 398; *Center* v. *Finney*, 17 Barb. 94; affirmed, 2 Seld. Notes, 44; *Eakin* v. *Brown*, I E. D. Smith, 26; *Beers* v. *Housatonic R. R. Co.*, 19 Conn. 566; *Bequette* v. *People's Transportation Co.*, 2 Oregon, 200; *Newbold* v. *Mead*, 57 Penn. St 487; *Davies* v. *Mann*, 10 M. & W. 546; *Bridge* v. *Grand Junction R. R. Co.*, 3 Id. 244; *Thorogood* v. *Bryan*, 8 C. B. 115; *Clayards* v. *Dethick*, 12 Q. B. 439; *Butterfield* v. *Forrester*, 11 East. 60; *Whirley* v. *Whiteman*, 1 Head, 610; *Munger* v. *Tonawanda R. R. Co.*, 4 N. Y. 349; 5 Denio, 255; *Garmon* v. *Bangor*, 38 Maine, 443; *Owings* v. *Jones*, 9 Md. 108.

† *Kerwacker* v. *Cleveland, &c., R. R. Co.*, 3 Ohio St. 172; *Galena, &c., R. R. Co.* v. *Jacobs*, 20 Ill. 478; *Illinois, &c., R. R. Co.* v. *Goodwin*, 30 Id. 117; *Illinois Cent. R. R. Co.* v. *Middlesworth*, 43 Ill. 64; *Chicago & Alton R. R. Co.* v. *Gretzner*, 46 Ill. 75; *St. Louis, &c. R. R. Co.* v. *Todd*, 36 Ill. 409; *Macon, &c., R. R. Co.* v. *Davis*, 27 Geo. 113; *Augusta, &c., R. R. Co.* v. *McElmurry*, 24 Id. 75; *Hartfield* v. *Roper*, 21 Wend. 615; *per* Harris, J., *Button* v. *Hudson River R. R. Co.*, 18 N. Y. 248; *Rathbun* v. *Payne*, 19 Wend. 399; *per* Johnson C. J., *Chapman* v. *New Haven R. R. Co.*, 19 N. Y. 341; *Chicago, B. & Q. R. R. Co.* v. *Dewey*, 26 Ill. 255; *Stucke* v. *Milwaukee, &c., R. R. Co.*, 9 Wisc. 202; *Whirley* v. *Whiteman*, 1 Head, 110; *Evansville & Crawfordsville R. R. Co.* v. *Lowdermilk*, 15 Ind. 120; *Lafayette, &c., R. R. Co.* v. *Adams*, 26 Ind. 76.

* See also *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 731; *Sweeny* v. *Old Colony R. R. Co.*, 10 Allen, 368.

the omission of the defendant to take precautions against the sudden starting of a train of cars, to which no locomotive was attached, but which a violent gale blew along the track. The plaintiff was at the time crossing the track, without any lawful authority, but by virtue of a bare license, which was implied from the fact of the company never having made any objection to persons crossing at that point. If he had been a passenger on his way to the cars, an entirely different question would have been presented, as was conceded by the court. But, being a bare licensee, the court held that the railway company owed him no duty, and was not in fault for omitting to keep watch of the cars, or to have them fastened up. Erle, C. J., was inclined to follow the opinion of Baron Bramwell, who, in *Southcote* v. *Stanley*, (1 H. & N. 247), held that a mere visitor could recover only for some act of positive *misfeasance*, and not for any *nonfeasance*, or simple omission to act. Upon this point the Court of Appeals did not pass; and neither of these cases is a direct judicial authority for the proposition. It having been suggested that a person inviting another upon his land ought to be liable for gross negligence, or, if the phrase is preferred, for a failure to use even slight care for the guest's protection, it has been answered that this would be in effect leaving the whole question to the jury, and would amount to an abdication by the court of its proper province, inasmuch as if the defendant were a corporation the jury would assuredly find a verdict for the plaintiff. But to this we reply, that it ought not to be left to a jury to determine simply whether the defendant has been guilty of gross negligence or not, but that the plaintiff must point out the particular act which the defendant ought to have done, or which he erred in doing. The court should instruct the jury whether the defendant was bound to do or not to do this specific act, and the jury should determine simply whether the defendant did or did not do it. That the rule laid down by Baron Bramwell is an unsatisfactory one, can, we think, be shown by a very simple illustration. If a man should invite a friend to visit him by night, knowing and concealing the fact that a deep ditch lay between the highway and the house, the only bridge over which was a single plank, which might more easily be missed than found, no one would question his liability for an injury suffered by the person thus invited, if the latter should fall into the ditch in the darkness. This would no doubt be considered an act of fraud. But, supposing that the person thus giving an invitation simply failed to mention the fact, and had no fraudulent intent whatever, can it be seriously claimed that he would therefore be exempt from liability? Clearly not, as we think; nor do we think it would make any difference, if the ditch were a natural one, for the existence of which the defendant was in no way responsible. Yet this would not be an act of misfeasance, but simply an act of gross negligence.

The common sense and common usage of mankind appear to us to recognize a distinction between the degree of care which is to be required from a person rendering a favor, and that which is to be required from a person to whom the favor is rendered. We do not know that this distinction has ever been disputed, except possibly in the case of *Wilson* v. *Brett* (11 M. & W. 113); and that case is not necessarily inconsistent with the maintenance of such a distinction. It was simply held in that case, if we take the opinions of all the judges together, that when a person taking charge of a horse as a matter of favor was shown to be thoroughly familiar with horses, he was bound to use the same degree of care which would be required of a borrower who was not familiar with horses, or, as Lord Abinger put it, that even a gratuitous bailee was bound to use such skill as he possessed. The difficulty of defining these distinctions is not a conclusive objection to their maintenance. There will be very little for courts to do, when they decline to maintain any rule which is difficult of application. Far too much responsibility has already been evaded on this ground; and it is by no means desirable to add to the excuses for failure to do substantial justice. No person who, on leaving the city for the summer, places a valuable piece of furniture with a friend for safe-keeping, free of charge, would expect the same care to be taken of it which he would have a right to expect if the same thing had been borrowed by his friend for the personal use of the latter; and yet it would not be altogether easy to draw a line between facts which would constitute culpable negligence in the one case and in the other.

We think that the distinction between gross negligence, and negligence of a less degree, is one that is by no means so difficult of defining, in a manner sufficient for general purposes, as has sometimes been thought. In some of the old books it has been said that gross negligence was such negligence as was equivalent to fraud; and this, although a serious mistake, nevertheless contained a certain element of truth, which may assist us in reaching a satisfactory definition. We think that gross negligence can be safely defined as such an extreme want of care as would imply an indifference to the injury which may thereby accrue to other persons: in other words, if, under the circumstances of the particular case, a person of ordinary intelligence would not omit to do a certain act, unless he were indifferent to the consequences which might ensue to others from such omission. Any person omitting to do that act should be deemed guilty of gross negligence,—and this without regard to the question whether he was as a matter of fact reckless of the consequences. He must be judged by the standard which will be applied to ordinary men. This, as it seems to us, would supply a test sufficient for all ordinary cases, and capable of application, under the guidance of the court, to every case. This definition may be illustrated by the case

of an engineer on a railroad, who, seeing persons on the track at a short distance in advance of the train, takes it for granted that they will take care of themselves, gives them no warning, and makes no effort to stop his train. Undoubtedly, in such cases, the engineer very rarely, if ever, *intends* to injure any one; but it does sometimes happen that, irritated by the constant presence of intruders upon the track, he becomes indifferent to their sufferings, and feels disposed to let them take exclusive care of themselves. On the other hand, where a passenger jumps from a car, while in rapid motion, it is clear that he is indifferent to the risk which he thereby assumes; and he may be justly said to be guilty of gross negligence.

