DIARY FOR FEBRUARY.

1. Wed. Last day for Co. Trea. to furnish to Ck of Mun. in Co's list of lands liable to be sold for taxes. Assessors to complete rolls, unless time ext.
2. Thur. Examination of Law Students for call to the Bar with Honors.
3. Frid. Examination of Law Stud. for call to the Bar.
4. Sat. Exam. of Art. Clerks for certificate of fitness.
5. SUN. *Septuagesima Sunday.*
6. Mon. Hilary Term begins. Articled Clerks going up for inter-examination to file certificate.
8. Wed. Inter-examination Law Students and Articled Clerks. New Trial Day, Queen's Bench.
9. Thur. New Trial Day, Common Pleas. Last day for setting down and giving notice of re-hearing in Chancery
10. Frid. Paper Day, Q. B. New Trial Day, C. P.
11. Sat. Paper Day, C. P. New Trial Day, Q. B.
12. SUN. *Sexagesima Sunday.*
13. Mon. Paper Day, Q. B. New Trial Day, C. P.
14. Tues. *St. Valentine.* Paper Day. C. P. New Trial Day, Q. B.
15. Wed. Paper Day, Q. B. New Trial Day, C. P.
16. Thur. Paper Day, C. P. Open Day, Q. B. Re-hearing Term in Chancery commences. Last day for service of summons for Co. Court, York.
17. Frid. New Trial Day, Q. B. Open Day, C. P.
18. Sat. Hilary Term ends. Open day.
19. SUN. *Quinquagesima Sunday.*
22. Wed. *Ash Wednesday.*
24. Frid. *St. Matthias.*
26. SUN. *1st Sunday in Lent.*
27. Mon. Last day for declaration County Court York.

THE

Canada Law Journal.

FEBRUARY, 1871.

RETAINERS AND RETAINING FEES.

SECOND PAPER.

In olden times counsellors dealt directly with the client, and a general retainer sometimes assumed the form of a grant by way of annuity *pro consilio impenso et impendendo* (Rolle's Abr. p. 435, pl. 10). In such a case the claim of the barrister for remuneration was a legal one, recoverable by suit. But in cases of special retainer, *with a view to advocacy in litigation*, the relationship of counsel and client precluded the making of any contract, so as to give the former a legal claim to compensation: *Kennedy* v. *Brown*, 13 C. B. N.S. 677. In other matters of counsel business, outside of the courts and not with a view to advocacy therein, it is necessary in order that a barrister may be able to recover his fees from a client that the client should have made an actual and express promise to pay them, inasmuch as nothing more than a moral obligation arises from the mere existence of the relation of counsel and client: *Mostyn* v. *Mostyn*, L. R. 5 Ch. Ap. 457.

In subsequent years it became, as it still continues, the customary etiquette to retain counsel through the medium of the solicitor or attorney in the particular suit: *Doe d. Bennet* v. *Hale*, 15 Q. B. 171. In such cases special retaining fees to counsel are always taxable between solicitor and client, and attorney and client, and there is even a case reported in which under extraordinary circumstances this item was allowed in a party and party taxation: *Nickells* v. *Halsam*, 9 Jur. 649. The solicitor under his general retainer is authorized to pay the counsel this and other fees, and after payment he can recover them from his client: *Morris* v. *Hunt*, 1 Chit. R. 544. Usage has established the course of dealing to be, that counsel is so employed by the solicitor not upon a preliminary traffic for his services in consideration of future payment, but upon a preliminary payment of his fees before those services are obtained: *Hobart* v. *Butler*, 9 Ir. C. L. R. p. 166. It may be noted (as Mr. Harrison has omitted it in his book) that in Ontario counsel fees are to a limited extent a legal claim and recoverable by action. This is by virtue of the enactment which is consolidated in section 332 of the Common Law Procedure Act and the tariff of costs framed in pursuance thereof, providing for counsel fees: *Baldwin* v. *Montgomery*, 1 U. C. R. 283; *Leslie* v. *Ball*, 22 U. C. R. 512.

The payment of retaining fees to attorneys and solicitors is a practice for which no modern English authority can be found, although there is reference made to such a fee in an anonymous case reported in 1 Salk. 87. (It is just possible that this may refer to the charge for drawing the retainer, which is taxable: *Browne* v. *Diggles*, 2 Chit. 312.) In the United States retaining fees to attorneys are sanctioned by the tariffs and claimable by law. It has been a usual practice in this Province to charge and in some cases to stipulate for such a fee, though some uncertainty exists as to its being taxable against the client when called in question. In an unreported case of *Eccles* v. *Carroll*, this practice was adverted to during the argument by Mowat, V. C., who said that in his time practitioners very often required a small fee, such as ten dollars, to be paid them at the commencement of a suit, with the view of covering the expense of miscellaneous non-taxable items during the progress of the cause.

A similar conventional charge in Ireland has been judicially recognized there, as "*oil for keeping the wheels agoing.*" It is probable that the propriety of the charge in this view only was recognized by the court in *Chisholm* v. *Barnard*, 10 Gr. 479, where executors were allowed the payment of such a fee in the passing of their accounts as against the estate.

We have had occasion to notice a passage in McMillan on Costs, p. 78, which seems to be replete with errors on this point. He says, "The fee on a retainer is only allowed in bills between attorney and client, and is never taxed against the opposite party, except when he is ordered by the court to pay costs as between attorney and client. It is, however, an item which should never be allowed, except in actions of a very special nature, and where great difficulty is encountered. It should always be explained to the client when necessary, and the amount stated to him before he is asked to sign the retainer. It is moreover an item which should never be charged, even where proper, unless there be a *written* retainer to support it. This consists of a mere memorandum in writing, with the fee intended to be charged by the attorney included therein, and signed by the client." Now be it observed that this fee was expressly disallowed upon a taxation in alimony as between solicitor and client in *Cullen* v. *Cullen*, 2 Chan. Cham. R. 94, and there is no reported case where it has been taxed at all, when objected to by the client, but several cases the other way are to be found: see *Re Geddes*, 2 Chan. Cham. R. 447; *Re McBride*, *ib.* 153. There is no reason in laying it down as a principle that only in actions of a special nature should retaining fees be allowed; the theory of the non-chargeability of such fees in England is, that Term fees, which are taxed alike in all cases, stand in the stead thereof, so that if retainers are to be taxed upon sufficient evidence of the agreement to pay, they should be so taxed in every case. But in truth it may be said that such fees are not in strictness taxable in this country at all. The mere fact of the agreement being in writing has no such virtue as the author imputes to it: *Strange* v. *Brennan*, 15 Sim. 346; *Pince* v. *Beattie*, 32 L. J. Ch. 734. It would seem contrary to the policy of our law relating to costs, as settled by statutes and tariffs, to permit of any such charge being made. The broad rule on this point is this where there is a tariff of costs providing for the remuneration of lawyers, they shall not be allowed to bargain for any compensation beyond that: see *Philby* v. *Hazle*, 8 C. B. N.S. 647; 8 W. R. 611. In Hibernian phrase, if the practitioner wishes to have his retainer taxed he had better keep it out of his bill of costs. In this way he may defend himself in the retention of a *paid* retaining fee, and refuse to give credit for it in his bill of costs on the ground that it is a gratuity given him freely by his client, above and beyond the bill of costs to which he is legally entitled. To do this, however, he would require to prove the concurrence of a variety of things, which we rather think has never yet been accomplished in any case. For instance, it would have to be established that the client was distinctly informed, (1) that the tariff allows of no such charge; (2) and that although the solicitor bargaining may decline to conduct the client's suit without such a fee, yet that others of equal ability may be found who would conduct it upon the usual scale of allowances; (3) that such a charge could not in any event be recovered from "the other side;" and (4) generally that all the circumstances of the transaction were voluntary and fair, and with full warning to and perfect knowledge by the client of his position and rights.

GENERAL SESSIONS OF THE PEACE.

Jurisdiction in cases of Perjury.

Our attention has been called to the above subject by various articles that have lately appeared in our public papers, and by discussions that have taken place thereon. Upon looking into the matter, we are compelled to admit that it is a subject by no means free from doubt as to whether the Court of General Sessions of the Peace has power to try cases of perjury or not. We will endeavour, however, to give some idea of how the matter rests.

Our Act (Con. Stat U. C. cap. 17) relating to General Sessions does not so much constitute a new Court, as continue and make valid the commissions and authority under which the Courts had been formerly holden, that is, prior to 41 Geo. III. It will be noticed that the County Courts, and some of the other Courts, have special acts, by which they were constituted Courts in Upper Canada; whereas, as mentioned before, Courts of Quarter Ses-

sions were only confirmed and continued by the first act of our Legislature which specially refers to them. This being so, it becomes necessary to enquire under what authority were the Courts of General or Quarter Sessions in this country first held. We should say, by the act introducing the criminal law of England in this Province.

Now, our act respecting these Courts says nothing in reference to jurisdiction; in which case we must fall back on the English law, and ascertain what law governed the jurisdiction of Courts of General Sessions in England when the criminal law was introduced into this Province.

The Court of General or General Quarter Sessions of the Peace was established in England in the reign of Edward III, for the trial of felonies, and of those misdemeanors and other matters which justices of the peace, by virtue of their commission or otherwise, might lawfully hear and determine. The statute 24 Ed. III. cap. 1, states what offences may be tried by these Courts, and, after enumerating a large number of different classes of cases, goes on to say, "and to hear and determine all and singular the felonies, trespasses, &c., according to the law and statutes of England." There was some considerable doubt entertained as to what the words "felonies" and "trespasses" included, and what constructions ought to be placed upon them; but the authorities now seem to be agreed that, with the exception of *perjury at common law*, and *forgery at common law*, the Court of Quarter Sessions has jurisdiction of all felonies whatsoever—even murder (2 Hawk. P.C. cap. 8, sec. 63). It has been long ago settled that for perjury *at common law*, an indictment at the Quarter Sessions will not lie (see 2 Hawk. P. C. cap. 8, sec. 64; *R.* v. *Bainton*, 2 Str. 1088); but perjury *under the statute* 5 Eliz. cap. 9, is within the jurisdiction. In a case that came up before Lord Kenyon, C. J.: *R.* v. *Higgins*, 2 East. 5 (an indictment for soliciting a servant to steal goods from his master), it was argued that the case did not fall within the jurisdiction of the Sessions, but his Lordship said, "I am clearly of opinion that it is indictable at the Quarter Sessions, as falling within that class of offences which, being violations of the law of the land, have a tendency, it is said, to a breach of the peace, and are therefore cognizable by that jurisdiction. Of this rule there are indeed two exceptions, namely, forgery and perjury;—why exceptions, I know not; but having been expressly so adjudged, I will not break through the rules of law." His Lordship, in referring to the above exceptions, no doubt alluded to the *common law* offences, perjury under the statute of Elizabeth not having been decided to be without the jurisdiction.

Such being the state of the law when it was introduced into this country, has the jurisdiction of the Sessions been diminished or changed by any Provincial act?

But before going further, we may mention that the English law has been altered by Imp. stat. 5 & 6 Vic. c. 38, s. 1, and the jurisdiction of the General Sessions greatly lessened. By that statute, among other crimes excepted from its jurisdiction, are the crimes of murder, perjury, subornation of perjury, forgery, &c.; but this statute having been passed long subsequent to the time when the English criminal law was introduced into Canada, does not affect our law on the subject. It may be said, from the fact of the crimes before mentioned being expressly excepted from the jurisdiction of the General Sessions, that the English Legislature considered that such crimes were not before then without the jurisdiction of these Courts; but this does not necessarily follow, as the law was very properly defined so as to prevent any doubt or uncertainty as to the jurisdiction.

If we, then, have no special enactment excepting these crimes, it would seem that, as regards them, the jurisdiction of General or General Quarter Sessions of the Peace still exists. The only act since the act first referred to (Con. Stat. U. C. cap. 17), bearing on the subject, is the act of 24 Vic. cap. 14, which abolishes the power of the Quarter Sessions to try treasons and felonies punishable with death. This act was, however, repealed by Dominion statute 32 & 33 Vic. cap. 36. The Dominion Act 32 & 33 Vic. cap. 29, sec. 12, withholds jurisdiction from the Sessions in cases of felony punishable with death, and libel; and cap. 21 withholds it in cases of fraud by agents, bankers, factors, trustees and public officers (*vide* sec. 92); and 32 & 33 Vic. cap. 20, in certain offences against the person, set forth in secs. 27, 28 & 29, withholds jurisdiction; so that, with these exceptions, the power of the Quarter Sessions is the same as before.

It will be noticed that the Act respecting Perjury (Dom. stat. 32 & 33 Vic. cap. 23, sec. 6), empowers the judge, &c., to direct that any person guilty of perjury before him shall be prosecuted, "and to commit such person so directed to be prosecuted until the next term, sittings or session of *any Court having power* to try for perjury." Now, the language of the English enactment 14 & 15 Vic. cap. 100, sec. 19, from which ours is taken, after providing that it shall and may be lawful for any judge, &c., to direct, &c., is as follows: "and to commit such person so directed to be prosecuted until the *next session of oyer and terminer or gaol delivery* for the county or district where," &c.; indicating that the jurisdiction over such cases in this country is not confined to the assizes only, as in England. From all which, we take the deduction to be, that in cases of perjury at common law, the Court of General Sessions of the Peace has no jurisdiction; in cases of perjury under the statute of Elizabeth (this statute relates to perjury by witnesses only) the Court has jurisdiction. In cases of forgery at common law, it has not jurisdiction: *R.* v. *Yarrington*, Salk. 406; *R.* v. *Gibbs*, 1 East. 173. As, however, the statute of Edward provides that if a case of difficulty arises upon the determination of the premises, that judgment shall in no wise be given unless in the presence of one of the justices of one or the other Bench, or of one of the justices appointed to hold the assizes, it is not at all probable that the justices sitting in General Sessions will take upon themselves to determine crimes of the more serious nature, but will exercise the power above given them of allowing such crimes to remain over for the judge holding the assizes.

We do not feel that we have arrived at a very satisfactory conclusion—certainly not at the generally conceived idea; but in view of the premises, we can form no other opinion on the matter.

It is not improbable that the jurisdiction of the Court of General Sessions will soon be fully settled by a decision of one of the Superior Courts of Common Law, as we understand a case was reserved lately by one of the County judges, upon the ground that he had doubts, and desired to have the opinion of the Court of Queen's Bench as to whether or not the Courts of General Sessions have jurisdiction in cases of forgery.

THE BENCHERS BILL.

Some considerable alterations have been made in this Bill by the special committee to whom it was referred, as will appear from the extracts given below. The privilege proposed to be given to the silk gowns to elect twelve members from amongst themselves is taken away; the provisions as to electoral districts are struck out, and thirty Benchers are to be elected, irrespective of locality; length of standing at the Bar is not required, and the youngest barrister is as eligible as the leader of the Bar. The first election is to take place next April, if the Bill passes.