Ordinary negligence, or, if the phrase is preferred, the want of ordinary care, may be established by proof of a much lower degree. It should not be necessary, in order to establish such a case, to raise any presumption in the mind of the court or jury that the defendant was guilty of indifference to the consequence of his acts. Mere thoughtlessness or forgetfulness, and this of a kind not uncommon, might suffice to establish the want of ordinary care. This degree of care is usually defined as that which men of average prudence and common sense take, under circumstances similar to those of the particular case, and where their own interests are to be protected from a similar injury.*

Great care is perhaps more difficult of definition; and yet it is a degree of care so constantly insisted upon, particularly with reference to common carriers, that it is useless to attempt to abandon the term on account of the difficulty of giving a definition. We do not pretend to be able at present to give an explanation of the term which will meet all cases, more particularly for the reason that the courts have, in some cases, sought to lay down what may be called a fourth degree, or "the utmost care."†

It seems, however, that great care is considered to be such a degree of vigilance and caution as is not usually exercised by the average of the community, but which is known to, and practised by, persons of unusual prudence and foresight. No one seems to be required to use a degree of care which is utterly unknown to the community in which he lives; and no one can therefore be said to lack even great care, simply because he has failed to anticipate disasters which might have been foreseen as possible in an extreme case, but which the common sense of a reasonable man must have told him were improbable.*

On the other hand, the obligation to use great care is not satisfied by simply taking precautions against those dangers which are commonly regarded in the community as inevitable in the absence of such care. Thus, on the one hand, a person who is bound to take great care of property situated in the United States would not be bound to take precautions against the occurrence of an earthquake; whereas in a country where earthquakes occurred in particular districts two or three times in the year, great care might require, in respect to some kinds of property, that precautions should, if possible, be taken for its preservation even from the consequences of an earthquake; or, to take a more familiar and practical illustration, in districts which are subject to freshets, great care would require that property should be placed out of the reach of any freshet that might be considered even remotely probable, while in other districts, although such a freshet might by bare possibility occur, no one would under any circumstances be required to anticipate and provide against it.† — *American Law Review.*

EJECTMENT.

Brown v. *Cocking*, Q. B. 16 W. R. 933.

Section 11 of the County Courts Act, 1867, gives county courts jurisdiction in ejectment "where neither the value of the lands, &c., nor the rent payable in respect thereof shall exceed the sum of £20 by the year."

Brown v. *Cocking* decides that the "rent payable" means the rent between the litigant parties, and not the rent that may be payable by a sub-lessee. The case also decides that the county court judge must decide the question of fact whether the lands, &c., in question are or are not above the value of £20 per annum.

Cockburn, C.J., and Lush, J., seemed to be of opinion that the Court would not review a finding of a county court judge on this question, but Hannen, J., although agreeing that in this particular case the Court ought not to interfere with the decision of the judge, intimated that he had "some hesitation in saying that we are absolutely concluded from reviewing the decision of the judge." Probably such a finding might be treated as a finding by a jury, with which the Court will not interfere unless a very strong case be shown. If, howeer, such a case be made out, the Courts will order a new trial, or otherwise provide against any injustice. The same rules will most likely be applied in these cases from the county courts.—*Solicitors' Journal.*

* *Rochester White Lead Co.* v. *Rochester*, 3 N. Y. 463; *Duff* v. *Budd*, 3 Brod. & B. 177; *Schwartz* v. *Gilmore*, 45 Ill. 455.

† *Bowen* v. *N. Y. Central R. R. Co.*, 18 N. Y. 408; *Johnson* v. *Hudson River R. R. Co.*, 20 N. Y. 65.

* *Bowen* v. *N. Y. Central R. R. Co.*, 18 N. Y. 408; *Corman* v. *Eastern Counties Railway Co.*, 4 H. & N. 781; *Deyo* v. *N. Y. Central R. R. Co*, 34 N. Y. 9. See *Brown* v. *Kendall*, 6 Cush. 292; *Aldridge* v. *Great Western Railway Co.*, 3 M. & G. 515; *Center* v. *Finney*, 17 Barb. 94; *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 781; *Wakeman* v. *Robinson*, 1 Bing. 213; *Vaughan* v. *Taff Vale Railway Co.*, 5 H. & N. 679; *Philadelphia & Reading R. R. Co.* v. *Yeiser*, 8 Penn. St. 366; *Boland* v. *Missouri R. R Co.*, 36 Mo. 484; *Dygert* v. *Bradley*, 8 Wend. 469; *Sawyer* v. *Hannibal, &c., R. R. Co.*, 37 Mo 240.

† *Withers* v. *North Kent Railway Co.*, 3 H. & N. (American ed.) 969. Compare *Brehm* v. *Great Western Railway Co.*, 34 Barb. 256.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

CONTRACT—CERTIFICATE OF ENGINEER—SEPARATION OF COUNTIES.—The plaintiff entered into a contract under seal with the United Counties of Huron and Bruce, to construct a gravel road in Bruce, according to plans and specifications annexed, payments to be made monthly on the estimate of the engineer in charge, who was to determine the amount or quality of work to be paid for under the contract, and to decide all disputes relating to the execution of the contract, and his decision was to be final.

The counties were separated on the 1st January, 1867, and the plaintiff afterwards sued the County of Bruce alone for work done in making the road. *Held*, 1. That he could not recover without a certificate of the engineer; and, 2. That the action should have been against the United Counties.—*Ekins* v. *The Corporation of the County of Bruce*, 29 U. C. Q B. 48.

INSOLVENCY—RECEIVER.—This court has jurisdiction, and will exercise it, to prevent a creditor of one partner obtaining an undue preference over the creditors of a firm by means of proceedings in this court. Where, therefore, a purchaser at sheriff's sale of the interest of one partner filed his bill for an account and a receiver, and the receiver obtained possession of the stock-in-trade, leave was granted to a creditor of the firm to take proceedings in insolvency, and the receiver was directed to hand over the assets to the assignee in insolvency when he should be appointed.—*Felan* v. *McGill*, 3 Chan. Cham. 68.

INSOLVENT ACTS—COSTS.—Certain funds had come to the hands of an official assignee, but were payable to encumbrancers under claims arising before the insolvency; the judge in insolvency had ordered certain costs of the insolvent to be paid thereout. On appeal such order was reversed, the court holding that the 11th section of the Insolvent Act of 1864 applies only to assets which belong to the insolvent beneficially.—*Re Stewart*, 3 Chan. Cham. 95.