The clauses referred to provide that—

"On the first day of Easter Term, one thousand eight hundred and seventy-one, the present benchers, except as hereinafter provided, shall cease to hold office, and from and after that day the benchers of the Law Society, exclusive of *ex-officio* members, shall be thirty in number, to be elected as hereinafter provided.

For the purpose of the election of the remaining thirty benchers, each member of the Bar not hereinafter declared ineligible as an elector, may vote for thirty persons.

Such votes shall be given by closed voting papers, in the form in schedule A of this Act, or to the like effect, being delivered to the Secretary of the Law Society on the first Wednesday of April of the year proper for such election, or during the Monday and Tuesday immediately preceding: any voting papers received by the said Secretary by post during said days, or during the preceding week, shall be deemed as delivered to him.

The said voting papers shall, upon the Thursday following, be opened by the Secretary of the Law Society in the presence of the scrutineers, to be appointed as hereinafter mentioned, who shall scrutinize and count the votes, and keep a record thereof in a proper book, to be provided by the said Society.

The thirty persons who shall have the highest number of votes shall be benchers of the said Law Society for the next term.

Any person entitled to vote at such election shall be entitled to be present at the opening of the said voting papers.

In case of an equality of votes between two or more persons, which leaves the election of one or more of such benchers undecided, then the said scrutineers shall forthwith put into a ballot-box a number of papers, with the names of the candidates having such equality of votes written thereon, one for each candidate, and the Secre-

tary of the said society shall draw by chance from such ballot box in the presence of the said scrutineers one or more of such papers sufficient to make up the required number, and the persons whose names are upon such papers so drawn shall be such benchers.

The persons so elected Benchers as aforesaid shall take office on the first day of Easter Term following their election, and shall hold office until the beginning of the Easter Term which shall be the fifth after they shall have entered on their said office, or till the election of their successors."

It has also been decided in committee that Benchers who shall be absent from Convocation for one year shall lose their seats.

By the Bill as introduced the County Judges were returning officers for the country districts, and this might have been thought to have rendered them ineligible as Benchers, but if that is all to be done away with, no such idea can arise, and so much the better, as there are some among them, take for example the Chairman and members of the Board of County Judges, who would make admirable Benchers. Hitherto it has not been the habit to appoint any of the County Judges, but with no sufficient reason that we can see, in fact there is much to be said in favor of appointing those of them who may be considered most eligible, and when this Act comes into force, which is now a foregone conclusion, we shall hope to see some of them elected.

The following is the Act introduced by Mr. Rykert to amend the Act to regulate the procedure of the Superior Courts of Common Law, and of the County Courts, as reprinted after the amendments made by the Special Committee:—

Her Majesty, &c., enacts as follows:

1. That sections one hundred and ten, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, and one hundred and thirty, of chapter twenty-two of the Consolidated Statutes of Upper Canada, be and the same are hereby repealed.

2. That the costs of any issue, either of fact or of law, shall follow the finding or judgment on such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues, unless the judge at the trial shall certify to the contrary.

3. That in all actions brought in any of the County Courts of this Province, it shall be lawful for the Judge of the County Court where the proceedings are commenced, to change the venue according to the practice now in force in the Superior Courts; and in the event of an order being obtained for that purpose, the clerk of the County Court where the action was commenced shall forthwith transmit all papers in the cause to the clerk of the county to which the venue is changed, and all subsequent proceedings shall be entered and carried on in said last mentioned county as if the proceeding had originally been commenced in such last mentioned court.

4. That section one hundred and nine be amended by adding to the end thereof the following: "Provided always that the Judge of the County Court shall have the power to grant such leave in cases brought in either of the Superior Courts when both the plaintiff's and defendant's attorney reside in the county where such action is commenced.

5. That section one hundred and twenty-nine be amended by adding to the end thereof the following words, "but this shall not apply to any action wherein the venue is laid in the County of York."

6. That in all actions of replevin the Judge of the County Court of the County where the goods are, which are sought to be replevied (excepting the County of York), shall have the power of issuing the order in the same manner as by law the Judges of the Superior Courts are empowered to issue the same.

7. That if any debtor in execution shall escape out of legal custody after the passing of this Act, the Sheriff, Bailiff, or other person having the custody of such debtor, shall be liable only to an action upon the case for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action for debt in consequence of such escape.

8. That it shall and may be lawful to plead any number of pleas, replications, avowries, cognizances or other pleadings without leave of the Court or a Judge; Provided always, that the opposite party shall be at liberty to apply to the Court or a Judge to disallow any plea upon the ground of embarrassment, or delay.

9. That the Judge at any trial shall at the request of either party cause the witnesses to be removed from the Court during such trial; and also the parties to the suit if in the discretion of the Judge it is deemed necessary; and any such witness who shall return to the Court without leave shall be liable to be punished in such manner as to the said Judge may seem proper; Provided always that the said Judge may in his discretion exclude the testimony of any witness who shall return to the Court without leave of the Judge.

10. In any case where on the trial leave is reserved to move to enter a non-suit, or to enter a verdict for the defendant, and the jury disagree and find no verdict, the court, on motion in Term pursuant to such leave, may give the same judgment as if a verdict had been found for the plaintiff.

11. Every writ of summons issued against a railway, telegraph, or express corporation,

and all subsequent papers and proceedings in the event of an appearance not having been duly entered, may be served on the agent of such corporation, at any branch or agency thereof, or on any station master of any railway company, or on any telegraph operator, or on any express agent having charge of an express office, shall for the purpose of being served with a writ of summons issued against such corporation, or any paper or proceeding as aforesaid in the event of non-appearance, be deemed the agent thereof.

12. In all cases where pleadings or notices of trial or countermand of notice of trial in either of the Superior Courts of Common Law, or in the County Court, are served upon the agent of the Attorney in the cause in Toronto two clear additional days to the time now allowed by law for such service shall be added.

13. That section twenty-eight of chapter thirty-five of the Consolidated Statutes for Upper Canada be repealed and the following substituted therefor:

Upon the application of the party chargeable by such bill within such month any of the Superior Courts of Law or Equity or any Judge thereof, or any Judge of a County Court shall without money being brought into court refer the bill and the demand thereon to be taxed by the proper officer of any of the Courts in the county, in which any of the business charged for in such bill was done, and the Court or Judge making such reference shall restrain the bringing any suit for such demand pending the reference.

14. That the second section of the Act passed in the twenty-eighth year of Her Majesty's reign, chaptered nineteen, be amended by erasing the figure "4" in the fourth line of such section and substituting therefor the figure "9."

Some slight alterations have also been made in Committee of the House, which we shall refer to hereafter.

SELECTIONS.

DEFECTIVE STATE OF INTERNATIONAL LAW.*

It is much to be regretted that whilst proper remedies are available of a preventive, suppressive, and penal character, against crime, the ordinary disease of the body politic, there are no remedies either of a preventive, suppressive, or penal character against war, the highest and most pernicious crime in the commonwealth of nations, unless it be, indeed, its own condign retribution. It is supposed that International Law is able to subordinate the relations of States to the dictates of natural law, and that though nations acknowledge no superiors, they are yet under the same obligation mutually to practice honesty and humanity. But, alas, experience shows that International Law is not able to effect its own noble mission. That law does indeed afford a standard of high maxims of right and justice, by which the acts of States may be judged, but fails altogether in the means of securing adherence thereto, and many are the acts which that law reprobates, that continue to be committed with the utmost impunity. Can nothing be done to place the public law of the civilised world on a firmer footing than it stands at present? Is there no mode for supplying the serious shortcomings of International Law?

The root of weakness in International Law is, that it is not a law. A law, in its special restricted sense, is a command or precept, emanating from some superior authority, and constituting a rule of action which an inferior is obliged to obey. Not so with International Law. That is only a body of principles or opinions enforced, not by physical but by moral sanctions. Nor is there much certainty or authority in the sources of such principles. Natural law, divine law, the reason of the thing, the customs of nations, the express agreements of States, the judgments of Prize Courts, the dicta of learned writers have each and all elements of weakness in them. Natural law is a sentiment rather than a principle. Divine law is unheeded by some, denied by others. The reason of the thing is often not very transparent in particular cases. The judgments of Prize Courts frequently reflect the opinions of the State under whom they are instituted. Treaties are easily disregarded or broken, and the statements of writers on the law of nations are often uncertain and conflicting.

Setting aside, however, these inherent defects, generally, we may say, International Law is composed of two elements, the natural and the conventional. The natural element is common to all nations. Like the *jus gentium* of the Romans, it embraces all those principles of morals which are implanted by the Author of Nature in the heart and mind of every one, of whatever clime or race, and which ought to regulate the acts of every individual of every State in their mutual relations. The duty of being faithful to one's engagements, or of acting in good faith, or of respecting the rights and property of others, are necessarily alike in every country, and are as binding on the State in its collective capacity as a moral person as on an individual. The conventional element of International Law is that which results from the practice of nations, from the judgments of their Prize Courts, and from express agreements or treaties. There are leading cases in the law of nations as in municipal law. The declarations made by ministers or ambassadors, the diplomatic correspondence, the conduct of States, constitute so many evidences of the positive obligations of States. But those two elements, the natural and the conventional, are often intermixed and often separate. There may indeed be a natural

* Recently read at the Social Science Congress.

obligation where there is not a conventional, but there is scarcely a conventional without the natural element bound up with it. Unfortunately, however, of the two elements the natural, that which is the most unchangeable and universal, is also the less certain in its operations and authority. Could we give to the universal principles of natural law the same certainty as is possessed by the conventional, we should not have to lament the weakness and uncertainty which characterise by far the greater part of the law of nations. As it is, the structure of International Law is most defective and unsatisfactory. If, as according to some, the law of nations in reality consists of the practice of nations, for what practice, however unhallowed, can we not find ample precedents? If, as according to others, it consists only of the aspirations of philosophers and moralists, or of the dictates of natural or revealed religion, we have always the ready answer, that its principles, however wise and beneficent in theory, are not suitable in practice.

For many of the evils and difficulties which often disturb the intercourse of nations International Law is certainly not responsible. It is the political system that is at fault. It is from the defective organisation of States that the greatest troubles arise. International Law takes the States composing the great commonwealth of nations such as they are, but it cannot guarantee their permanent existence. Since the Treaty of Vienna, which was supposed to have settled the public law of Europe, and established a balance of power among its different States, Italy has become a kingdom, the German Confederation has been destroyed, the Republics of Frankfort and Cracow are extinct, Belgium is parted from Holland, and another Napoleon has reigned in France. Matters connected with the internal government of a State and matters relating to its external relations appertain to political science, and not to International Law, and in practice there is, alas, too great a difference between politics, which are too often prompted by the lust of power or expediency, and International Law, which proposes to set forth the dictates of eternal justice. In the relations of States in time of peace International Law enjoins the observance of all those duties which the safety of the general society requires, and commends the performance of those offices of humanity which may tend to the preservation and happiness of other States, and to promote their intelligence, power, and freedom; but how often the political system of States has been based on selfishness and exclusiveness. Nor would it be right to attempt to enforce what are simply moral duties, whether in international or social relations, for they are duties which do not produce corresponding rights, or rights which do not produce corresponding duties. It might be an act of enmity on the part of a State to refuse to trade with another, but no one could compel it to do so without violating its own right of freedom. We had no more right to compel China to take our opium than China would have to compel us to receive her tea duty free.

It is, however, when we come to a state of war that the defective character of International Law becomes most apparent. Amongst the many works on the subject, Grotius's "De Jure Belli ac Pacis" holds certainly the first and highest rank, and this work was suggested, as he said, by the natural horror with which he beheld the frequency and atrocity of the wars in which every State was engaged on the most trifling pretext. "I have been for a long time convinced," he said, "that there is a God common to all nations, who watches both the preparation and the course of war. I have remarked, on all sides in the Christian world, such a wanton license as regards war, that even the most barbarous nations should blush for. People turn to arms without reason, and for the slightest object, and they trample under foot all Divine and human laws as if they were authorised, and were quite resolved to commit all sorts of crime without any check." Grotius wished to put a stop to such barbarism, and he conceived the thought of bringing the precepts of Scripture, as well as the dicta and sayings of philosophers and moralists, having a direct bearing on matters relating to peace and war, clearly before the civilised States of the world, in the hope that these might, by their own moral force, succeed in establishing a law which no civilised State might feel itself at liberty to disregard. That great influence was exercised by that and subsequent works on International Law is incontestible.

What we lament is, that whilst, on what may be considered insufficient and unsatisfactory ground, at least in that religious aspect in which Grotius first discussed the question, both he and the other principal writers of the law of nations declared that, under certain circumstances, war is lawful, neither Grotius, nor any other writer, sufficiently defined the precise circumstances under which war may be justifiable. Following the analogy of criminal law, Lord Bacon said:—"As the cause of a war ought to be just, so the justice of that cause ought to be evident, not obscure, not scrupulous; for, by the consent of all laws in capital cases, the evidence must be full and clear, and if so where one man's life is in question, what say we to a war which is even the sentence of death upon many?" It is, I conceive, too loose a statement to say that war is lawful to prevent or redress a wrong, to obtain a reparation against an injury committed or threatened, or for any act committed or expected to be committed affecting the independence of a State, or the free enjoyment of its rights. What, if the wrong be of a most trivial character? What, if the threat be imaginary and not real? Looking back to the ordinary cases of war, how few of them can be resolved into wars simply of self-defence!

There have been wars of pillage, conquest, and domination, where the Cæsars, the Alexanders, and the Napoleon Bonapartes claimed an universal empire. There have been religious wars, as where the Greeks fought for their Temple in Delphis, where the Huguenots fought for their existence in France, and where Protestantism asserted its rights, arms in hand, in Germany. And there have been wars for the maintenance of a principle, as those of the French Revolution and the wars of Austria in Italy.

But the most prolific cause of war in modern times have been the balance of power and intervention, both of which infringe a cardinal principle of International Law, the principle of the sovereignty of States. What is the balance of power it is not easy to determine, but its object would seem to be so to distribute the forces of the different States, that none shall have the power to impose its will on, or oppress the independence of, any other State, Let any State extend its forces or multiply its resources beyond a certain limit, and according to that principle a cause is at once given to every other State to unite in checking this unwonted aggrandisement. Nor is this principle a simple theory, since the treaties of Westphalia, Utrecht, and Vienna, have, in effect, reduced it into positive law. But has not every State an absolute right to increase in power, forces, and wealth? Can we prevent the substantial sources of aggrandisement which lie in the superiority of race, in greater capacity for labour, and in the strength of higher morals? The power of a State does not consist merely in the extent of its territory, or in the number of its population, but in the wisdom of its administration, in the activity of its inhabitants, in the full development of its resources. Against this development no balance of power can be of any avail. Most mischievous was, moreover, the principle of combining all the States of Europe on every isolated emergency; thus uselessly extending the ravages of war, and bringing nations into the fray which had no interest to defend or any wrong to avenge.

But we have not done with this principle. The present war between France and Prussia had its origin in the jealousy of France for Prussian aggrandisement in Europe. It is another war caused for or by the balance of power. Can it be considered a just cause of war? The authority of Grotius upon this point is of the greatest value. "We cannot admit," he said, "the validity of what some authors have taught that, according to the law of nations, it is lawful for us to take arms in order to enfeeble a State whose power is increasing, lest, if allowed to increase too much, it should be in a position, when occasion arises, to do us injury. We allow, that when deliberating whether we should make war or not, such considerations may have their weight, not as a justification, but as a motive of interest, so that if there be a just reason to take arms, the fact of the aggrandisement of such State may render it prudent, as well as just, to declare war. But that we have any right to attack a State for the simple reason that she is in a condition to injure us, is contrary to all rules of equity. War is lawful only when necessary, and it cannot be necessary unless we have a moral certainty that the power we fear has not only the means but the intention of attacking us." Grotius, Book II., ch. i., s. 17, and Book II., ch. xxii., s. 5. It is clear, indeed, on every ground, that the war which now agitates and afflicts Europe is altogether a gratuitous breach of International Law.

But another principle is being evolved at this moment in Germany and Italy. It is the principle of Nationality. It is true that Prussia has stretched the bounds of her territory far and wide in Germany, that she has absorbed Hanover, destroyed the Republics of Frankfort, subjected the Hanse towns, and rendered Saxony and Baden subservient to her will. But she is only placing herself at the head of a German nationality. Equally true it is that Sardinia made war on the King of Naples, absorbed Tuscany, got hold of Lombardy and Venice, and now appropriates even Rome; but she has acted throughout on the principle, and asserted the right, of an Italian nationality. What constitutes true nationality, and whether it results from identity of language and literature, from unity of race and descent, from the possession of a national history, or from geographical position, it matters not. Suffice to say, that where the sentiment of nationality does exist in any force, there is a *prima facie* case for uniting all the members of the nation under the same government.

But admitting that a nation has the right to constitute itself into a people or separate State, has it a right to claim, even by force of arms, any portion of that people which hitherto may have formed part of another nationality, or have been subject to another State? Take the case of Rome at the present moment. Have the Italians any right to that province or State? The only answer is that the right of nationality must be held superior to any right arising from the present organisation of States. The spirit of nationality is strong and enduring, and it is because it is not sufficiently recognised in the constitution of States that we have to lament the frequent occurrence of revolution and war.

Interventions have also been frequent causes of war. On the principle that, whenever a sudden and great change takes place in the internal structure of a State, dangerous in a high degree to all neighbours, they have a right to attempt by hostile interference the restoration of an order of things safe to themselves, or at least to counterbalance, by active aggression, the new force suddenly acquired. Russia, Prussia, and Austria arrogated to themselves the right of interfering with any

changes in the political system of the Italian States. France intervened in Spain to reverse the national party, and to re-establish absolute government; Russia, Prussia, and Austria tore to shreds, and divided among themselves poor distracted Poland. In most cases, let it be observed, it was the strong that interfered in the affairs of the weak, and it was rare indeed when such interventions were suggested from any regard to the interest of the weak. But even if it were, that would not justify the intervention. It might appear a chivalrous act on the part of a strong power to offer its aid to a weak State at a moment of danger, but universal experience proves that no State can long maintain its independence if it is to be beholden for it to the support of another power. It should be remembered, moreover, that an armed intervention is war, and that no duty of friendship or generosity can justify the unsheathing of the sword, and the perpetration of so much evil as war brings in its train.

But there is another kind of intervention of an amicable character in which we are at present deeply interested. In its primary sense the word "intervention" means to come in between things or persons, to interfere in the affairs of another. Has a nation any right to exercise such interference? Does the community of interest, which binds us altogether, give us a voice in the acts and conduct of other States? Can we force our offices or interpose our action on an unwilling nation? To do so would be to infringe the sovereign rights of other States—would be to incur the certain danger of war. And it is the same thing whether we interfere *officiously* by verbal notes through our ambassadors, or *officially* by formal notes or letters, or by the proposal of a congress, or in an armed manner preceded by an ultimatum, and accompanied by a military demonstration. In either case the intervention would be the sole act of the intervening party, which might be resented or opposed by the parties affected by it. Mediation, on the other hand, is quite another thing. A State may most appropriately at any time offer its good offices for the amicable settlement of a dispute. It may be asked by the contending parties themselves to make proposals for such settlements without binding themselves to accept such proposals; or may be constituted arbitrator to decide the question. There is no interference in mediation. It is not a forcing of one's own will or action upon others, but it is only the manifestation of willingness and readiness to perform a friendly act. What should be done in the present difficult position of France and Prussia? Should England intervene? Notes verbal or official would be of little purpose. For a congress they are not ready. An armed intervention would be war to either State or to both. Surely, then, no intervention is possible. But it is otherwise with mediation. This may be offered at any time without any danger of wounding the susceptibilities of either power.

The only justifiable cause of war, if we once admit its lawfulness, is self-defence. England, for instance, has mighty interests to defend at home and abroad. She has an enormous trade; she has unbounded wealth; she has colonies and dependencies widely scattered and isolated; she has an extensive number of subjects planted in every part of the habitable globe. Nothing could be more natural than that she should be jealous of her rights, and that she should be prepared to defend them at all hazards. But a limit must be put even to this right of self-defence. Many of the wars for the balance of power were waged on the plea of self-defence, and the enlargement of a State, though more than thousands of miles distant, has been held sufficiently dangerous to justify a war. But surely nothing short of actual invasion of territory, nothing less than an act of aggression on the sovereign rights of a State, should justify a war of self-defence. International Law has given even to this principle too great a latitude, and the European nations have been too prone to use it as a convenient justification for acts of unhallowed aggression.

When war has once been declared it seems almost puerile to spend much time in settling the exact bounds to which the belligerents may lawfully proceed, for bitter experience proves that when the passions are unfurled, the reign of law is at an end. We may wish, however, that even as respects the conduct of nations in time of war, International Law should be more definite and consistent. It is a sound principle that, whilst whatever is likely to be conducive to the accomplishment of the enterprise is allowable, whatever has not that object directly in view is not to be held lawful. But the principle is neither properly carried out nor universally applied. It may be right, because necessary, in a belligerent to capture soldiers, military officers, and arms, but no such justification exists for the capture of goods and property of private individuals. Nevertheless, whilst International Law seems to disallow the capture of private property by land, except, indeed, in case of fortified towns, in the form of booty, it permits it by sea. The United States of America proposed in 1856 to accept the regulation relating to the abolition of privateering, on condition that private property on the high sea should be exempted from seizure. But England did not accept the proposal. Now Prussia has taken the initiative in this important reform. Let us hope that at a future congress the principle may be established by the consent of all nations. Upon the principle that war should be waged against the armed forces of the belligerent, and not against inoffensive subjects or places, no private individuals should be captured or shot, and nothing should be destroyed but what may be used as means of offence and defence in actual warfare. Yet we still hear, though International Law does certainly not justify it, of wanton practices

against whole populations, of the destruction of ports of trade, and of the bombardment of places not fortified. The right of search also as practised in former wars is vexatious and needless. Since it is the destination that determines whether an article is contraband or not, it should rest with the belligerent cruiser to bar, if he can, the entrance of such into the enemy's country, without disturbing for that purpose the entire trade of the world. The case of the *Trent*, during the American War, showed the necessity of having it declared, that packets engaged in the postal service, and keeping up the regular and periodical communication between the different countries in Europe, America, and other parts of the world, should be exempt from visit and search. The list of contraband articles would need to be reduced and rendered more certain. The blockade of commercial towns also can scarcely be defended as useful or necessary, since, by the improvement of internal communication, the enemy is, in most cases, able to provide himself with necessaries from other means. Many, indeed, are the improvements needed in the principles of International Law relating to the rights and duties of belligerents.

But not less essential it is to define more correctly the rights and duties of neutrals. It is all important to realise the fact that a state of war between any two States is highly detrimental to the interests of every other nation, who suffer from the destruction of their trade and the diminution of their resources. It is not as a concession, but as a right, that neutrals claim to continue their trade and navigation undisturbed; and it was not more than they were entitled to, when they wrested from the belligerents the principle that the neutral flag shall cover enemy's goods, and that neutral goods shall not be liable to capture under the enemy's flag. But the great question of the duties of neutrals respecting the sale and transport of contraband of war remains to be settled.

What is most important of all, however, in International Law, is to put an end to the obscurity and uncertainty which now exists on many subjects; and I conceive that we could not pursue a better course to that end than by following up the useful precedent set by the Conference of Paris of 1856, in reducing as many of the points as are recognised and acted upon by the civilised States, into so many distinct propositions to be recognised and expressly assented to by all civilised States. If we could bring nations to understand that international Law is really binding upon us, and if we could clothe its precepts with the authority of an express agreement, we should do much to secure a fuller compliance with its requirements. A congress is likely to take place at the conclusion of the present war to restore order in the political system of Europe. Let us hope that an effort may then be made to put the law of nations on a firmer and more satisfactory footing than it has ever yet been placed.

And since, with the multifarious and complicated relations between States, disputes will ever arise, let us provide some means for their peaceful arrangement without resorting to the fearful alternative of war. The Treaty of Paris of 1856, concluded between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, has a provision "that if there should arise between the Sublime Porte and one or more of the signing Powers any misunderstanding which might endanger the maintenance of their relations, the Sublime Porte and each of such powers, before having recourse to the use of force, shall afford to the other contracting parties the opportunity of preventing such an extremity by means of their mediation." And, further, in the Protocol of the Congress the same powers, on the proposition of the late Earl Clarendon, agreed as follows:—"The plenipotentiaries do not hesitate to express in the name of their governments the wish that States between which any serious misunderstanding may arise, should, before appealing to arms, have recourse, as far as circumstances might allow, to the good offices of a friendly power." It is true that Count Walewski, as representing France, in approving, added—"That the wish expressed by the Congress cannot in any case oppose limits to the liberty of judgment of which no power can divest itself in questions affecting its dignity." Yet it might have been expected that when England appealed to the protocol, and offered mediation, both powers, and France especially, by whom the offensive was taken, should have consented to submit her grievance, in the first instance at least, to the arbitration of two friendly powers. This important concession to public opinion, however, cannot be allowed to be thus foiled, and it is well to consider by what means the agreement may be rendered more operative.

What is wanted is the formation of an International Council composed of the foreign ministers and ambassadors, for the time being, of all the civilized powers, for the determination of any disputes and difficulties which may arise between such States, to be summoned only when such differences arise. We should guard against the admission of any provision, such as that which was taken advantage of to justify France in withdrawing from the agreement on this last and most fatal war to herself. And it ought to be part of the arrangement, on the example of our municipal jurisprudence in matters of arbitration, that should, notwithstanding such formal agreement, any one power refuse to abide by its engagement, the other power or powers should still appeal to the International Council for the determination of the dispute, and the pronouncement of an award, and that the Council should proceed with the consideration of the question without regard to that refusal. Two important advantages would result from such an arrangement.

We should obtain from an impartial tribunal a deliberate opinion on any question which might disturb the peace of the world. And we should have the moral weight of the civilized world brought to bear against the nation which, whether as the aggressor or the aggrieved, refuses to abide by its formal agreement, or to comply with the deliberate award of the International Council. I am not proposing, that in case of such refusal all the States should join with the other powers in enforcing the award. We must not fall into the blunders of another Holy Alliance. We must not, with a view, or in the hope of promoting peace, extend the range of quarrels and wars. Moral reforms can only be achieved by moral means. But I do attach the greatest possible weight to an arrangement which might relieve many States from pursuing a course of hostility to a point where it becomes almost impossible to retract. We must count on the moral feeling, on the honour, on the good sense of nations, and we must strive to put some barrier to the first outburst of passions, by retarding the steps which might otherwise inevitably end in open war.

Too long have we seen, with seeming indifference, this grossest outrage against all that is sacred and humane. Too long have we sat with folded arms, witnessing the fatal course which brought one power after another towards a certain ruin. The suggestion I have the honour of making has already received a certain amount of diplomatic sanction. Let it be matured, developed, and strengthened. But, whether by this or by any other means, let us devote our highest effort to remove for ever from the bounds of the civilized world the demon of war. By all that is sacred in the human breast, by all that is noble, enlightening, and elevating in our advancing civilization, by all that animates us to sentiments of affection and amity towards our brother man, all the world over, let us put an end to this grossest and blackest of all crimes, the name of war. The natural state of man in society is peace, and not war. Let us ask this noblest of all services from International Law, that it may provide means by which nations may live in peace and concord among themselves.—*Law Magazine.*

It is the business of a lawyer to be ready-witted; and it may be that he whose wit is sharpened in daily encounters deserves little credit for readiness. This does not detract, however, from the merit of such as this passage of Jekyll. Lord Ellenborough, who was a severe judge, was one day at an assize dinner, when some one offered to "help him to some fowl." "No; I thank you," said his lordship, "I mean to try that beef."

"If you do, my lord," said Jekyll instantly, "it will be *hung* beef."

CANADA REPORTS.

PROVINCE OF ONTARIO

GENERAL SESSIONS OF THE PEACE, COUNTY OF SIMCOE.

Before J. A. Ardagh, Esq., *Deputy Judge, Chairman.*

In re Charles C. Webster and others.

31 Vic. cap. 66—Affidavit of residence—Certificate of Justices—Oath of allegiance.

[Barrie, Dec. 19, 1870.]

This was an application to prevent certificates of naturalization being issued by the Court of General Sessions of the Peace for the County of Simcoe, to Charles C. Webster, John W. Fisher and B. F. Kendall, under the provisions of the Dominion Act 31 Vic. cap. 66.

The grounds of opposition were—

1. That the time of residence is not stated in the affidavit of residence.

2. That the certificates of the justices of the peace, read on the first day of the Court, do not show that the requisite oaths of allegiance have been taken by the applicants.

3. That initial letters only are used in the headings of the affidavits, and not the full names of the applicants.

Ardagh, D. J.—As to the first ground, the contestant insists that affidavits of residence having been filed with the Clerk of the Peace, they must be considered as open to objection by any person contesting the granting of the certificates.

The act requires (by section 3) that every alien now residing in any part of this Dominion, and who, after a continued residence therein for a period of three years or upwards, has taken the oaths of residence and allegiance, and procured the same to be filed of record as thereinafter prescribed, so as to entitle him to a certificate of naturalization as thereinafter provided, shall thenceforth enjoy the rights of a natural-born subject.

Now, it will be noticed that no provision is made for filing of record the affidavits of residence and allegiance; the only thing required to be filed of record is the certificate of residence. Section 5 provides that this certificate shall be presented to the court on the first day of some general sittings thereof, and shall be read in open court; and that if the facts mentioned therein are not controverted, nor any other valid objection made to the naturalization, such certificate shall be filed of record on the last day of such general sittings. Here it will be seen that the mere lodging of the certificate is not to be considered as a filing thereof, such filing taking place only upon the order of the court on the last day of its sitting.