INSOLVENCY.—1. An insolvent is discharged, by a composition deed with the requisite number of his creditors confirmed by the court, from debts for which the creditor has claimed from the assignee of the estate of the insolvent, but not as regards costs incurred subsequent to making the claim by the litigation of the insolvent.—14 *L. C. Jurist*, 215.

2. A note of a third party, (in this case, the mother of the insolvent) given by an insolvent to a creditor, to obtain the creditor's consent to the discharge of the insolvent, is null and void. (29 Vic. Cap. 18, sec. 28.)—Ib. 220.

INSOLVENT ACT — PRIORITY OF SUBSEQUENT CREDITORS.—An insolvent compounded with his creditors, and had his goods restored to him; he thereupon resumed his business with the knowledge of his assignee and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment was sued out against him by his subsequent creditors: *Held* that they were entitled to be paid out of his assets in priority to the former creditors.—*Buchanan* v. *Smith*, 17 Chan. Rep. 208.

INSOLVENT ACT OF 1864—DISCHARGE OBTAINED BY FRAUD.—Where an insolvent before the meeting of his creditors concealed a portion of his stock—*Held*, (under the Insolvent Act of 1864) that his discharge was thereby avoided, and that it was not the less a fraud because he had valued his assets at a sum sufficient to cover the goods so concealed.

The plaintiff, therefore, though he had signed a deed of composition and discharge, and the discharge had been confirmed, was held entitled to recover for his debt.—*McLean* v. *McLellan*, 29 U. C. Q B. 548.

INSOLVENT ACT OF 1864—STATEMENT OF DEBT IN SCHEDULE — DISCHARGE. — To an action for attorney's costs defendant pleaded his discharge under the Insolvent Act of 1864, alleging that the plaintiff's name and residence, with a statement of defendant's indebtedness to him being for a balance of costs in two suits specified, were stated in his schedule filed, and that he was not aware before obtaining his discharge of the exact amount of such indebtedness. The plaintiff replied that his name was not mentioned in the schedule for any sum or amount whatever. *Held*, on demurrer, that the replication was bad, and the plea good; for that the debt due to the plaintiff was, under the circumstances, sufficiently stated in the schedule

The statute (Insolvent Act of 1864) is substantially complied with if the debt is set out in such a manner as cannot mislead, and leaves no doubt as to the debt referred to, and the amount is capable of being ascertained by the creditor. —*Cameron* v. *Holland*, 29 U.C. Q.B. 506.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

NEGLIGENCE.—1. The plaintiff was a gardener in the service of the defendant, and accompanied him in a buggy to do some work for him. While crossing a furrow, the kingbolt broke and the plaintiff was thrown out and injured. *Held*, that as the defendant was performing a gratuitous service for the plaintiff, the plaintiff could not recover in the absence of gross negligence, and that there was no evidence to establish gross negligence.—*Moffatt* v. *Bateman*, L. R. 3 C. P. 115.

2. The plaintiff, while attempting to cross the defendant's railway by a road which crossed it a level, was knocked down and injured by an engine. Originally, gates were erected and a gate-keeper kept at the crossing, but for some years the defendants had ceased to employ a gate-keeper; there had been several accidents before, and attention called to the danger of the crossing. Three years before, the defendants obtained an act authorizing them to make a new road, and to discontinue so much of the old road as crossed their railway; five years were allowed for the exercise of the powers, but nothing was done until after the accident. *Held*, that there was no evidence of negligence on the part of the defendants, and that there was no obligation upon them to employ a gate-keeper or to divert the road.—*Cliff* v. *Midland Railway Co.*, L. R. 5 Q. B. 258.

PRINCIPAL AND AGENT.—1. F. and four others, being joint owners of an estate, offered it for sale by an advertisement, intimating that applications "to treat and view" were to be made to F. (among others). *Held*, that this gave F. no authority to enter into a contract for the sale of the estate.—*Godwin* v. *Brind*, L. R. 5 C. P. 299 *n.* 1.

2. Action by a broker for non-acceptance of cotton. The bought note given by the plaintiff to the defendant stated, "I have this day sold you on account of T., &c. E. F., broker." *Held*, that a broker cannot maintain an action in his own name on a contract made by him as broker.—*Fairlie* v. *Fenton*, L. R. 5 Ex. 169.

WILL.—1. A testatrix gave property "in trust for such of M. P.'s own family or next of kin, and in such parts as M. P. should appoint." M. P. appointed a share to her grand-niece. *Held*, that the word "family" was not confined to the statutory next of kin, and would include a grand-niece.—*Snow* v. *Teed*, L. R. 9 Eq. 622.

2. A testator devised lands to trustees to the use of Robert Gillett, the fourth son of George Henry Gillett, and his heirs, in case he should attain the age of twenty-one years; but if he should die under that age, then to the use of the fifth son and his heirs, in case he should attain the age of twenty-one; if he should die under that age, then to the first son after the fifth who should attain twenty-one. George Henry Gillett had seven sons; Robert Henry Gillett was the third, and John William Gillett the fourth, and both attained twenty-one. *Held*, that Robert was the one intended to take, although erroneously described as the fourth son; and if he had died under twenty-one the estate would have gone to the son next in order of birth.—*Gillett* v. *Gane*, L. R. 10 Eq. 29.

PROMISSORY NOTE.—PAYABLE IN U. S. FUNDS —PLEADING.—*Held*, that a note made in this province, papable in current funds of the United States of America, was not a promissory note.

The plaintiff having declared upon such note, the defendant pleaded setting it out *in hæc verba*, and alleging that it was made in this province: that the current funds mentioned were paper notes issued by the United States Government, and current there as money, but that the dollar named in them was not equal to the dollar of our money; nor of any fixed value; and that except by the indorsement of said notes by defendant, there was no contract between them and the plaintiff. *Held*, that the plea was good, and not objectionable as varying the written contract by parol.—*Betts* v. *Weller et al*, 29 U. C. Q. B. 23.

PROMISSORY NOTE—STAMPS—ACCOUNT STATED. —A note not properly stamped cannot be used as an acknowledgment to take a case out of the Statute of Limitations, or as evidence of an account stated.

The mere calculation of what is due as the balance of a former transaction, will not support an action on account stated.—*McKay* v. *Grinley*, 29 U. C. Q. B. 54.

CO-SURETIES — CONTRIBUTION. — Accommodation indorsers, like other co-sureties, are liable to mutual contribution, unless this liability is controled by contract; but such a limitation if stipulated for is binding. — *Mitchell* v. *English*, 17 Chan. Rep. 303.

PROMISSORY NOTE — CONDITIONAL ENDORSEMENT—Where a note not signed by any one was endorsed by defendant, and delivered by him to the plaintiff, upon condition that A. and B. should sign it as makers, and it was signed only by C.: *Held*, that these facts might be shown by defen

dant under a plea denying his endorsement.—*Austin* v. *Thomas Farmer, Robert Bond, & James Farmer*, 29 U. C. Q. B. 10.

ADMINISTRATION SUIT—LEGACY TO EXECUTORS.—Where the judgment on an appeal from the Master's report enunciates a principle which is applicable to other parties and other points, the Master should so apply it in the further prosecution of the reference.

Three parties made purchases before suit, and two of them only being charged by the Master with compound interest in respect of their respective purchase money, they appealed unsuccessfully against the charge, and they afterwards appealed against the charge of simple interest only to the third party.

Held, that such appeal was regular.

Where the estate to be administered was large, requiring great care, judgment and circumspection in its management for a number of years, the Court sustained an allowance of $1,500 to the principal executor and trustee, and $1,500 to the others jointly.

Where a legacy is given to executors as a compensation for their trouble, they are at liberty to claim a further sum under the statute, if the legacy is not a sufficient compensation.—*Denison* v. *Denison*, 17 Chan. Rep. 306.

ONTARIO REPORTS.

QUEEN'S BENCH.

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

GRAY v. WORDEN.

Promissory Note—Form of.

"Due J. G., or bearer, $482 *in Canada Bills*, payable fourteen days after date," &c. *Held*, not a promissory note, for such bills (issued under 29-30 Vic. ch. 10) though currency, are not specie or money.

[29 U. C. Q. B. 535.]

Declaration on a promissory note made by defendant, dated 3rd May, 1869, for $482 of lawful money of Canada, payable to the plaintiff fourteen days after date.

Second count, on an account stated.

Pleas—To first count, denial of making the note. To second count, never indebted. Issue.

The cause was tried at the last Fall Assizes held at Cobourg, before Morrison, J.

The document put in in support of the first count was as follows:

"Lewiston, May, 1869.

"Due James Gray, or bearer, four hundred and eighty-two dollars in Canada bills, payable in fourteen days after date, at the Express Office at Port Hope, with interest.

"GEO. W. WORDEN."

The handwriting of defendant was proved.

The plaintiff's counsel moved to amend the first count by adding the words after $482, "in Canada bills, meaning thereby," which was allowed.

It was objected by defendant's counsel that the instrument produced was not a promissory note, and that the plaintiff should be nonsuited. A verdict was thereupon entered for the plaintiff on both counts for $495, with leave to defendant to move to enter a verdict for defendant on the first count, if the Court should be of opinion the instrument was not a promissory note as declared on.

In Michaelmas Term last, *Huson Murray* obtained a rule calling on the plaintiff to shew cause why a non-suit should not be entered on the first count, on the leave reserved.

Armour, Q C., shewed cause. There is a promise to pay contained in the note: *Waithman* v. *Elsee*, 1 C & K 35; *Kimball* v. *Huntington*, 10 Wend. 675; *Pepoon* v. *Stagg*, 1 Nott and McCord, South Carolina Reports, 102. The payment being "in Canada bills," means "Canada notes," and the 29-30 Vic ch. 10, authorizes such notes to be issued, which constitute a legal tender: *McCormick* v. *Trotter*, 10 Serge & Rawle 94; *Judah* v. *Harris*, 19 Johns, 144; *Keith* v. *Johns*, 9 Johns, 120; *Story* on Promissory Notes, 3rd ed., 22; *Miller* v. *Race*, 1 Smith's L C., 6th ed., 468.

Murray supported the rule. The words "to be paid" are equivalent to a promise to pay, but the word "payable," as here, is very different: *Byles* on Bills, 6th ed., 10. Payable "in Canada bills" is not a payment in money generally, and these words do not mean Canada legal tender notes, but bills which are current in Canada: *Byles* on Bills, 10; *Ex parte Imeson*, *In re Seaton*, 2 Rose, 225.

WILSON, J.—A promissory note is an absolute promise in writing, signed by the maker, to pay a certain sum of money at a certain time, or on demand, or at sight, to another, or to his order, or to bearer.

An instrument "To pay on demand to W. W." is a promissory note, not an agreement: *Walker* v. *Roberts*, 1 Car. and Mar. 590.

"I have received the sum of £200, which I borrowed of you, and I have to be accountable for the said sum with interest:" *Held*, an agreement and not a note, because it might mean that the party was to be accountable by way of set-off or otherwise: *Horne* v. *Redfearn*, 4 Bing. N. C. 430.

In *Ellison* v. *Collingridge*, 9 C. B 570, and *Allen* v. *The Sea Fire and Life Assurance Co.*, 9 C. B. 574, documents, so many days after date, signed by the managing director of a company addressed to the cashier, saying "Credit Messrs. P. & Co., or order, with the sum of £500 in cash," were held to be promissory notes. The words "credit in cash" were held to mean to pay in money.

The words, "I, J. D., have this day borrowed of J. C. £300, at £4 per hundred, payable yearly," were held not to be a promissory note: *Cory* v. *Davis*, 14 C. B. N. S. 370. Because the instrument was only an acknowledgment of £300, with a promise to pay the interest: *Melanotte* v. *Teasdale*, 13 M. & W. 216.

The words in this instrument, "Due James Gray, or bearer," are merely an acknowledg-

ment: but the words "payable in fourteen days," &c., are certainly words of promise, just as in the two last cases, where the word "payable" was used, but it was held in them not to be applicable to the principal money, but only to the interest. There can be no difference between *payable* and *to be paid*, or *to pay*.

The question then is, whether the words in which the money is made payable, "in Canada bills," prevents the instrument being construed as a promissory note.

In *Stephens* v. *Berry*, 15 C. P. 548, the bill of exchange was drawn payable in New York "with current funds," but no question was made as to the wording of it. See also *Crawford* v. *Beard*, 13 C. P. 35.

By the 29–30 Vic. ch. 10, the Governor in Council is authorized to direct the issue of provincial notes payable on demand, which were to be redeemable in specie, and to be a legal tender, excepting at the offices where they were redeemable.

Does this statute constitute these provincial notes lawful *money* of Canada? The expression *Canada bills*, instead of *Canada notes*, I do not think is of any material consequence. As the declaration is now, by the amendment, the averment of the note, is payable "in Canada bills, meaning thereby lawful money of Canada," and that averment is proved if these bills or notes are money.

Between 1797 and 1823, arrests for debt were not permitted in England or Ireland, unless the affidavit negatived tender of the debt in Bank of England notes, but these notes were not at any time made a legal tender. Arrests were not allowed in cases where a tender in bank notes had been made, and actions against the Bank of England were authorized to be stayed, for not paying in money or specie, upon the bank paying in or tendering their notes. But this was the utmost that was done. A creditor could still demand and insist on a specie payment, only he could not arrest if he were offered bank notes: *Grigby* v. *Oakes*, 2 B. & P. 526

The 3 & 4 Wm. IV., ch. 98, sec. 6, has since made Bank of England notes a legal tender for all sums above £5.

Here the Provincial notes are made expressly a legal tender, as the Bank of England notes now are in England But I have not seen any case in which a promissory note has been made payable in Bank of England notes since the 3 & 4 Wm. IV., ch. 98.