Again, the only certificate spoken of is one of residence alone (except, indeed, that mentioned in section 6, to which allusion will be made presently); and this appears from section 4, subsection 3, which provides that a justice of the peace, on being satisfied by evidence produced that the alien has been a resident of Canada for a continuous period of three years or upwards, and is a person of good character, shall grant to

him a certificate setting forth that such alien has taken and subscribed the said oath, &c.

Section 5 of the act prescribes the mode of procedure, and enacts that such certificate (that is, in our opinion, the certificate of residence only) shall be presented to the court in open court on the first day of some general sitting thereof, and thereupon such court shall cause the same to be openly read in court.

From this we take it that the only thing before the court, and the only thing they are bound to take notice of, is this certificate of residence. Behind this we cannot go, nor have we authority to enquire whether the evidence upon which it was granted was sufficient. We must presume that the justice who granted it saw that the act was complied with. The mere production of *an* affidavit, appearing to have been made by the applicant, is not necessarily conclusive that no proper affidavit was made before the justice granting the certificate; and further, the court is not called upon to listen to or take notice of any affidavit, not being authorized thereto by the act.

Section 5 then goes on to say, "And if, during such general sitting, the facts mentioned in such certificate are not controverted, or any other valid objection made to the naturalization of such alien, such court, on the last day of such general sitting, shall direct that such certificate shall be filed of record in such court."

Here, then, we must enquire if the facts mentioned in such certificate (read on the first day of the court) are controverted or not. It is not attempted to be shown by the contestant that the alien has not taken and subscribed the oath of residence, but merely that he has made *an* affidavit which does not conform to the act. This, we think, is not such a controverting of the fact of residence as to form a bar to the granting the certificate mentioned in section 6, in the face too of the certificate of the justice saying the oath of residence has been made, and further, that a residence of seven years has actually been proved before him.

2. As to the second objection. In no place do we find that the justice is to state that the applicant has taken the oath of allegiance. Subsection 3 of section 4 prescribes what sort of certificate is to be given, and only alludes to one of residence; and section 9 again speaks of a certificate of residence only as the one to be read by the Clerk of the Peace.

3. As to the third objection. We know of no law requiring the exclusion of initial letters in the heading of affidavits. The courts of law and equity, we believe, have made such a rule, but it refers only to matters and suits in these courts.

Therefore the court determines, that as none of the facts mentioned in the three above certificates are contravened, nor any valid objection made to the naturalization of the above named Charles C. Webster, John W. Fisher and B. F. Kendall, and as it is against public policy that such certificates should be refused, except upon good and sufficient grounds, that such certificates should be filed of record under the provisions of said act.

We have alluded above to the certificate to be granted by the court under section 6. A difficulty here presents itself. The form given recites the reading of a certificate that the alien has complied with the requirements of the act, that is, amongst other things, that he has taken the oaths of residence and allegiance. In no place, however, do we see any provision for such a certificate. As stated above, the only certificate to be read is that mentioned in section 5, and that says nothing whatever about the oath of allegiance. In consequence of this, and inasmuch as the third section enacts that the oaths of residence and allegiance required by section 4 shall be filed of record before the alien shall be entitled to a certificate of naturalization (but without saying when the same are to be made, or when or where they are to be filed), the Clerk of the Peace is hereby directed not to file the certificate read before the Court, nor to issue the certificates mentioned in section 6 until the said oaths are duly filed of record with him.

ENGLISH REPORTS.

CHANCERY.

Mordue v. Palmer.

Arbitrator — Award — Clerical error — Power to rectify — Power of arbitrator as to costs.

Where an arbitrator has once signed a document purporting to be his award he has no power to rectify even a clerical error, but an application for that purpose ought to be made to the Court under the Common Law Procedure Act, 1854.

Where an arbitrator appointed by a Court of equity is, by the terms of the reference, empowered to deal with the costs of the suit, he has jurisdiction to give costs as between solicitor and client.

[L. J., 19 W. R. 86.]

This was an appeal from a decision of Vice-Chancellor Bacon, which is reported 18 W. R. 1068, where the facts are very fully stated.

On the 17th January, 1868, an order was made in this suit by consent, referring all the matters in difference between the parties in the cause to the determination of Mr. Henry Udall, who was to make his award on or before the 17th of April, 1868. The order provided that the costs of the cause, and of the application for the order, and of the reference, should be in the discretion of the arbitrator; that the arbitrator should have power from time to time to enlarge the time for making his award; and that either party should be at liberty to apply without notice to the other that the award might be made an order of the court. The arbitrator afterwards enlarged the time for making the award till the 17th of April, 1869. On the 12th of November, 1868, Mr. Udall signed a paper, purporting to be his award, by which he declared that the defendant was liable to pay to the plaintiff £400, and he ordered that the defendant should pay to the plaintiff his costs of the suit and of the application for he order of reference and the charges of the award. He ordered also that the costs should be taxed as between solicitor and client, and he declared that there were no other matters in difference in the suit brought before him than such as he had thereby determined upon.

A copy of this award was delivered to the plaintiff's solicitors, but no copy was served on the defendant or on his solicitors. Mr. Udall

afterwards discovered that the document which he had signed as his award differed from the original draft which he had written, by the omission of a direction that the defendant should pay the costs of the reference. On the 2nd of Dec., 1868, Mr. Udall sent to the plaintiff's solicitors a corrected copy of his award, with a letter explaining the omission, and stating his opinion that the former document under the circumstances was not his award. On the 3rd of December, 1868, the plaintiff's solicitors served a copy of the award of December 2nd, with a copy of Mr. Udall's letter, on the defendant's solicitors. On the 18th of March, 1869, an order was made by Vice-Chancellor James, *ex parte*, on the application of the plaintiff, that the award of December 2nd should be made an order of the Court. On the 16th of July, 1870, the plaintiff gave notice of motion to the defendant to enforce the performance of the award of December 2nd. The defendant then gave to the plaintiff a cross-notice of motion to discharge the order of the 18th of March, 1869, on the ground that the document of the 2nd of December, 1868, was not the true award of Mr. Udall, it having been made after he had made a previous award, and after communications between him and the plaintiff's solicitors, in the absence of the defendant and his solicitors.

These two motions were heard together by the Vice-Chancellor, and he made an order in the terms of the plaintiff's notice of motion, but refused the defendant's motion, giving no costs on either side.

The defendant appealed.

Fry, Q.C., and *J. W. Chitty*, for the appellant.—The first award was complete and intelligible, and the arbitrator had no power to alter it after he had signed it: *Henfree* v. *Bromley*, 6 East, 309; *Irvine* v. *Elnon*, 8 East, 54; *Ward* v. *Dean*, 3 B. & Ad. 234. The second award being a nullity there can be estoppel against the appellant because he did nothing to set it aside before the plaintiff attempted to enforce it. Another objection to the second award is, that communications took place between the arbitrator and the plaintiff's solicitor behind the back of the defendant: *Harvey* v. *Shelton*, 7 Beav. 455; *Mills* v. *The Bowyers' Company*, 3 K. & J. 67. Moreover, the arbitrator had no power to give costs as between solicitor and client: *Whitehead* v. *Firth*, 12 East, 165. They referred also to *Auriol* v. *Smith*, T. & R. 121, and the Common Law Procedure Act, 1854, s. 8.

Kay, Q.C., and *G. Williamson*, for the plaintiff, were called on only with regard to the power of an arbitrator to correct a mistake in his award when once made. They contended that *Henfree* v. *Bromley* was really in favour of the plaintiff, and that it was not qualified at all by *Irvine* v. *Elnon*. As to *Ward* v. *Dean*, it was quite a different case from the present. The arbitrator had set his hand to a document, and there was no other document to show that he had made a mistake; it was nothing but a question of his recollection. They also referred to *Vorley* v. *Cook*, 1 Giff. 230.

No reply was called for.

James, L. J., said that the Vice-Chancellor made an order in substance enforcing the second award, or the document so called, and refused an application by the defendant to have an order making the second award an order of court discharged, and he gave no costs on either side. There was no intention now of interfering with the order as to costs. His Lordship thought the contention of the defendant was a very idle and technical one, and he must have known from the very first, that if he insisted upon it, the error would be at once set right upon an application to the court. But, at the same time, it was very important to adhere to previous decisions, and his Lordship thought that the present case could not be distinguished from *Ward* v. *Dean* (*ubi sup.*), which was as clear a case as possible of a merely clerical error. But even at that time, when the court had no power to remedy a mistake, however trivial, in an award, they thought that it would not be safe to open the door to anything outside the written document, which, when once it had been signed ought to stand. This decision and others of the same kind must have been in the contemplation of the Legislature when it passed the Common Law Procedure Act. That statute provided the most ample means of setting right any mistake which might have been made by an arbitrator, and it was certainly better that any step taken to correct an accidental error in an award should be taken in the manner provided by the Act. The mistake which had been made in the present case was of the most palpable nature, and the matter must be referred back to Mr. Udall to reconsider and redetermine it in respect of the mistake which was certified by him to have been made in his original award of November 12th. Two other points were taken in the argument. One was that Mr. Udall had been improperly having interviews with one of the parties behind the back of the other. His Lordship quite agreed that it was very important to prevent an arbitrator from receiving evidence or hearing arguments in the absence of one of the parties. But the only communication which in the present case was made by the plaintiff to the arbitrator in the absence of the defendant, was the putting the question to him, "Did you not make a mistake in copying your award?" He admitted that he had done so, and his answer was at once communicated by letter to the defendant's solicitors. There was no pretence for saying that he had been induced by any such communication to alter his award, or that there had been any misconduct on his part. If the court thought that there had, of course they would not refer the matter back to him, but would refer it to some one else. The other argument was that the arbitrator had no power to give costs as between solicitor and client. But at any rate that would not make the award bad in form. All the costs of the suit, as well as the costs of the reference and the award, were referred to the decision of the arbitrator, and he thought it right, having regard to the fiduciary relation existing between the parties, to give the costs as between solicitor and client. It was enough to say that he had jurisdiction to do it, he being the person appointed to decide who should pay the costs of the suit. The order appealed from must be discharged, but with costs, and the matter must be referred back to the arbitrator as already mentioned.

Mellish, L.J., was of the same opinion. The result of the cases at law was that when an arbitrator had once signed a paper which, on the face of it, purported to be his award, he was *functum officio*, and could not make any alteration in the award. And, though his Lordship regretted that costs to such an extent should be incurred, he was not certain whether it was not, on the whole, better in all such cases that the parties should come back to the court to set an error of this description right. His Lordship thought that there had been nothing on the part of the defendant which amounted to acquiescence in the second award, for he had not been party to anything in the nature of an agreement to do so. He had done nothing beyond remaining passive. His Lordship also agreed with his learned brother as to the power of the arbitrator to give costs as between solicitor and client. Common law courts had no power to give costs in that way, and therefore, in the case of a reference by one of these courts, an arbitrator could only give party and party costs. But a court of equity had jurisdiction to give costs as between solicitor and client whenever it thought fit to do so, and consequently, when the costs of the suit were left in the discretion of the arbitrator, he had jurisdiction to give costs as between solicitor and client.

Dicconson v. Talbot.

Power of sale and exchange—Consent of tenant for life—Sale to tenant for life.

It is a well settled rule, that where trustees of a settlement have a power of sale and exchange over the settled estates, to be exercised at the request or with the consent of the tenant for life, they may sell to the tenant for life just as they may to any other person.

The reason for that rule is, that the consent of the tenant for life to the exercise of the power is required for his own benefit, and does not place him in any fiduciary relation to the persons entitled in remainder.

Provided a sale by trustees to a tenant for life is *bona fide* and at a fair value, it is immaterial what was the object for which he made the purchase.

[L. J., 19 W. R. 138.]

This was an appeal from a decision of Vice-Chancellor Stuart.

By an indenture dated the 2nd January, 1849, and made between Lord Skelmersdale and the Rev. S. Master of the first part, Charles Scarisbrick of the second part, and Ralph Anthony Thicknesse and John Woodcock of the third part, certain manors, lands and hereditaments, known as the Wrightington Estate, were conveyed to R. A. Thicknesse and John Woodcock and their heirs, to hold the same unto R. A. Thicknesse and John Woodcocke and their heirs, to the use of Charles Scarisbrick and his assigns during his life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainders to the issue of Charles Scarisbrick as therein mentioned, with an ultimate remainder, in the events which happened, to the use of the plaintiff's mother for life, with remainder to her first and other sons successively in tail male. The settlement contained a power for the trustees at any time or times, at the request in writing of any person who should for the time being, by virtue of the limitations thereinbefore contained, be either the actual possessor of or entitled to the receipt of the rents of the settled property so as to be tenant for life or tenant in tail of the age of twenty-one years, to dispose of and convey, either by way of absolute sale or in exchange for or in lieu of other lands situate in England or Wales, all or any part of the settled property and the inheritance thereof in fee to any person or persons whomsoever, for such price or prices, or for such an equivalent in lands, as to the trustees should seem reasonable.

By another indenture of the same date, and made between the same parties, another estate, called the Eccleston Estate, was conveyed to the same trustees, upon (in the events which happened) the same uses, and the like powers of sale and exchange were given.

Charles Scarisbrick remained in possession of both estates until his death, which happened on the 6th of May, 1860. He was never married. By the death of the other intervening tenants for life, the plaintiff, in 1863, became tenant in tail in possession of both estates. He, in 1864, filed the bill in this suit against the representatives of the trustees of the two settlements, and the executors and trustees of Charles Scarisbrick, for the purpose of impeaching certain dealings with some portions of the estates, called respectively Bottlingwood and Hurst House, which had taken place between Charles Scarisbrick and the trustees. Both those properties had been sold and conveyed by the trustees to Charles Scarisbrick; and the plaintiff sought to have these transactions set aside on the ground that the sales had been made at an undervalue, and also that as to Bottlingwood there had been a collusion between the trustees and the tenant for life, inasmuch as Mr. Scarisbrick desired to exchange Bottlingwood with Lord Balcarres, a neighbouring landowner, for other property, and, finding that there were some conveyancing difficulties as to the exercise of the power of exchange, because it was proposed to exchange only the surface, agreed with the trustees that they should sell Bottlingwood to him under the power of sale, in order that he might afterwards, as he in fact did, exchange it with Lord Balcarres. It was alleged that the Hurst House estate too was bought in order that Mr. Scarisbrick might exchange it with another person.

The Vice-Chancellor dismissed the bill, except so far as it sought an account and the delivery up of title deeds to the plaintiff. The plaintiff appealed.

Greene, Q. C., *Dickinson*, Q. C., and *F. Riddell*, for the plaintiff, contended that there was a fraud upon the power. They referred to *Howard* v *Ducane*, T. & R. 81; *Grover* v. *Hugell*, 3 Russ. 428.

Sir R. Palmer, Q. C., *O. Morgan*, Q. C., and *C. Hall*, for the executors and trustees of Charles Scarisbrick, and

Kirslake, Q. C., and *Rasch*, for the representatives of the trustees, were not called upon.

James, L. J.—The Vice-Chancellor was of opinion that the plaintiff's case, in respect of the two properties in question, which has been argued before us on the appeal, had failed, and dismissed that part of the bill with costs. I am entirely of the same opinion. In my judgment, a case with less foundation, more idle and vexatious, to be brought by a *cestui que trust* against the repre-

sentatives of deceased trustees, was never presented to the court. The law of this court is, and is well established and known, that where there is a power of sale and exchange given to trustees, to be exercised at the request or with the consent of the tenant for life, they may sell to the tenant for life just as they may sell to any other person. No doubt Lord St. Leonards, in his book on Powers, says that it was formerly a considerable question whether a tenant for life, whose consent was required for the exercise of a power of sale and exchange, could buy the estate himself, or take it in exchange for an estate of his own. He is referring there to something which had occurred before the case of *Howard* v. *Ducane*, and he says, "Lord Eldon, though fully aware of the danger attending a purchase of the inheritance by a tenant for life, seems to think it cannot be impeached upon general principles." Then he refers to the case, which appears to me very important indeed, where the House of Lords actually refused to pass a bill sanctioning a sale, for fear of throwing a doubt upon the established practice of conveyancers respecting the right of sale to a tenant for life. Then Lord St. Leonards says, "The point has at last been set at rest (that is in 1826) by the decision of the Lord Chancellor in favour of the validity of the execution of the power in the late case of *Howard* v. *Ducane*." From 1826 to the present time, I am not aware that there has ever been the slightest attempt to unsettle that which was so considered settled. I take it that the meaning of the rule, and the only ground upon which that rule can be sustained, is that the tenant for life has given to him the power of consent, or the power to request, for his own benefit, and he has not in any way whatever a fiduciary character as between him and the tenants in remainder in respect of his consent or request. That being so, the tenant for life has the same right to buy from the trustees as any other person. Then it is alleged that in this particular case the sale was improper, because it was preceded, to the knowledge of the trustees, by a negotiation for an exchange with Lord Balcarres. There were conveyancing difficulties—not suggested as sham difficulties for the purpose of inducing them to sell to the tenant for life—but conveyancing difficulties of a *bona fide* character existing, which made the negotiation for an exchange incapable of being carried into effect. Upon that, of course, the negotiation failed, and the thing passed into history. It was a sort of thing from which the parties had a new starting-point, and thereupon this gentleman said to the trustees, As you cannot do that, I am very anxious to accommodate my friend, Lord Balcarras, and it would be a convenience to me, and therefore I propose to buy from you, and I tell you that my object in buying from you is to do a thing which will accommodate my neighbour and be a benefit to myself. I am not aware of any rule of law, or any Act of Parliament, or any decision of this court, which says that, if a man is otherwise entitled to buy an estate from the trustees, he is not entitled to buy it if his intention is to do an act of kindness to his neighbour, or to obtain some benefit for himself, provided he gives the full value for the estate. This gentleman might have said, "I want to buy the estate because I wish to make a speculation of it, which you, the trustees, cannot enter into;" or he might have said, "I want to give it for a church or school-house," or "I want to save my neighbour from an annoyance which he may otherwise be subjected to." It appears to me, as I said before, that there is no Act of Parliament or rule of this court which says that that is wrong or improper. That seems to me to be the whole case as to the Bottlingwood property, except that it is said that there was something which the tenant for life was aware of which he ought to have communicated to the trustees; and possibly—I will say more than possibly—probably the tenant for life may not be exactly in the same position of a stranger with respect to non-communication of facts. It may be supposed that he has a knowledge which may to a certain extent enlarge the obligation which may be imposed on every man not to conceal something which he knows and which ought to be known to the other side, that is, the vendor.

[His Lordship then reviewed the evidence of the alleged concealment of the value of the Bottlingwood property by the tenant for life, and of his having bought it at an undervalue, which evidence he considered entirely failed to prove the plaintiff's allegations. He also expressed his opinion that the evidence as to the Hurst House Estate equally foiled, and added—] I am of opinion, therefore, that the case has wholly failed as to both points, and that the Vice-Chancellor's decree was perfectly right.

Mellish, L. J.—I am of the same opinion. Since the case of *Howard* v. *Ducane*, at any rate, it appears to have been the settled rule of this court that there is no objection in itself to a sale from trustees to a tenant for life, although the consent of the tenant for life is necessary for such a sale. This rule was acted upon apparently in the practice of conveyancers for many years before *Howard* v. *Ducane* was decided, and has been acted upon ever since, and certainly we should do very wrong if we allowed any doubt to be cast upon that. The sale being in itself perfectly good, the tenant for life not being in any respect a trustee for the persons in remainder, what ground is there for setting aside either of these sales? As I understand it, the argument insisted upon is this—that because it was originally contemplated in both cases that there should be an exchange, and that these sales were effected as it were for the purpose of effecting the exchange, therefore the exchange ought to be carried out by this court for the benefit of the persons entitled in remainder. I cannot see what ground there is for that. In both cases there seems no doubt that Mr. Scarisbrick did in the first instance intend to effect an exchange *bona fide*, if the exchange could properly be effected under the power; but in both cases the lawyers raised difficulties, and said there were doubts whether the exchange could take place under the power, and those difficulties seem to have been, as far as appears, perfectly *bona fide*. The matter was therefore given up, and certainly it would be a very extraordinary thing if, it having been given up because there was no power to effect it, and not having been carried out, we should now, because it would happen to be for the advantage

of the tenants in remainder, treat it as if the exchange had really taken place.

There is nothing to show that the parties really intended to effect an exchange. They were told they could not effect an exchange, and therefore they gave it up. That being so, unless it is made out that the properties, or one of them, were improperly sold at an undervalue, I cannot see what case there is for the plaintiff.

[His Lordship then discussed the evidence, which he considered failed entirely to establish that the sales were at an undervalue, and added] On these grounds I think the decision of the Vice-Chancellor was perfectly right, and the appeal must be dismissed with costs.

UNITED STATES REPORTS.

SUPREME COURT OF UNITED STATES.

The National Bank of the Republic, Plaintiff in Error v. Rees J. Millard.

Bank cheques.

Held, that the holder of a bank check cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or charged against the drawer.

Mr. Justice Davis delivered the opinion of the Court.

This is an action of assumpsit brought by the defendant in error, against the National Bank of the Republic, for failing to pay a check drawn on it, in his favor, by one Lawler, a paymaster in the United States army. The declaration, in addition to the special count on the transaction, contained a general count for money had and received by the defendant to the use of the plaintiff. The only question presented by the record which it is material to notice is this: Can the holder of a bank check sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or charged against the drawer?

It is no longer an open question in this court, since the decision in the cases of *The Marine Bank The Fulton Bank*, (2 Wallace,) and of *Thompson* v. *Riggs*, (5 Wallace,) that the relation of banker and customer, in their pecuniary dealings is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositor shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Broughman, Lyndhurst and Campbell, in the case of *Foley* v. *Hill*, (2 Clark and Finnelly Reports of cases in House of Lords 1848-50, p. 28,) and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect.

As checks on bankers are in constant use, and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important, for the security of all parties concerned, that there should be no mistake about the status which the holder of a check sustains towards the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused, but can he also, in such a state of case, sue the bank? It is conceded, that the depositor can bring assumpsit for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons, at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor as was said by an eminent judge, (2 Selden, 417) is a case in action, and his check does not transfer the debt, or give a lien upon it to a third person without the assent of the depositary. This is a well established principle of law, and is sustained by the English and American decisions.—(*Chapman* v. *White*, 2 Selden, 412; *Butterworth* v. *Peck*, 5 Bosworth, 341; *Ballard* v. *Randall*, 1 Gray, 605; *Harker* v. *Anderson*, 21 Wendell, 373; *Dykers* v *Leathe*, *Manufacturing Co.*, 11 Paige 616; *National Bank* v. *Eliot Bank*, 5 Am. Law Reg., 711; Parsons on Bills and Notes, edition 1863, pages 59, 60, 61, and notes; Parke, Baron, in argument in *Bellaney* v. *Majoribanks*, 8 Eng. L. & E. p. 522-3; 4 Barnwell and Creswell, *Wharton* v. *Walker*, p. 163; *Warwick* v. *Rogers*, 5 Manning and Granger, p. 374; Byles on Bills, chapter, Check on a Banker; Grant on Banking, London edition, 1856, p. 96.)

The few cases which assert a contrary doctrine, it would serve no useful purpose to review.

Testing the case at bar by these legal rules, it is apparent that the court below, after the plaintiff closed his case, should have instructed the jury, as requested by the defendant, that the plaintiff, on the evidence submitted by him, was not entitled to recover. The defendant did not accept the check for the plaintiff, nor promise him to pay it, but, on the contrary, refused to

do so. If it were true, as the evidence tended to show, that the bank, before the check came to the plaintiff's hands, paid it on a forged indorsement of his signature, to a person not authorized to receive the money, it does not follow that the bank promised the plaintiff to pay the money again to him, on the presentation of the check by him for payment.

It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable, as the bank, having assented to the order and communicated its assent to the paymaster, would be considered as holding the money thus appropriated for the plaintiff's use, and, therefore, under the implied promise to him to pay it on demand.

It is hardly necessary to say, that the check in question having been drawn on a public depositary, by an officer of the government, in favor of a public creditor, cannot change the rights of the parties to this suit. The check was commercial paper, and subject to the laws which govern such paper, and it can make no difference whether the parties to it are private persons or public agents.—(*The U. S. v. Bank of Metropolis*, 15 Peters, 377.)

As soon as the deposit was made to the credit of Lawler as paymaster, the bank was authorized to deal with it as its own, and became answerable to Lawler for the debt in the same manner that it would have been had the deposit been placed to his personal credit.

As this case will be remanded for a new trial, it is not necessary to notice the exceptions taken to the charge of the court on the evidence introduced by the defendant.

Judgment reversed and a *venire de novo* awarded.—*Chicago Legal News.*

SUPREME COURT OF ILLINOIS.

Mayfield v. Moore.

Intruding officer—Liability of, for fees of office.

Held, that the legal right to an office confers the right to receive and appropriate the fees and emoluments legally incident to the place.

That where a person has usurped a place belonging to another, and received the accustomed fees of the office, an action for money had and received will be sustained at the suit of the person entitled to the office against the intruder.

That an officer's commission is evidence of the title, but not the title; that the title is conferred by the people, but the evidence of the right by the law.

That the appellee having received his commission as sheriff without a resort to fraud, he should be required to account only for the fees and emoluments of the office received by him after deducting the reasonable expenses incurred therein, and that if he had intruded without pretence of legal right, then a different rule should be applied.

That he should be charged from the time of entering upon the duties of the office, and not from the time the justices of the circuit court found him not entitled to the office.

That this being an equitable action, it should be governed in this respect by the same rules that would have obtained, had this been a bill for an account instead of an action for money had and received.

(Springfield, Sept., 1870.)

Opinion of the Court by Mr. Justice Walker: This was an action of assumpsit, brought by appellant in the Morgan Circuit Court against appellee, to recover fees received by the latter as sheriff and collector of the State, County, and other revenue. It appears that on the 6th of November, 1866, appellant and appellee were opposing candidates for the sheriff of Morgan county, in this State. On a canvass of the vote of the county, a certificate of election was given to appellee, who afterwards received a commission and entered upon and discharged the duties of the office, from the 17th day of November, 1866, till the 13th day of January, 1868. Soon after the canvass of the vote was had, appellant gave appellee notice that he should contest the election, upon the grounds that illegal votes were cast for appellee—more than sufficient to change the result and give appellant the office.

Justices of the peace were selected, in the mode pointed out by the statute, a trial was had, which resulted in favor of appellant, and finding him, on the evidence adduced, to be entitled to the office. From this decision appellee removed the case to the Circuit Court of Morgan County by appeal. A trial was there had, with a similar result. To reverse the judgment of the Circuit Court, appelee sued out a writ of error to the Supreme Court, which was subsequently dismissed by the Court, and appellant was duly commissioned, and entered upon the duties of the office. He then brought this suit to recover the fees and emoluments of the office received by appellee whilst acting as sheriff. A trial was had in the court below, where appellant recovered a judgment for $84.65, the amount of fees received after the rendition of the judgment by the Circuit Court, and before the office was surrendered to appellant.

On the trial below, appellant offered to prove to the jury the sum of money received by appellee whilst he exercised the office, as fees, allowances and emoluments, but on the objection of the attorneys for appellee, the Court refused to permit the proof to be made, and confined him to the receipt of fees, commissions and profits, which were received after the decision of the case by the Circuit Court. This ruling of the Circuit Court is urged as ground of reversal, and is the point upon which the whole controversy turns.

It is urged by appellant that he being entitled in law to the office, the fees and emoluments incident to it followed the title and were vested in him. And on the familiar rule that where one person has received the money which in equity and good conscience belongs to another, he may sue for and recover the same, in an action for money had and received.

We presume that it will not be questioned that the legal right to an office confers the right to receive and appropriate the fees and emoluments legally incident to the place. That where such an officer performs the duties of the office, that he may demand and receive the compensation allowed by the law. It cannot be, that in such a case another person can legally claim such compensation. An officer, having rendered services, is as fully entitled to the compensation fixed by law, as is any other individual entitled to a reasonable compensation for labor and skill rendered for an individual. The fees and emoluments are legally his.

We also find that the authorities have still gone farther, and held, that where a person has usurped an office belonging to another, and received the accustomed fees of the office, money had and received will be at the suit of the person entitled to the office against the intruder. *Avis* v. *Stukely*, 2 Mod., 260—1 Sel. Nisi Prius, 68. And the same rule was announced and enforced in the case of *Croshis* v. *Hurley*, 1 Alcock and Napier 431. In this last case there was a contest as to the title to the office, and the person recovering the title to it, sued the other who had acted, and recovered the fees and emoluments received whilst in possession and exercising the duties of the place. The same rule has been adopted in this country, and seems to be based in common law rules.

It is said by Blackstone in his commentaries, vol. 2, p. 36, that "offices are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, and are also incorporeal hereditaments; whether public, as those of magistrates, or private, as bailiffs, receivers, or the like. For a man may have an estate in them, either to him and his heirs, or for a term of years, or during pleasure only; save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice; for then they perhaps might vest in executors or administrators." Thus it is seen that the right to the fees and emoluments are stated to be co-extensive with the office. And this is undoubtedly correct, as it is analogous to every other thing capable of ownership No principle of law can be clearer than the owners of lands and chattels is entitled to the products, increase, or fruits flowing from them, and the fees of an office are incident to it as fully as are the rents and profits of lands, the increase of cattle, or the interest on bonds or other securities.