In 3 *Kent's* Com., 11th ed., 92, it is said, "in England negotiable paper must be for the payment of money in specie, and not in bank notes. In this country it has been held that a note payable in bank bills was a good negotiable note within the statute, if confined to a species of paper universally current as cash. But the doctrine of these cases has been met and denied, and I think the weight of argument is against them, and in favour of the English rule." There are many authorities in different States, opposed to each other, referred to in the notes.

In *Byles* on Bills, ed. of 1866, p. 89, it is said, "Bills and notes must be for money *in specie*. Therefore a promise to pay in three good East India bonds, or in cash, or Bank of England Notes, is not a promissory note:" citing B. N. P. 272; *Bayley* on Bills, 6th ed., p. 11.

In *Story* on Promissory Notes, 3rd ed., sec. 18, it is said, Not a good note if payable in "bank bills or notes, or foreign bills," or "current bank notes."

In *Ex parte Imeson*, 2 Rose 225, a note was payable in cash "or Bank of England notes." The K. B. held it not to be a good note.

On this case, *Bayley* on Bills, 6th ed., p. 11, note 28, says, "for these notes were not within the statute, because a delivery of bank notes, which might be of less value than cash, would satisfy them, and they were not absolutely and at all events for payment of money in specie."

There is a difference between *money* and *currency*. In *Lansdowne* v. *Lansdowne*, 2 Bligh, O. S., 78, Lord Redesdale said, in 1820, "there is no lawful money of Ireland. It is merely conventional. There is neither gold nor silver coin of legal currency, nothing but copper. * * * There is no such thing as Irish money; it is Irish currency." See also *Kearney* v. *King*, 2 B. & Al. 301; *Sprowle* v. *Legge*, 1 B. & C. 16.

The case of *Boardman* v *Quayle*, 11 Moore P. C. 223, does not afford any guide, for there the notes, which were in this form, "we promise to pay the bearer on demand one pound British, in bank notes, or bills on London," and which were issued by bankers carrying on business in the Isle of Man, were held to be valid promissory notes within the meaning of the Manx Banking Act.

The money need not be current in the place of payment, or where the bill or note is drawn. It may be payable in the money of any country whatever: *Chitty* on Bills, 8th ed., 153.

The holder of a bill drawn in dollars, rupees, roubles, or other foreign money, cannot in England get payment in that coin. He is paid its equivalent in the money current in England. So a bill drawn in sterling money, payable in Vienna, cannot be paid in sterling pounds, but in florins or other current money of the place: *Suse* v. *Pompe*, 8 C. B. N. S. 538.

It seems to be, therefore, not the specific kind of money mentioned in the bill which has to be paid, but its value or equivalent in money of the country where it is paid.

The note in question is however restricted to redemption in "Canada bills," and such bills I think are not money, though payable on demand, and though a legal tender, and redeemable in specie. The fact that they must be redeemed in specie shows they are not specie, and though possessing many of the qualities and conveniences of money, are nevertheless not money, and certainly not money in specie, though they may be described as currency.

Such a security as this if good as a note would be good also as a foreign bill of exchange, and it might be, and in all probability it would be, that the par value of such bills would not be deemed the same in other countries, where the promissory note or bill of exchange was made payable, as the par of our specie currency. Nor could the foreign holders of a bill of exchange payable in Canada bills conveniently re-draw on default for the principal money, interest, exchange, re-exchange, and other proper charges, by another bill payable in "Canada bills." The re-exchange at any rate should not be paid in Canada bills.

It may be that a person can make a promis-

sory note payable in a particular coin, as in gold or silver, because they are respectively money and specie; but I think he cannot make it payable in Canada bills, because they are not money or specie They have no intrinsic value as coin has. They represent only, and are the signs of value. "Money itself is a commodity: it is not a sign; it is the thing signified."—*McCulloch's Principles of Pol. Economy*, 135.

On this ground, after some hesitation, I must decide against the plaintiff.

In my opinion the rule should be made absolute, not for a nonsuit, but according to the leave actually reserved, to enter a verdict for defendant on the first count. The plaintiff's verdict on the second count was not moved against, and will therefore stand.

MORRISON, J., concurred.

Rule absolute.

ASSESSMENT APPEAL FROM COURT OF REVISION.

IN THE FIRST DIVISION COURT IN THE COUNTY OF ELGIN.

Court of Revision—Appeal.

Power of the Court of Revision to grant time for entering appeals beyond that prescribed by the Municipal Assessment Act—Practice in appeal cases—Notice of appeal, and necessity for stating grounds as causes and matters of appeal—Right of counsel to be heard before Courts of Revision and all other courts.

[St. Thomas, July 7, 1870.]

McDougall and *White* for appellant.

Ellis for respondents.

HUGHES, Co. J.—There were several legal points raised which I have to dispose of, the first being as to the notice of these appeals. I decide that all that the 63rd section of the stat. 32 Vic. chap. 36, requires, is that if a person be dissatisfied with the decision of the Court of Revision he may appeal therefrom, and, within three days after the decision, serve upon the Municipal Clerk a written notice of his intention to appeal to the County Judge. The clerk is, thereupon, to notify all the parties appealed against, in the same manner as is provided for notice of complaint by the 60th section. The party appealing is, at the same time, and in like manner, to give a written notice of his appeal to the clerk of the Division Court within the limits of which the municipality or assessment district is situated, and to deposit with him $2, &c.

These notices were given both to the clerk of the council and the clerk of the proper Division Court. But a preliminary objection is taken to their form, and to the ground stated as the cause and matter of the appeals, which it is urged are in most of the cases insensible, inasmuch as the fourth sub-section of section 60 of the Assessment Act of 1869 does not refer to, or require a written notice to be served.

Judging from the analogy which subsists between all these appeals, and the principles which govern appeals from orders and convictions of justices, and appeals against county rates in England, I think the decided cases must govern me in these matters. I find that the Ontario Assessment Act of 1869 does not require the notices of appeal to state any grounds of the causes and matters of appeal. This being the case, a simple notice of appeal properly framed and served is all that the statute requires, and as the grounds of appeal taken are not calculated to mislead, I think what is stated may be treated as surplusage

It was not complained that the respondent was misled, otherwise I should have adjourned the hearing of the cases to another day, so that the respondents might not be affected by surprise, if alleged.

The case of *The King* v. *The Justices of Westmoreland* was very like the present. It was there held that it was not necessary, in a notice of appeal against a county rate, to specify the grounds of appeal; but if the appellant stated in the notice as causes of appeal *things which were not so*, the court ought to adjourn the appeal if they think the respondents have been misled by the terms of the notices, or otherwise to hear it. I think the preliminary objection was not entitled to prevail in any of the cases referred to in the annexed schedule, where the reason given is, "inasmuch as no written notice was served upon the clerk in conformity with sub-section 4 of section 60 of the Assessment Act of 1869," or where the words of the notice import the same reference to that sub-section. Where the sub-section of a statute is expressly referred to, as was the case in these instances, and where the notices set forth that sub-section had not been complied with, I can, and I think any one could, by referring to the sub-section, easily understand what was meant by the allegation that a notice was not given in conformity with its provisions; because the Court of Revision has the power conferred upon it of extending the time for making complaints ten days further.