A person owning any of those things, is by virtue of such ownership equally entitled to the issues and profits thereof, as to the thing itself. If then appellant was the owner of and held the title to the office of sheriff, he was as clearly invested with the right to receive the fees and emoluments. They were incident to and as clearly connected with the office, as are rents and profits to real estate, or interest to bonds, and such like securities. See *Gluscock* v. *Lyons*, 20 Ind., 1; *Petit* v. *Rosseau*, 15 Lousiana, 289; *Dorsey* v. *Smith*, 28 Cal., 21, and *The People* v. *Tieman*, 30 Barb., 193. We think that on both reason and authority appellant is entitled to recover the fees and emoluments arising from the office, whilst it was held by appellee.

It is, however, urged that appellee surrendered the office as soon as it was finally judicially determined that appellant was entitled to it, and is therefore not liable to account for any fees but those received after the Circuit Court decided the case on appeal from the three Justices of the Peace. This is not a question of intention, but a question of legal title to the sum in dispute. Under the law, so soon as a majority of the votes were cast for appellant at the election held in pursuance to law, he became legally and fully entitled to the office. The title was as complete then as it ever was, and no subsequent act lent the least force to the place. The commission was evidence of the title, but not the title. The title was conferred by the people, and the evidence of the right by the law.

Nor can it be successfully claimed that appellee was not in the wrong. He was bound before entering upon the discharge of the duties of the office and the receipt of the emoluments, to know whether he had title. His position was the same as a person who, having a defective title to a tract of land, and enters into possession and the receipts of rents and profits He entered at his peril. Nor do we perceive any hardship. After the vote was canvassed by the clerk and a Justice of the Peace, appellant promptly gave appellee notice that he would contest the election, and specifically pointed out the grounds. Being thus apprised of the grounds upon which appellant based his claim, the sources of information were open to him to learn the facts, and to have acted upon them. Failing to learn them, or having done so, not heeding them, he has no reason to complain if he has to respond to the wrong perpetrated upon another. He has entered into appellant's office without right, and has received the profits of the office, and like the person entering into the land of another with a defective title, he must answer for the profits.

Inasmuch, however, as appellee obtained the certificate of election, and a commission was issued to him, he was acting in apparent right, and so far as this record discloses, he resorted to no fraudulent or improper means to produce that result, he does not occupy the position he would, had he resorted to such a course. He should only be required to account for the fees and emoluments of the office received by him, after deducting reasonable expenses incurring them. This being an equitable action, it should be governed in this respect by the same rules that obtain, had this bill for an account, instead of an action for money had and received. He should only have a reasonable allowance for the necessary expense in earning the fees and emoluments. Had he intruded without pretence of legal right then a different rule would no doubt have been applied.

In adopting the time when the Circuit Court decided that appellant was entitled to the office, as the period from which he was entitled to have the fees and emoluments of the office, the Circuit Court erred. That decision was no more potent to confer the right to the office, than was the decision of the three Justices of the Peace. It, as we have seen, was not the decision, but the vote of the majority of the electors of the county that conferred the right. The Court on the evidence found and declared the title, but did not confer it. We have seen that appellant was entitled to the office and its emoluments, from the time appellee entered into it, and became liable to account for them from that date, until he ceased to act and receive the fees and perquisites of the office.

The judgment of the Court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

—*Chicago Legal News.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR AUGUST, SEPTEMBER AND OCTOBER, 1870.

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Action.—*See* Attorney.

Agent.—*See* Principal and Agent.

Agreement.—*See* Contract; Vendor and Purchaser, 3.

Annuity.—*See* Security.

Answer.—*See* Equity Pleading and Practice.

Appointment.

Personal property was settled, and a general power of appointment given to a *feme sole*, and in default of appointment upon trust for her use for life, and, after her decease without having exercised the power of appointment, in trust for any future husband surviving her for life, and after his decease in trust for her children at such ages, on such days, and in such shares, as she by deed or will should appoint, and in default of appointment upon other trusts; there was a provision that if she or any future husband should become possessed of any property, it should be settled on similar trusts. She was afterwards married, and by a deed-poll appointed the trust property to herself and her husband absolutely. *Held*, that the general power was not cut down by the limited power, and that it could be properly exercised during coverture.—*Wood* v. *Wood*, L. R. 10 Eq. 220.

Arbitration.—*See* Partnership.

Assignment.—*See* Attorney.

Attorney.

Four partners pledged goods to the defendant as security for an advance. P., one of the partners, gave N., another partner, a power of attorney "for the purposes of exercising, for me, all or any of the powers and privileges conferred by a certain indenture of partnership constituting the firm," and generally to do all other acts as fully as P. himself. A deed was made by the other partners and by N. as attorney for P., dissolving the partnership and transferring P.'s interest to the others, who on the next day assigned all their property to the plaintiff for the benefit of their creditors. The defendant refused to deliver the goods upon the tender of the amount due, but sold them; the plaintiff brought trover. *Held*, that the power of attorney did not authorise N. to dissolve the partnership and transfer P.'s interest, the general terms being restrained by the context; also, that the plaintiff could not maintain trover for a part of the goods. *Harper* v. v. *Godsell*, L. R. 5 Q. B. 422.

Bankruptcy.

1. B. and S. were partners, and had certain bills of exchange; S., without the authority of B. and in fraud of the partnership, indorsed and delivered the bills to the defendant in satisfaction of a private debt of his own, the defendant being aware of the fraud. S. having become bankrupt, his assignees and B. brought this action for conversion and for money received to their use. Judgment having been given for the plaintiffs, it was *held*, that the action might be maintained upon the count for money received.—(Exch. Ch.) *Heilbutt* v. *Nevill*, L. R. 5 C. P. 478; s. c. L. R. 4 C. P. 354; 4 Am. Law Rev. 93.

2. H. being about to enter the service of a gas company, G. agreed with him to indemnify the company, and H. agreed that, if G. should receive notice of any default under the guarantee, it should be lawful for G. to take possession of any goods, &c., of H.; and in case G. should be called upon to make any payment under the guarantee, it should be lawful for G. to sell the goods, &c., at discretion. The event provided for in the contract happened, and G. took possession of the goods of H., who had in the meanwhile committed an act of bankruptcy, of which G. had no notice. The 12 & 13 Vic. cap. 106, sec. 133, enacts that "all contracts, dealings and transactions" made with the bankrupt *bonâ fide* before the date of the *fiat* or filing of a petition for adjudication, shall be valid notwithstanding any prior act of bankruptcy committed without notice to the person dealing with the bankrupt. *Held*, that what was done was a "transaction" protected by the statute.—*Krehl* v. *Great Central Gas Co.*, L. R. 5 Ex. 289.

See Fraudulent Conveyance, 2.

Bill of Exchange.—*See* Bankruptcy, 1.

Bills and Notes.

Action on a bill of exchange accepted by J. and indorsed by the defendant. Plea, that the defendant did not indorse. The plaintiff and defendant were partners in a speculation; the defendant sold goods to J., who gave him the bill in payment; he indorsed it, handed it to the plaintiff, and asked him to try to obtain payment from J. *Held*, that to charge the indorser there must be an intent to stand in that relation, and that the above facts supported the plea denying the indorsement.—*Denton* v. *Peters*, L. R. 5 Q. B. 475.

Bond.—*See* Bottomry.

Bottomry.

The appellants chartered a vessel for a voyage from Liverpool to Cuba and back. In Cuba their agent advanced money to the master on a bottomry bond. No attempt to communicate with the owner was made before the bond was granted, although he was at Liverpool and could have been telegraphed to. *Held*, that it was necessary to give notice to the owner, which was not excused by his insolvency, and that the bond was invalid.—*The Panama*, L. R. 3 P. C. 199; s. c. L. R. 2 A. & E 390; 4 Am. Law Rev. 463.

Broker.—*See* Contract, 1.

Burden of Proof.

C., a licensed victualler, was charged, under 11 & 12 Vic. cap. 49, sec. 1, with unlawfully opening his house for the sale of wine and beer, during prohibited hours on Sunday, otherwise than as refreshment for travellers. His hotel adjoined a railway station; eight men were seen there, six of them having a glass of beer each, and two a glass of sherry each; four of them were strangers, and four were residents of the town. A train stopped at the station in a few minutes and seven of the men went by it, and one returned to the town, having come to see a son off by the train. There was a notice in the room that refreshments were supplied, during prohibited hours, only to travellers, and C. had given directions to the waiter not to give out refreshments without first asking the parties whether they were going by the train; but the waiter had failed to ask two of the men the question. *Held*, that the burden of proof was upon the informer, and there was no evidence that C. knew that any of the men were not travellers, nor evidence of an intention to break the law.—*Copley* v *Burton*, L. R. 5 C. P. 489.

See Collision.

Carrier.—*See* Negligence, 2–6.

Charity.

1. Testator devised certain houses and tenements to a corporation, "for this intent and purpose, and upon this condition," that they should yearly distribute £8 in charity, and that the rest of the rents and profits should be bestowed in repairs; and in case the corporation should leave any of these things undone, he willed that his next of kin should enter and hold the tenements to him and his heirs upon the same condition. At the testator's death the annual value of the property was £9 4*s.*, and its present value was £330. *Held*, that after satisfying the charge of £8 for charity and keeping the buildings in repair, the residue went to the corporation for its own benefit. *Attorney-General* v. *Wax Chandlers' Company*, L. R. 5 Ch. 503; s. c. L. R. 8 Eq. 452; 4 Am. Law Rev. 463.

2. Testatrix gave legacies to several charitable institutions, and her residuary estate to trustees, "to pay and divide the same to and among the different institutions, or to any other religious institution or purposes as they the said F. and W. may think proper." *Held*, that "religious" applied to "purposes" as well as to "institution," and that the gift was a good charitable bequest.—*Wilkinson* v. *Lindgreen*, L. R. 5 Ch. 570.

Charter Party.—*See* Ship.

Cheque.—*See* Principal and Agent.

Collision.

A brig was run into by a steamship in the evening; the steamship had the lights required by the Admiralty Regulations, but the brig showed no lights at all. *Held*, that the burden was on the brig to show that the non-compliance with the Regulations was not the cause of the collision.—*The Fenham*, L. R. 3 P. C. 212.

Company.

1. A company's prospectus stated its object, and that more than one-half of the capital had been subscribed for. The plaintiff subscribed and paid a deposit. When the prospectus was issued very few shares were subscribed for, but more than half had been taken when the plaintiff subscribed. The memorandum of association, afterwards registered, extended the objects of the company, and for the variance between the prospectus and memorandum the court ordered the plaintiff's name to be removed from the list of contributories. *Held*, that the plaintiff could not maintain a bill to make the directors personally liable for the deposit money, there being no fraud on their part.—*Ship* v. *Crosskill*, L. R. 10 Eq. 73.

2. A fund was constituted by officials in the service of the East India Company, to provide annuities of £1000 each for those who retired after twenty-five years' service; the fund was made up by an annual deduction of £4 per cent. from their salaries, and by an allowance by the Company of £6 per cent. on the amount so paid. The rules of the subscribers provided that the annuitant, on taking the annuity, should pay "the difference between one half of the actual value on his life, and the accumulated value of his previous contributions, . . . but should the contribution be in excess, such excess shall be refunded;" also that "all questions proposed at a general

meeting shall be determined by three-fourths of the members present or voting by proxy; and upon all general questions involving . . . any essential addition or alteration in the original rules, . . . all subscribers in India not able to attend" shall be allowed to vote by a written communication. In 1852, the Directors of the Company ordered that no refund be allowed in future, and sent out a new set of rules to be submitted to the Service, omitting the rule as to refund. In 1853, the new rules were passed at a general meeting, by 108 to 2. *Held*, that the refund was abrogated by the subscribers, in 1853, and that payments in excess after that date were not recoverable. (Lord Hatherly, L C., dissenting.) — *Secretary of State for India* v. *Underwood*, L. R. 4 H. L. 580.

Condition.—*See* Charity, 1; Landlord and Tenant.

Conditions of Sale —*See* Vendor and Purchaser, 2.

Confidential Relation.

A decree was made in a foreclosure suit directing a sale in case of non-payment; at the sale the property was purchased by W., who was solicitor of a creditor of the mortgagee in a suit for the administration of the mortgagee's estate. Two days before the sale, W. took out a summons for the creditor to have leave to attend the proceedings in the foreclosure suit, but no order was made until after the sale. W.'s name was on the printed particulars of sale as one of the solicitors of whom particulars and conditions of sale might be obtained. *Held*, that the creditors were not precluded from purchasing, and therefore W. was not precluded by being their solicitor. —*Guest* v. *Smythe*, L. R. 5 Ch. 551.

Consideration.

Declaration that the plaintiff had alleged that certain moneys were due to him from H., and was about to take legal proceedings against H. to enforce payment; and thereupon, in consideration that the plaintiff would forbear from taking such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain bonds. Averment of forbearance. Breach, non-delivery of the bonds. Plea, that at the time of the agreement no moneys were due to the plaintiff from H. *Held*, that the plea was bad; otherwise, if it had alleged that the plaintiff knew he had no claim against H.—*Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449.

See Contract, 1.

Construction.—*See* Appointment; Attorney; Bankruptcy, 2; Charity; Company, 2; Contract, 2, 3; Estate Tail; Statute; Vendor and Purchaser, 2, 3; Will.

Contract.

1. The plaintiff, by G. & B., stockbrokers, sold to M., a stock-jobber, 100 shares of stock, to be settled for on the next account day. The defendant agreed with M. to "take in" for him 100 shares, *i. e.*, to take the shares or deliver to him on a certain day the name of an unobjectionable purchaser to whom they should be transferred; if the name were not delivered, the vendor might sell out the shares. No such name was delivered; instead of it, M. gave G. & B. a memorandum, and on the same day it was arranged between the defendant and G. & B. that the delivery of the name by the defendant should stand over until required by them. It was found that the plaintiff was ready and willing to execute a transfer, but that the name delivered by the defendant was objectionable. The company being wound up, a call of £5 a share was made, and paid by the plaintiff. The action was brought to recover £500 so paid. *Held*, that there was a contract between the plaintiff, through his brokers, and the defendant, that the defendant would, when required, deliver a name, into which the shares might be transferred; that this contract was not performed by him, and that he was liable to the plaintiff for the amount of the call with interest.—*Allen* v. *Graves*, L. R. 5 Q. B. 478.

2. The defendants issued the following circular: "We are instructed to offer to the wholesale trade for sale by tender the stock in trade of E., and which will be sold at a discount in one lot. Payment to be made in cash. The tenders will be received and opened at our office," &c. The plaintiffs made the highest tender, but the defendants refused to accept it. *Held*, that there was no contract to sell to the person who should make the highest tender.—*Spencer* v. *Harding*, L. R. 5 C. P. 561.