Now the extending the time gives to each complainant (and the assessor or any one else may be the complainant) the right to make complaint, and that involves the giving to the assessor and to the party whose assessment, or the omission of whose name or property is complained of, a notice by the municipal clerk, as provided by the 2nd sub-section of the 60th section. And I think it does not require any wide stretch of the imagination to discover what was meant by the complaint that that notice was not given.

It turns out, however, that in several of the cases the cause of complaint was that the Court of Revision, upon the complaint of Mr. McBride, first acted upon the 4th sub-section and extended the time for making complaints ten days further, and adjourned the court, for the purpose of hearing those complaints, to the 23rd of May; and that afterwards, on the 23rd May, they did, at the instance of the assessor, further extend the time for making complaints for another ten days, thus actually going beyond the statute, by extending the time more than *twenty* days. The powers of the court are expressly conferred and limited by statute, so that whatever power the statute gives can be exercised without doubt, but whatever the statute limits or restrains cannot be exceeded. The proceedings of the court are definitely prescribed, and, unlike courts which have no practice laid down, they have no power to frame a procedure for themselves. Their duties, by the 59th section, are to be completed and the rolls to be finally revised, in so far as they are concerned, before

the 15th of June in every year; and although under the 55th section they may meet and adjourn at pleasure, or may be summoned to meet at any time by the head of the municipality, they cannot adjourn to a period beyond, nor can they be summoned to meet for performance of their functions on or after the 15th June. Anything done by them on or after that day is void, for the court becomes *functus officio* by effluxion of time, subject to their being summoned to meet again for the discharge of duties or exercising special powers under the 62nd section. The assessor was bound by the 49th section to make and complete his roll not earlier than the 1st of February and not later than the 15th of April. He was to deliver (under the 50th section) the assessment roll completed and added up, with certificate and affidavit attached, to the clerk; and the officer last named was bound to file and keep the roll in his office, and at all convenient times to keep it open to the inspection of all the householders, tenants, and freeholders, resident, owning or possessing property in the municipality.

A time is to be appointed for the court to meet and try complaints in regard to persons wrongfully placed upon or omitted from the roll, or assessed at too high or too low a sum. Within the time from the return of the roll at the office of the municipal clerk and the assembling of the court, all parties have the power of examining the roll at the clerk's office, and any person complaining of an error or omission in regard to his own or any other person's assessment, may, within fourteen days after the time fixed for the return of the roll, give notice to the clerk that he considers himself aggrieved, &c., and if a municipal elector thinks that any other person has been assessed too high or too low, or has been wrongfully inserted in or omitted from the roll, he may complain, and the matter is to be decided in the same manner as complaints by a person assessed; so that ordinarily the complaints cannot be made under the 1st and 2nd sub-section of the 60th section later than fourteen days after 15th April, which would be the 29th of April. But the court may sit for the hearing of such complaints at any time, and adjourn from time to time, within the limits of their existence, up to the 15th June, on which day, without any power of revival, they become defunct for all purposes of complaints under the 60th section. The 4th sub-section of the 60th section gives no power, no matter what palpable errors need correction, for the court to resume its functions. The court may, within the limit of its existence, but not afterwards, extend the time for making complaints ten days further, and may then meet and determine the additional matter complained of upon palpable errors being made to appear as needing correction. That cannot be done, however, after the 15th of June. The 62nd section, it is true, confers upon the court further powers after the 15th June for certain other purposes, but those powers are so expressly limited and specific that they cannot be held to apply to these appeals.

It was not objected that anything was done by the court on or after the 15th June, but that they once legally exercised, and once after that illegally affected to exercise the powers conferred upon them by the 4th sub-section of the 60th section It very plainly appears that by the last words of the 3rd sub-section the court could do nothing upon its own motion with regard to altering or amending the roll, *except upon complaint.* If after a complaint either party failed to appear, the court might proceed *ex parte*, so that if there were no complaints the court had nothing to do, and its functions would cease from having discharged its duties, provided all the complaints were disposed of.

If, however, in the discharge of its functions, the court itself discovered, or if it was otherwise made to appear, that there were palpable errors which needed correction, the court might extend the time for making complaints *ten days further*, and might then meet and determine any additional matter complained of; and the assessor might for such purpose (supposing there were no other person to make the complaint) be the complainant.

I think this function could only be discharged by the Court of Revision *once*, and they had no power to extend the time for making complaints *twenty* days, but only fourteen days, as limited and allowed by the 4th sub-section.

When Mr. McBride appeared, it was the 9th of May, the first day on which the Court of Revision sat. The assessor had been derelict in his duty in returning the roll, and was punishable. Still, the law, with regard to making complaints, is specific—they must be made within fourteen days after the 15th of April. The time had gone by for further complaints, for at least six days' notice is required by the 11th sub-section of the 60th section. So that I must hold that the application of Mr. McBride for, and the grant by the court of, an extension of time, could have only been legal under the 4th sub-section of the 60th section: that the court could only (legally) once grant such an extension. If they could assume the power of giving it twice—or two extensions—there would be no use in the limit fixed by the statute of confining complaints to ten days. The 4th sub-section does not say the court may extend the time for making complaints *from time to time* for ten days at a time, but *for ten days further*, and the court might then meet and determine the additional matter complained of. Beyond those ten days they could not adjourn, extend, or adjudicate.

I have no doubt, however, that in granting that extension it is general in its nature, and not confined to the person who might happen to make manifest the palpable errors which needed correction; but that it was open for any person to make whatever complaints he might think proper: that the court could not of its mere motion assume powers of extending the time for making complaints to any one in the absence of a complainant, no matter what the injustice might be, nor how illegally or negligently the assessor had acted in the discharge of his duties; that the only power they could invoke after the fourteen days had passed from the time fixed for the return of the roll, for the extension of the time for making complaints, was the provision of the 4th sub-section; and where there is a jurisdiction and power conferred by law, I suppose it will be proper to presume, in the exercise of it, that the principle *omnia rite esse acta* applies; there was certainly jurisdiction to support the proceeding once, that is, the first time it was exercised, but

not twice. The second time, therefore, was illegal.

Having stated my view of the law of this case, I proceed now to dispose of the facts *upon the law.*

1st. I decide that the application made to the Court of Revision was, and could only have been, an application, and the extension of time for making complaints under that application could only have been exercised by the court under the 4th sub-section of the 60th section: that the record of the court is incomplete, but the evidence given outside of the record sufficiently shows facts from which I can presume the court acted in order to make their proceedings on the 9th of May legal.

2nd. I decide that all cases which were appealed upon that extension by any one within the ten days were legally made, whether by Mr. McBride or any one else.

3rd. I decide that the affected granting of the *second* extension of time upon the application of the assessor on the 23rd of May was illegal; that the proceedings upon his appeal were void and *coram non judice;* that all alterations or additions made to the roll by the Court of Revision upon complaints or appeals made after the 23rd of May were entirely *ultra vires*; so that if any such were made in the cases referred to in the annexed list and schedule, they are hereby set aside, and the clerk of the municipality of the township of Bayham is hereby ordered to alter and amend the roll according to this my order, and to restore the roll to its original state in respect thereof, pursuant to the 65th section of the said Assessment Act.

4th. I further decide that the names of the following persons were improperly ordered to be struck out of the said roll by the said Court of Revision, and I order their said names to be restored as they were originally entered therein, viz: Robert W. Locker, Andrew M. High, Jesse Millard, Wm. H. McCollum, Edwin A. Weaver, James H. McKinney, Elisha Howell, Jeremiah McKinney.

5th. I further decide that the names of the following persons were improperly ordered by the said court to be inserted in the said roll, and I order their names to be erased therefrom, viz: Joseph Stansell, Thos. Baker, Andrew Shingler, James Oliver.

6th. I further decide that the names of the following persons were improperly ordered to be left in the said roll by the said court when they ought to have been ordered to be struck off and erased therefrom, and I order them to be erased therefrom, viz.: Benjamin Drake, Heman A. McConnell, Robert W. Smuck.

7th. I further decide that the said roll ought to be amended in other respects as follows, viz.: Charles B. Saxton should have been assessed as tenant for six acres, a part of the east half of lot number 9, in the second concession, at $20 per acre—whole value $120.

8th. I further decide that the name of the following person was properly ordered by the said Court of Revision to be left on or inserted in the said roll, and I confirm the decision of the said court with respect thereto, and I order the appellant to pay the costs of this appeal with respect to it, viz: William Stratton.

Were a good purpose likely to be served by any remarks I might make, I should animadvert in terms of strong censure upon the way in which the functions of a court were discharged by the members of this Court of Revision. I shall, however, forbear making them, knowing that when in the discharge of duty men allow themselves to be actuated by strong sectional or political feelings, they are in no mind to listen to or benefit by words which might under usual circumstances serve for the public good. Still, I do insist and maintain that when a member of the bar may be heard before the highest tribunals of the land, and even before the Queen herself in her Privy Council on an appeal from one of his own courts in this Province; that that court, or the members of that court, must be very ignorant, indeed misguided, who would refuse him audience before a petty local tribunal such as a township Court of Revision.

Lastly With respect to the costs in all the cases (with the exception of those referred to in finding eight, that is to say, regarding the appeal respecting the case of William H. Stratton), I order that all the costs of these proceedings in appeal be borne and paid by the municipality of the township of Bayham to the appellant forthwith.

UNITED STATES REPORTS.

SUPREME COURT OF MICHIGAN.

CITY OF DETROIT v. BLAKEBY AND WIFE.

A municipal corporation is not liable, in a private action for damages, for injuries caused by neglect to keep its streets in repair.

The cases founded on mere neglect to repair, and on acts of positive misfeasance reviewed and distinguished by Campbell, C. J.

[9 Am. Law R. 670.]

This was an action by defendants in error, against the City of Detroit, for damages received from the defective condition of a cross walk. In the Wayne Circuit Court the defendants in error had a verdict and judgment, to which the city took this writ of error.

The opinion of the court was delivered by

CAMPBELL, C. J.—The principal question in this case is, whether the City of Detroit is liable to a private action of an injured party for neglect to keep a cross walk in repair. The other questions involve an inquiry into the circumstances which would go to modify any such liability in the present case.

There has been but one case in this State decided by this court, where the claim for damages arose purely out of a neglect to repair. In *Dewey* v. *Detroit*, 15 Mich., 307, such a suit was brought, but it did not call for a decision upon the main question. In *Township of Niles* v. *Martin*, 4 Mich., 557, it was held there was no such liability in a township, and this case was followed by us at the present term in *Township of Leoni* v. *Taylor*. It was held in *Larkin* v. *Saginaw County*, 11 Mich., 88, that a county could not be sued for directing a bridge to be built on a plan that was defective and injurious. In *Pennoyer* v. *Saginaw City*, 8 Mich., 534, a city was held liable for continuing a private nuisance which it had created, and in *Corey* v. *Detroit*, 9 Mich., 165, the City of Detroit was held liable

for an accident caused by leaving an excavation in a street for a sewer imperfectly guarded. In *Dermont* v. *Detroit*, 4 Mich., 135, it was held the city was not liable for the flooding of a cellar by a sewer, into which it drained. None of those cases presented the precise question raised here, and we are required therefore to consider it as an original inquiry, except in so far as it may be affected by any principles involved in the cases already decided.

The streets of Detroit are public highways, designed like all other roads for the benefit of all people desiring to travel upon them. The duty or power of keeping them in proper condition is a public and not a private duty, and it is an office for the performance of which there is no compensation given to the city. Whatever liability exists to perform this service to the public, and to respond for any failure to perform it, must arise, if at all, from the implication that is claimed to exist in the nature of such a municipality.

There is a vague impression that municipalities are bound in all cases to answer in damages for all private injuries from defects in the public ways. But the law in this state and in most parts of the country, rejects this as a general proposition, and confines the recovery to cases of grievances arising under peculiar circumstances. If there is any ground for recovery here, it is because Detroit is incorporated, and it depends therefore on the consideration whether there is anything in the nature of incorporated municipalities like this which should subject them to liabilities not enforced against towns and counties. The cases which recognise the distinction apply it to villages and cities alike.

It has never been claimed that the violation of duty to the public was any more reprehensible in these corporations than outside of them; nor that there was any more justice in giving damages for an injury sustained in a city or village street, than for one sustained outside of the corporate bounds. The private suffering is the same and the official negligence may be the same. The reason, if it exists, is to be found in some other direction, and can only be tried by a comparison of some of the classes of authorities which have dealt with the subject in hand.

It has been held that corporations may be liable to suit for positive mischief produced by their active misconduct, and not by mere errors of judgment, and while the application of this rule may have been of doubtful correctness in some cases, the rule itself is at least intelligible and will cover many decisions. It was substantially upon this principle that the case of *Detroit* v. *Corey* was rested by the judges who concurred in the conclusion. *Thayer* v. *Boston*, 19 Pick., 511, was a case of this kind, involving a direct encroachment on private property. *Rochester White Lead Company* v. *City of Rochester*, 3 N. Y., 465, where a natural water course was narrowed and obstructed by a culvert entirely unfit for its purpose and not planned by a competent engineer, is put upon this ground in the decision of *Hickox* v. *Plattsburg*, cited 16 N. Y., 161; *Lee* v. *Village of Sandy Hill*, 40 N. Y., 422, involved a direct trespass.