3. The defendant, a merchant at Liverpool, sent to the plaintiffs, commission merchants at Mauritius, an order for sugar at a limited price, viz., "You may ship me 500 tons; . . . fifty tons more or less, of no moment, if it enables you to get a suitable vessel . . . I should prefer the option of sending vessel to London, Liverpool or the Clyde; but if that is not compassable, you may ship to either Liverpool or London." He also sent a telegram, received at the same time with the letter, "If possible,

the ship to call for orders for a good port in the United Kingdom." The plaintiffs could obtain only 400 tons of sugar at the price fixed by the defendant, and they shipped this to London, where the defendant refused to receive it. Before the plaintiffs made any further purchase of sugar, they received a letter from the defendant countermanding his order. At Mauritius it is generally impossible to purchase so large a quantity of sugar from one seller, and it is generally necessary to purchase it at different times and in different parcels. *Held*, that the defendant meant to buy an entire quantity of 500 tons (fifty tons more or less), to be sent in one vessel; and that a smaller quantity being sent, he had a right to refuse to accept it. (Montague Smith, J., and Cleasby, B., dissenting) (Exch. Ch.)—*Ireland* v. *Livingston*, L. R. 5 Q. B. 516; s. c. L. R. 2 Q. B. 99; 1 Am. Law Rev. 694.

See Bankruptcy, 2; Company, 2; Consideration; Sale; Security; Vendor and Purchaser, 2, 3.

Contributory Negligence. — *See* Negligence, 3, 5.

Conversion.—*See* Attorney.

Covenant.—*See* Landlord and Tenant; Railway.

Criminal Law.—*See* Burden of Proof; Statute 1.

Custom.—*See* Contract, 3.

Debtor and Creditor —*See* Fraudulent Conveyance, 1; Security.

Dedication.—*See* Way.

Demurrage —*See* Ship.

Directors —*See* Company.

Discovery —*See* Equity Pleading and Practice.

Easement.

The plaintiff was in possession of certain land, upon which he built copper works, under an agreement with the defendant for a lease. There was an understanding between them that, so long as the plaintiff was a good customer of the defendant's canal, he might use the surplus water for the copper works. *Held*, that such an understanding was not the foundation of an equitable right to the use of the water.—*Bankart* v. *Tennant*, L. R. 10 Eq. 141.

Ejectment.—*See* Landlord and Tenant

Equity.—*See* Company, 1; Easement; Wife's Separate Estate.

Equity Pleading and Practice.

The testator's widow carried on his business under a direction in his will that she should have the option of doing so, and that his trustees should permit her, while carrying it on, to have the entire use, disposal and management of all the capital in the business, and of his other personal estate. After her death the plaintiff brought a bill against the executor, alleging that he was a creditor of the widow's for goods supplied to her, and claiming a lien on the estate used in the business; an interrogatory called for an account of the testator's personal estate, and of the personal estate employed in the business, which the executor refused to answer. *Held*, that the executor should give the account —*Thompson* v. *Dunn*, L. R. 5 Ch. 573.

See Partition.

Estate Tail.

A settlor conveyed real estate to the trustees to the use of himself for life, remainder to the use of D. and his heirs; but if he died without issue, then to T. and his heirs, and if D. and T. died without issue, then to the issue of the settlor. D. died without issue in the lifetime of the settlor; T. died in the lifetime of the settlor, leaving issue. *Held*, that D. and T. each took an estate tail.—*Morgan* v. *Morgan*, L. R. 10 Eq. 99.

Evidence.—*See* Bills and Notes; Burden of Proof; Contract, 1; Negligence, 1, 3-6; Principal and Agent.

Executory Trust.—*See* Will, 2, 4.

False Imprisonment.—*See* Master and Servant.

Forbearance.—*See* Consideration.

Foreign Enlistment.

The 59 Geo. III. cap. 69, sec. 7, enacts that if any person in His Majesty's dominions shall, without leave of His Majesty first obtained, "equip, furnish, fit out or arm" any vessel to be employed "in the service of any foreign prince, state or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people," as a transport or store-ship, or to commit hostilities against any prince, state or potentate with whom His Majesty shall not be at war, the vessel shall be forfeited. An insurrection existed in Cuba; at Nassau the Salvador was supplied with provisions and water; various munitions of war were shipped, and with eighty passengers on board she sailed to Cuba; the passengers were landed, and erected a battery; while there, seeing a Spanish man-of-war passing, they abandoned the vessel, but as the man-of-war passed without seeing them, they took charge of her again. The vessel was

seized on her return to Nassau. *Held*, that there was a fitting out or arming, within the meaning of the act; and that the vessel was employed in the service of insurgents, who formed part of the province or people of Cuba. —*The Salvador*, L. R. 3 P. C. 218.

Forfeiture.—*See* Landlord and Tenant.

Fraud.—*See* Bankruptcy, 1; Company, 1.

Fraudulent Conveyance.

1. A. made a voluntary settlement of certain property, after which he had not the means to pay his debts. *Held*, that the settlement could be set aside at the suit of a subsequent creditor; because, although there was no actual intent to defraud or delay creditors, that was its necessary effect —*Freeman* v. *Pope*, L. R. 5 Ch. 538; s. c. L. R. 9 Eq. 206; 4 Am. Law Rev. 707.

2. A trader conveyed all his property to secure the payment of a debt of £450, and a further advance of £300 Seventeen months afterwards he became bankrupt. *Held*, that the conveyance was not fraudulent under the 13 Eliz. cap. 5, nor impeachable under the Bankrupt laws.—*Allen* v. *Bonnett*, L. R. 5 Ch. 577.

Gift.—*See* Will, 3.

Husband and Wife.—*See* Vendor and Purchaser, 1.

Illegitimate Children.—*See* Will, 1.

Implied Contract.—*See* Negligence, 7.

Indorsement.—*See* Bills and Notes.

Injunction.—*See* Railway.

Insanity.—*See* Testamentary Capacity.

Insurance.—*See* Security.

Intent.—*See* Bills and Notes; Burden of Proof; Fraudulent Conveyance, 1.

Interest.—*See* Partnership.

Landlord and Tenant.

The plaintiff, in 1860, leased to T. and P. for fourteen years, and the lease contained a covenant "that the lessees shall not nor will underlet or assign or otherwise part with the possession of the premises," without the written consent of the lessor; with a clause of re-entry if the lessees should fail in the observance or performance of any of their covenants. In 1865 the plaintiff wrote a letter to W. saying, "I consent for you to take the two estates that T. and P. have been renting of me, on the same conditions and in accordance with their lease. This will be an authority for them to transfer the lease to you on paying £75, being three-quarters' rent due this day. P.S. It will be necessary for you to write accepting these terms." W. accepted the terms, and entered into possession without any assignment of the term; he continued in possession two years, when by consent of the plaintiff he assigned his interest in the lease to trustees for his creditors, who sold the term to the defendant. *Held*, that there was no breach of covenant by T. and P. *Quære*, whether the proviso for re-entry applied to the breach of a negative covenant. (Exch. Ch.).—*West* v. *Dobb*, L. R. 5 Q. B. 460; s. c. L. R. 4 Q. B. 634; 4 Am. Law Rev. 293.

See Easement.

Lease.—*See* Landlord and Tenant.

Married Women.—*See* Wife's Separate Estate.

Master.—*See* Bottomry.

Master and Servant.

H. was foreman, porter and superintendent of the defendants' station yard; he gave the plaintiff into custody on a charge of stealing the company's timber; the plaintiff was brought before a magistrate and discharged; he was then in the employ of the defendants, but was soon after discharged. *Held*, that H. had no implied authority to give a person into custody, and there was no evidence of a ratification of his act by the defendants —*Edwards* v. *London and North Western Railway Co.*, L. R. 5 C. P. 445.

Misrepresentation —*See* Company, 1.

Mortgage —*See* Priority.

Negligence.

1. The plaintiff was passing along the highway under a railway bridge of the defendants, when a brick fell and injured him. A train had passed just previously. The brick fell from the top of a perpendicular brick wall, upon which the bridge rested on one side *Held*, that this was *prima facie* evidence of negligence on the part of the defendants. (Hannen, J., dissenting)—*Kearney* v. *London, Brighton and South Coast Railway Co.*, L. R. 5 Q. B. 411.

2. The defendant was part owner of a steamer, which ran from M. to L. Passengers went on board a hulk in the harbour at M., where they obtained their tickets, and upon the steamer's coming up, descended by a ladder to the maindeck, from which they got on board the steamer. The hulk did not belong to the owners of the steamer, but was used by them by agreement with the owner, for the purpose of embarking passengers. The plaintiff, in descending the ladder, fell down a hatchway, close to its foot, which had been negligently left open. *Held*, that the defendant was liable, on the ground that the defendant had held this out as a place for passengers to embark, and

also on the ground that there was a contract to use due care for the plaintiff's safety during the journey from M. to L.—*John* v. *Bacon*, L. R. 5 C. P. 437.

8. The plaintiff was a passenger to D. on the defendants' railway, and was in the last carriage. The train stopped at D. late at night, with the body of the train alongside the platform, but the last carriage was opposite to and about four feet from a receding part of the platform, where passengers could not alight; the platform was long enough for the whole train to be drawn up alongside of it. The plaintiff stepped out, expecting to step on the platform, but fell on the rails and was injured. *Held*, by Bovill, C. J., and Brett, J., that there was evidence for the jury that the injury arose from the negligence of the defendants; *held*, by Montague Smith and Keating, JJ., that there was no evidence of negligence on the part of the defendants, and that the plaintiff contributed to the accident by her own negligence.—*Cockle* v. *London and South Eastern Railway Co.*, L. R. 5 C. P. 457.

4. A train of the defendants' drew up at a station so that the last carriage, in which B. was a passenger, was in a tunnel which terminates at the station, and not at the platform. The name of the station was called out by a porter, and B. immediately got out, though it was dark, and fell on the rails. *Held*, that there was no evidence of negligence on the part of the defendants. — *Bridges* v. *North London Railway Co.*, L. R. 5 C. P. 495, n. (5).

5. A train on the defendants' railway drew up at a station so that the carriage in which the plaintiff was a passenger was opposite to the platform at a part where it curved back, leaving an interval of two feet between the carriage and the platform. The name of the station had been called, and the plaintiff stepped out and fell between the carriage and the platform. *Held*, that the conduct of the plaintiff amounted to contributory negligence, and that a non-suit should be entered. — *Praye* v. *Bristol and Exeter Railway Co.*, L.R. 5 C. P. 500, n. (1).

6. A train of the defendants', in which the plaintiff was riding, overshot the platform, so that the carriage in which he was sitting was opposite to the parapet of a bridge beyond the platform, the top of which in the dusk looked like the platform; the porter called out the name of the station, and the plaintiff, having got out upon the parapet in the belief that it was the platform, fell over and was injured. *Held*, that there was evidence of an invitation to alight at a dangerous place, and evidence of negligence of the engine-driver, in not stopping at the platform.—*Whittaker* v. *Manchester and Sheffield Railway Co*, L. R. 5 C. P. 464, n. (3).

7. The defendant was one of several gentlemen interested in steeple-chases, and was appointed to cause a stand to be erected for the purpose of viewing the races; he employed a competent person to erect it, and stationed a man at the door to admit any one upon payment of 5*s*. The plaintiff paid 5*s*, and went upon the stand; it was improperly constructed and insufficient for the purpose, and for that reason gave way and fell while the plaintiff was there, whereby he was injured. *Held*, that there was an implied contract between the plaintiff and defendant that the stand was reasonably fit for the purpose for which it was to be used, and that the defendant was liable for the consequences of its not being so fit. (Exch. Ch.)—*Francis* v. *Cockrell*, L. R. 5 Q. B. 501; s. c. L. R. 5 Q. B. 184; 4 Am. Law Rev. 717.

See Collision.

Negotiable Instrument.—*See* Bills and Notes

Notice.—*See* Priority.

Partition.

Upon a suit for partition, where the plaintiffs had not been in possession for many years, the court refused to decide the legal title to the land, and ordered the bill to be retained for a year, with liberty to the plaintiffs to bring an action.—*Giffard* v. *Williams*, L. R. 5 Ch. 546; s. c. L. R. 8 Eq. 491; 4 Am. Law Rep. 476.

Partnership.

Partnership articles between the plaintiffs and defendant provided that they should be allowed interest at five per cent. upon the amount of capital contributed by them respectively, and that, upon the determination of the partnership, the value of the plaintiff's share should be ascertained by two persons, one to be chosen by each partner, and the defendant should purchase it at that valuation. *Held*, that, although the valuation could not be made in the manner provided, because there was no umpire, the court would make the valuation and carry out the agreement; also that the undivided profits should not be treated as capital in computing interest on the capital. —*Dinham* v. *Bradford*, L. R. 5 Ch. 519.

See Attorney; Bankruptcy, 1.

Passenger.—*See* Negligence, 2–6.

Payment.—*See* Principal and Agent.

Plea.—*See* Bills and Notes; Consideration.

Pledge.—*See* Attorney.

Power.—*See* Appointment.

Principal and Agent.

Action by the lord of a manor to recover £78 15*s.*, for a fine payable by the defendant, on admission as tenant to a copyhold. The defendant was admitted by C., who had been appointed by the steward of the manor, to act as his deputy for that turn. C. also acted as the defendant's attorney in the purchase of the land. After the admission, the defendant gave C. a cheque for £87 10*s.* 6*d.*, being the amount of the lord's fine, steward's fees, and C.'s charges as the defendant's solicitor. At C.'s request he crossed the cheque with the name of C.'s bankers, to whom the cheque was duly paid by the defendant's bankers. C. became insolvent soon afterwards. *Held*, that as the cheque had been paid, it was the same as payment in cash; and that there was evidence of payment for the jury. (Exch. Ch.)—*Bridge* v. *Garrett*, L. R. 5 C. P. 451; s. c. L. R. 4 C. P. 580; 4 Am. Law Rev. 297.

See Attorney; Contract, 1, 8; Master and Servant; Negligence, 2, 7.

Priority.

The plaintiff, being mortgagee of certain leasehold property, lent the lease to the mortgagor, to enable him to raise money by a second mortgage, but told him to inform the second mortgagee of the first mortgage. The mortgagor borrowed money of his banker's, and deposited the lease as security, without giving any notice of the prior mortgage. *Held*, that the plaintiff's mortgage must be postponed to the claim of the bankers.—*Briggs* v. *Jones*, L. R. 10 Eq 92.

Railway.

The plaintiff's grantors sold a piece of land to a railway company, which agreed that it should forever be used as a "first-class station;" a station was accordingly built, and a railway was opened in 1842. In 1869, the plaintiff filed a bill alleging that the accommodation was insufficient, and that only a small number of trains stopped there. *Held*, that as the station had stood so long without complaint, it must be presumed that the building was originally satisfactory; also that a "first-class station" was not to be construed to mean a first-class building, but a place where there were as many advantages for stopping as at any other place on the line; and the defendants were restrained from stopping a less number of trains at this station than at any other station between the termini, excepting express, special, or mail trains.—*Hood* v. *North Eastern Railway Co.*, L. R. 5 Ch. 525; s. c. L. R. 8 Eq. 666; 4 Am. Law Rev. 478.

See Master and Servant; Negligence, 1, 3–6.

Sale.

The defendants' agents in Valparaiso purchased for them a cargo of soda, and chartered the Precursor to bring it to England; the soda was soon after destroyed by an earthquake, and the agents thereupon cancelled the charter. Afterwards the defendants, being ignorant of the destruction, sold to the plaintiff the soda, "being the entire parcel of nitrate of soda expected to arrive at port of call per Precursor. . . . Should any circumstance or accident prevent the shipment of the nitrate, . . . this contract to be void." The defendants' agents, upon hearing of this contract, bought another cargo of soda, and shipped it by the Precursor to England. *Held*, that the contract did not apply to the soda which arrived, the voyage by which it was brought not being the voyage intended by the contract.—*Smith* v. *Myers*, L. R. 5 Q. B. 429.

See Confidential Relation; Contract, 3.

Security.

K. sold an annuity to T. for the life of K., and covenanted to attend at an insurance office in order to have his life insured by T., and if he went beyond the seas to pay any sums which T. might be obliged to pay as additional premiums; it was also provided that K might repurchase the annuity at any time at its original price. T. insured K.'s life; afterwards K. repurchased the annuity and claimed the policy. *Held*, that the policy was the property of T., and K was not entitled to have it assigned to him.—*Knox* v. *Turner*, L. R. 5 Ch. 515; s. c. L. R. 9 Eq. 155; 4 Am. Law Rev. 718.

Settlement.—*See* Appointment; Estate Tail; Fraudulent Conveyance, 1.

Ship.

The defendant chartered a ship to take in a cargo and proceed to a certain port, "and there, or so near thereto as she may safely get, deliver the said cargo in the usual and customary manner." At that port goods can only be landed in lighters, which are furnished by the merchant. The authorities there refused for several days to allow the cargo to be landed, owing to a threatened bombardment of the port. *Held*, that the ship-owners could not maintain an action against the defendants for the delay. (Exch. Ch.)—*Ford* v. *Cotesworth*, L. R. 5 Q. B. 544; s. c. L. R. 4 Q. B. 127; 3 Am. Law Rev. 715.

See Bottomry; Collision; Foreign Enlistment.

Solicitor.—*See* Confidential Relation.

Specific Performance. — *See* Partnership; Railway; Vendor and Purchaser.

Statute.

1. The 6 & 7. Wm. IV. cap. 37, enacts that bread shall be sold by weight, and in case any baker "shall sell or cause to be sold bread in any other manner than by weight," such baker shall pay a fine. H. was a baker, and in making a 3½ lb. loaf, used to put 4 lbs. of dough into the oven, but did not weigh it after baking. Six of such loaves sold by him, were found to weigh on an average not more than 3½ lbs. each. Upon these facts he was convicted. *Held*, that the conviction was right, the bread never having been weighed.—*Hill* v. *Browning*, L.R. 453.

2. By 3 Geo. IV. cap 126, sec. 41, if any person shall leave upon any turnpike road any horse, cattle, beast or carriage whatsoever, by reason whereof the payment of any tolls or duties shall be avoided or lessened, he shall pay a fine. S. was driven by his coachman in a waggonette more than a quarter of a mile along a turnpike road to within about 140 yards of the turnpike gate, and he then got out and walked through the gate to a railway station, which was about 100 yards beyond; the waggonette was driven back by the coachman. *Held*, that "leaving" a carriage, in the sense of the statute, did not mean "quitting" it, and that the conduct of S. was not within the statute.—*Stanley* v. *Mortlock*, L R. 5 C. P. 497

See Burden of Proof; Foreign Enlistment; Fraudulent Conveyance

Tenancy in Common.—*See* Partition.

Testamentary Capacity.

A testator was subject to two delusions, one that a man, who had been dead for some years, pursued and molested him, and the other that he was pursued by evil spirits, whom he believed to be visibly present. It was admitted that at times he was so insane as to be incapable of making a will. *Held*, that the existence of a delusion compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it.—*Banks* v. *Goodfellow*, L. R. 5 Q. B. 549.

Title.—*See* Vendor and Purchaser, 2, 3.

Trover.—*See* Attorney.

Trust.—*See* Charity, 1; Will.

Usage.—*See* Contract, 3.

Vendor and Purchaser.

1. Husband and wife agreed to convey real estate of the wife; the wife afterwards refused to convey. *Held*, that as the purchaser knew it was the wife's estate, the husband could not be compelled to convey his partial interest, and submit to an abatement of the price.—*Castle* v *Wilkinson*, L. R 5 Ch. 534.

2. The defendants sold by auction to the plaintiff a lot of land containing limestone and freestone; the conditions of sale provided that "if any objection or requisition be delivered and persisted in, the vendor shall be at liberty to rescind the contract," on returning the deposit; and that if there should be any mistake in the description of the property or the vendor's interest, it should not vacate the sale, but a compensation should be made. The lot was found to be subject to the right of the lord of the manor to the mines and minerals thereunder, and the plaintiff claimed compensation therefor; the defendants refused, and, the plaintiff persisting in his claim, they rescinded the contract and returned the deposit *Held*, that under the conditions of sale, the defendants were at liberty to rescind the contract.—*Mawson* v. *Fletcher*, L. R. 10 Eq. 312.

3. An agreement between the plaintiffs and defendant for the sale of a piece of land, provided that the purchaser should send in writing to the vendors within a limited time all his objections and requisitions in respect of the title; and that in this respect time should be of the essence of the contract, and in default of such objections and requisitions, and subject only to such, the purchaser should be deemed to have accepted the title. Requisitions were sent to the vendors within the time, and disputes arising, a suit for specific performance was brought by the vendors. *Held*, that the purchaser was precluded by the agreement, from taking, under the inquiry, objections other than those taken within the specified time.—*Upperton* v. *Nickolson*, L. R. 10 Eq. 228.

See Confidential Relation.

Voluntary Conveyance.—*See* Fraudulent Conveyance, 1.

Warranty.—*See* Negligence, 7.

Way.

A foot-path along the top of the river wall, which is maintained by the commissioners of sewers for the purpose of keeping out the water of the Thames from the marsh lands, had been used by the public without interruption from time immemorial. *Held*, that there was nothing in the river wall necessarily inconsistent with the user of a foot-path at the top.—*Greenwich Board of Works* v. *Maudslay*, L R. 5 Q. B. 397.

Wife's Separate Estate.

A married woman, living alone at Paris, and to all appearance a *feme sole*, indorsed a bill drawn by her agent, and drew a cheque on her bankers payable to her agent or bearer. The plaintiff cashed both the bill and the cheque, which were afterwards dishonored. *Held*, that her separate estate was liable for the amount due on the bill and cheque, without any deduction on account of equities between her and her agent.—*McHenry* v. *Davies*, L. R. 10 Eq. 88.

Will.

1. Testator gave real and personal property in trust for his wife M, for her life (provided she continued his widow and unmarried), and after her decease to be divided among all his children if more than one; and if there should be but one such child, then the whole to go to such child. He had a wife E., who survived him, by whom he never had any children, and from whom he had lived apart for many years. For several years he had lived with one M., who was recognised by him as his wife, and bore his name, and by whom he had four children; two of them died before the date of the will, one was then alive, and one was born afterwards; these children were baptised as his children and bore his name. *Held*, that M. was entitled to the benefit of the trust for life, and after his decease the property went to the child living at the date of the will—*Lepine* v. *Bean*, L. R. 10 Eq 160.

2. Testator gave real estate to trustees, upon trust to convey to his son T. F. and the heirs of his body, but in such manner and form nevertheless, and subject to such limitations and restrictions, as that if the said T. F. shall happen to depart this life without leaving lawful issue, then that the said real estate may after his decease descend unincumbered to R. F. and her heirs. *Held*, that the will created an executory trust, to be executed by a conveyance to the use of T F. for his life, with remainder to his first and other sons and daughters in tail, with remainder to R. F. in fee.—*Thompson* v. *Fisher*, L. R. 10 Eq. 207.

3. Testator gave an estate upon trust for his son for his life, and after his decease upon trust to convert into money and divide the same among the testator's eleven grandchildren, *nominatim*, when they should respectively attain twenty-one; and if any of such grandchildren should die before such share should become payable without leaving any child surviving, then the share of him so dying should be divided among the survivors; and in case any of them died before his share became payable, leaving any child surviving, then his share should go to his children. The eleven grandchildren all survived the testator and attained twenty-one, but several died in the lifetime of the tenant for life. *Held*, that "payable" should be construed to mean "vested," and that the shares of the grandchildren who had died were payable to their personal representatives.—*Haydon* v. *Rose*, L. R. 10 Eq. 224

4. A. devised real estate to trustees, in trust for her sister D. for life, and after her decease in strict settlement to the use of the eldest, third and other sons of D. for their respective lives, without impeachment for waste, remainder to their sons successively in tail male. Afterwards the Crown granted a barony to D. for life, remainder to her second, third, and other younger sons in tail male; the patent contained a shifting clause by which, in the event of any of the sons succeeding to the Earldom of D., the barony should devolve upon the next son. A. then made a codicil, which recited that it was her intention to settle the property disposed of in her will "in a course of settlement to correspond, as far as may be practicable, with the limitations of the said barony," and gave her estates, &c., to trustees upon trust, "to convey, settle and assure all the same manors and hereditaments, &c., in a course of entail to correspond as nearly as may be with the limitations of the said barony," and the provisos affecting it, "in such manner and form, and with all such powers," &c., as the trustees or their counsel should advise. *Held*, that the estates ought to be settled in a course of strict settlement to the second and other younger sons of D for their respective lives, without impeachment of waste, remainder to their first and other sons in tail male; and that the settlement should contain a shifting clause in the words of the patent (Lord Hatherly, L. C., dissenting).—*Sackville-West* v. *Viscount Holmesdale*, L. R. 4 H. L. 543.

See Charity; Testamentary Capacity.

Words.

"*Any other religious institution or purposes*"—See Charity, 2.

"*Children.*"—See Will, 1.

"*Correspond.*"—See Will, 4.

"*Course of entail.*"—See Will, 4.

"*Dying without issue*"—See Estate Tail.

"*Expected to arrive.*"—See Sale.

"*Furnish, fit out, or arm.*"—See Foreign Enlistment.

"*First-class Station.*"—See Railway.
"*Leave.*"—See Statute, 2.
"*Payable.*"—See Will, 3.
"*Sale by weight.*"—See Statute, 1.
"*Transaction.*"—See Bankruptcy, 2.
"*Wife.*"—See Will, 1.

OBITUARY.

JOHN SHUTER SMITH, ESQ.

Died, at his residence, Wildwood, Port Hope, on Wednesday, the 18th January last, in the 57th year of his age, John Shuter Smith, Esq., Barrister at Law.

Mr. Smith was descended from an U.E. Loyalist, being the third son of Mr. J. D. Smith, nearly fifty years ago a member of the Parliament of Upper Canada, and a prominent man in the neighbourhood of Port Hope. His brother, is the County Judge of Victoria; the Hon. Sidney Smith, Inspector of Registry Offices, and several other brothers and sisters, survive him.

Mr. Smith, in 1831, commenced the study of the law, in the office of the late Hon George S. Boulton, of Cobourg, and finished his time in that of Hon. M. S. Bidwell, at Toronto. In 1836 he was called to the bar, and practised with much success in Toronto for several years, as senior member of the firms of "Smith & Crooks," and "Smith, Crooks & Smith," his partners being the late Robt. P. Crooks and Larratt W. Smith, Esqs.; and again with the late Mr. Justice Sullivan and J. Hector, Esq., as "Sullivan, Smith & Hector;" and afterwards, at Cobourg, with the Hon. Sidney Smith, and at Port Hope with the present Judge Smith, of Lindsay, as "Smith & Smith."

At the latter place he entered into politics in the Reform interest, and, though unsuccessful at first, was on two occasions elected for East Durham.

In Michaelmas Term he was appointed a Bencher of the Law Society at the same time as Mr. Becher, Mr. Vice-Chancellor Mowat, and the late Mr. Henry Eccles.

He was appointed Registrar of the Court of Chancery, in 1854, and held the office but for a few months. In January, 1868, he was appointed Clerk of the Legislative Council of Ontario, and continued therein till the beginning of the year 1869, when he was seized with the illness which has just terminated with his life.

HON. JOHN ROSS, Q. C.

Died at his residence, in the township of York, on Tuesday, the 31st January, 1871, the Hon. John Ross, in the 53rd year of his age.

We shall give some particulars of his life hereafter.

REVIEWS.

Scientific American. Munn & Co., New York, U. S.

We publish in another place the prospectus of this very interesting and instructive journal.

It occupies a space filled by no other periodical, keeping us *au courant* with all that takes place in the scientific and mechanical world, containing information which can nowhere else be obtained. The plates given in it are admirably executed, and are an evidence of the enterprise of the publishers.

Albany Law Journal.

With the first number of the third volume comes the Title page and Index to Vol. II.

This is one of the most readable of our exchanges, perhaps the most so, and is admirably conducted by Mr. Isaac Grant Thompson, but why is it that it, like so many other legal periodicals and law books, fails in its Index? There seems to be a general want of care on this most important point on this side of the Atlantic. Few, if any, are what they should be, or might be. The defect in the one before us is, that there scarcely seems to have been any attempt made to index the *subjects* in alphabetical order; the alphabetical arrangement having reference only to the catch heading of each article or item. We are the more sorry for this, as it will deprive the volume of much of its practical value to those who keep it, as we do, for binding, and to be placed in an easily accessible place on our library shelves. The publishers promise additional matters of interest for subscribers for 1871; and possibly if the enterprising conductor of this Journal thinks our hint of any value, he may take advantage of it. Our only desire is to save so much that is valuable and interesting from being practically lost.

By 32-33 Victoria, cap. 29, sec. 38, which took effect on 1st January, 1870, it is enacted that "in all criminal trials, whether for treason, felony or misdemeanor, four jurors may be peremptorily challenged on the part of the Crown; but this shall not be construed to affect the right of the Crown to cause any juror to stand aside until the panel has been gone through, or to challenge any number of jurors for cause."—*Held*:—1. That even before 1st January, 1870, on a trial for a misdemeanor, the Crown might, without showing cause, direct jurors, on their names being called by the clerk of the court, "to stand aside," until the panel has been gone through. 2 Illegal evidence allowed to go to the jury under reserve of objection may be subsequently ruled out by the judge in his charges and the conviction is not invalidated thereby, if it does not appear that the jury were influenced by such illegal evidence. 3. The Court of Queen's Bench in Appeal will adjudicate upon a reserved case of misdemeanor in the absence of the defendant who has fled beyond the jurisdiction of the court.—*The Queen* v. *Fraser*, 14 L. C. J. 245.