The injuries involved in these New York and Massachusetts cases referred to, were not the result of public nuisances, but were purely private grievances. And in several cases cited on the argument, the mischiefs complained of were altogether private. The distinction between these and public nuisances or neglects, has not always been observed, and has led to some of the confusion which is found in the authorities. In all the cases involving injuries from obstructions to drainage, the grievance was a private nuisance. In case of *Mayor* v. *Furge*, 3 Hill, 612, which has been generally treated as a leading case, the damage was caused by water backing up from sewers not kept cleaned out as they should have been: *Barton* v. *Syracuse*, 36 N. Y., 54, involved similar questions, as did also *Childs* v. *Boston*, 4 Allen, 41. These cases do not harmonise with *Dermont* v. *Detroit*, 4 Mich., 135; but they rest on the assumption, that having constructed the sewers voluntarily for private purposes, and not as a public duty, the obligation was complete to keep them from doing any mischief, as it would be in private persons. And in *Bailey* v. *Mayor*, 3 Hill, 538; S. C., 2 Denio, 433, the mischief was caused by the breaking away of a dam connected with the Croton water works, whereby the property of the plaintiff was destroyed. In this latter case the judgment rested entirely upon the theory that the city held the water works as a private franchise and possession, and subject to all the responsibilities of private ownership. The judges who regarded it as a public work, held there was no liability. In *Conrad* v. *Trustees of Ithaca*, 16 N. Y., 159, the facts were substantially like those in *Rochester White Lead Co.* v. *Rochester*, and the decision was rested on the principles of that case. DENIO, C. J., who delivered the opinion of the court, stated his own opinion to be, that there was no liability, but that he regarded the recent decision in another case referred to as establishing it, and in *Livermore* v. *Freeholders of Camden*, 29 N. J., 245 (and on Error, 2 Vroom, 507), under a statute like that which was considered by this court in *Township of Leoni* v. *Taylor*, it was decided that while a passenger over a bridge could sue for injuries, yet where property adjacent was injured by the bridge, there was no remedy. Upon anything which sustains the liability for such grievances however, it is manifest that the injury is not a public grievance in any sense, and does not involve a special private damage, from an act that at the same time affects injuriously the whole people.

Another class of injuries involves a public grievance specially injuring an individual, arising out of some neglect or misconduct in the management of some of those works which are held in New York, to concern the municipality in its private interests, and to be in the law the same as private enterprises. It is held, that in constructing sewers and similar works, which can only be built by city direction, if the streets are broken up and injuries happen because no adequate precautions are taken, the liability shall be enforced as springing from that carelessness, and not on the ground of non-repairs of highways. *Lloyd* v. *Mayor*, 5 N. Y., 369, and *Storrs* v. *Utica*, 17 N. Y. 104, were cases of this kind. In these cases, as in the case of *Detroit* v. *Corey*, the streets were held to have been broken up by the direct agency of the city authorities, and the negligence which caused the injury, was held to be negligence in doing a work

requiring special care, or in other words, the wrong complained of was a misfeasance and not a mere omission. The case of *Weet* v. *Brockport*, 16 N. Y., 161, was also a case where SELDEN, J., who reviewed and discussed all the decisions, said it was not necessary to consider the wrong complained of as a mere neglect of duty, because it was in itself a dangerous public nuisance, created by the corporation, and not in any sense a non-feasance. In *Delmonico* v. *Mayor*, 1 Sand 226, the injuries, though in a highway, consisted in crushing in a vault under the street, by improperly piling earth upon it while excavating for a sewer, and there was also a direct misfeasance.

The cases in which cities and villages have been held subject to suits for neglect of public duty, in not keeping highways in repair, where none of the other elements have been taken into the account, are not numerous, and all which quote any authority professs to rest especially upon the New York cases, except where the remedy is statutory. It will be proper, therefore, to notice what those cases are, and upon what cases they are supported. The only cases of this kind decided in the courts of last resort, that we have been able to find, are *Hutson* v. *Mayor*, 9 N. Y. 163; *Hickox* v. *Plattsburg*, 16 N. Y. 161, and *Davenport* v. *Ruckman*, 37 N. Y. 568. This latter case resembles the one before us very closely in its leading features, and would furnish a very close precedent. It is not reasoned out at all, but refers for the doctrine to the other two cases, and to an authority in 18 N. Y., which does not relate to municipal liabilities. The case of *Hutson* v. *Mayor*, does not attempt to find any distinct foundation for the right of action, but refers to the cases in 3 Hill, and *Rochester White Lead Co.* v. *Rochester*, and *Adsit* v. *Brady*, 4 Hill, 630, as having established the liability. This latter case is disapproved in *Weet* v. *Brockport*, and the others are sustained there on the ground of misfeasance, and as Judge Denio, when the decisions in 16 New York were made, stated that he had not supposed there was any corporate liability for mere neglect to keep ways in repair, it is quite possible that the case of *Hatson* v. *Mayor*, was regarded as distinguishable. The circumstances were very aggravated, as it would seem that the city had left a road too narrow to accommodate a carriage without any paving and without protection against the danger of falling down a deep embankment into a railroad excavation. The report is not as full as could be desired upon the precise state of facts. In the Supreme Court, where the judges differed in opinion (two dissenting), the liability seems, from the view taken of that case by Judge Selden, to have rested on the ground that there had been a breach of private duty and not of duty to the public. If this was the view actually taken, it would not bring the case within the same category with the other road cases. But the case of *Weet* v. *Brockport*, 16 New York, 161, is recognized as the one in which the whole law has been finally settled, and it is upon the grounds there laid down, that the liability is now fixed in New York. The elaborate opinion of Judge Selden, which was adopted by the Court of Appeals, denies the correctness of the dicta in some of the previous cases, and asserts the liability to an action solely upon the ground that the franchises granted to municipal corporations are in law a sufficient consideration for an implied promise to perform with fidelity all the duties imposed by the charter, and that the liability is the same as that which attaches against individuals who have franchises in ferries, toll-bridges, and the like. The principle as he states it, is:

"That whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign power is deemed to enure to the benefit of every individual interested in its performance."

(*To be continued,*)

One of Curran's butts in Dublin was a certain Sergeant Kelly, known from an unconscious, but laughable, peculiarity of his as counsellor. Therefore, he was an incarnate *non sequitur*, and never spoke without convulsing the court. "This is so clear a point, gentlemen," he once told a jury, "that I am convinced you felt it to be so the very moment I stated it. I should pay your understandings but a poor compliment to dwell on it even for a minute; *therefore* I shall now proceed to explain it to you as minutely as possible."

Meeting Curran, one morning, near St. Patrick's cathedral, he said to him: "The archbishop gave us an excellent discourse this morning. It was well written and well delivered; therefore I shall make a point to be at four courts to-morrow at ten."

Curran used to tell a story of Lord Coleraine, the best dressed man in England, and a very punctilious fashionable. Being one evening at the opera, he noticed a gentleman enter his box in *boots*, and vexed at what he thought an unpardonable breach of decorum, said to him: "I beg, sir, you will make an apology." "Apology!" cried the stranger, "for what?" "Why," rejoined his lordship, pointing down at the boots, "that you did not bring your horse with you into the box." "It is lucky for you, sir," retorted the stranger, "that I did not bring my *horse whip;* but I will pull your nose for your impertinence."

The two were immediately separated, but not before exchanging cards and settling for a hostile meeting. Coleraine went to his brother George to ask his advice and assistance. Having told the story, "I acknowledge," said he, "that I was the aggressor; but it was too bad to threaten to pull my nose. What should I do?"

"Soap it well," was the cool fraternal advice, "then it will slip easily through his fingers."