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DIARY FOR JULY.

1. Mon... County Court and Surrogate Court Term com. Heir and Devisee sittings. Long Vacation. Last day for County Council finally to revise assessment roll and to equalize R. L. M.
4. Thurs. Sittings Court of Error and Appeal.
6. Sat. ... County Court and Surrogate Court Term ends.
7. SUN... *3rd Sunday after Trinity.*
13. Sat. ... Last day for County Judges to make return of appeals from assessments.
14. SUN... *4th Sunday after Trinity.*
16. Tues... Heir and Devisee sittings end.
21. SUN... *5th Sunday after Trinity.*
25. Thurs. *St. James.*
28. SUN... *6th Sunday after Trinity.*

THE

Upper Canada Law Journal.

JULY, 1867.

THE DOMINION OF CANADA.

It is not for information to the public, or as a matter interesting to the profession, that we hail the first day of July as a day to be remembered by Canadians; but it is right that we should so far go out of our usual course as to chronicle an event which, however interesting at the present time, is even more full of portent for the future.

The Provinces of Canada, Nova Scotia, and New Brunswick, become on the 1st of July instant, by virtue of the Queen's Proclamation, dated the 29th March, 1867, under the authority of the Imperial Act of 30 Vic. cap. 3, sec. 3, one Dominion, under the name of Canada. What was formerly known as Upper Canada being now Ontario, and Lower Canada being styled Quebec; each of the four Provinces having a distinct local legislature, with a general government for the Union.

The Right Honorable Charles Stanley, Viscount Monck, and Baron Monck of Ballycammon, was appointed by the Crown the Governor General of Canada; and subordinate to him have been appointed, Major-General Henry William Stisted, C.B., Lieutenant-Governor of the Province of Ontario; the Honorable Sir Narcisse Fortunat Belleau, Knight, Lieutenant-Governor of the Province of Quebec; Lieutenant-General Sir William Renwick Williams, Baronet of Kars, K.C.B., Lieutenant-Governor of the Province of Nova Scotia; Major-General Charles Hastings Doyle, Lieutenant-Governor of the Province of New Brunswick.

The appointment of the military commanders in Ontario, Nova Scotia and New Brunswick is provisional merely.

The *Canada Gazette* of the 3rd instant also contains the designation of the ministerial offices, with the names of the persons appointed to fill them who are all, moreover, members of the Queen's Privy Council for Canada, viz.:—

The Honorable Sir John Alexander Macdonald, K.C.B., to be Minister of Justice and Attorney General; The Honorable George Etienne Cartier, C.B., to be Minister of Militia; The Honorable Samuel Leonard Tilley, C.B., to be Minister of Customs; The Honorable Alexander Tilloch Galt, C. B., to be Minister of Finance; The Honorable William McDougall, C. B., to be Minister of Public Works; The Honorable William Pearce Howland, C.B., to be Minister of Internal Revenue; The Honorable Adams George Archibald, to be Secretary of State for the Provinces; The Honorable Adam Johnson Fergusson Blair, to be President of the Privy Council; The Honorable Peter Mitchell, to be Minister of Marine and Fisheries; The Honorable Alexander Campbell, to be Postmaster General; The Honorable Jean Charles Chapais, to be Minister of Agriculture; The Honorable Hector Louis Langevin, to be Secretary of State of Canada; The Honorable Edward Kenny, to be Receiver General.

The Executive Councils of Ontario and of Quebec are to be composed of such persons as the Lieutenant-Governors may think fit; and in the first instance of the following officers, namely—the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, the Commissioner of Agriculture and Public Works, with, in Quebec, the Speaker of the Legislative Council and the Solicitor General.

The Constitution of the Executive authority in each of the Provinces of Nova Scotia and New Brunswick is, subject to the provisions of this Act, to continue as it existed at the Union, until altered under the authority of this Act.

Lord Monck was sworn in at Ottawa on the 1st of July, by Chief Justice Draper, assisted by Chief Justice Richards, Mr. Justice Hagarty, and Mr. Justice John Wilson, from the Province of Ontario, and Judge Mondelet,

from the Province of Quebec; and General Stisted was, on the 6th July, at Osgoode Hall, Toronto, sworn in as Lieutenant-Governor of Ontario, by the Chancellor, under a commission directed to him and the two Vice-Chancellors.

The judicature of the Dominion is settled by sections 96 to 101, inclusive of the Act referred to, which are as follo s:

"96. The Governor General shall appoint the ..dges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. Until the laws relative to property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98. The Judges of the Courts of Quebec, shall be selected from the Bar of that Province.

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

100. The salaries, allowances, and pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are, for the time being, paid by salary, shall be fixed and provided by the Parliament of Canada.

101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the administration of the laws of Canada."

The uniformity of laws in Ontario, Nova Scotia, and New Brunswick, is foreshadowed in section 97, and also in section 94, which provides that:

"Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and of the procedure of all or any of the Courts in those three Provinces, and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof."

This uniformity will probably hereafter introduce a more intimate relationship between the Bars of the different Provinces, even if an interchange of ..vilities is not sooner accomplished.

The assimilation of some at least of the laws of New Brunswick to those of Upper Canada is already contemplated if not commenced, for we understand that information with respect to our courts for the collection of small debts has been obtained from a gentleman in this city who has made a study of the subject.

The few simple words of section 101 of the Act tell but little of the magnitude of the task before the Legislature, in the constitution and organization of a "general Court of Appeal for Canada, and the establishment of any additional courts for the better administration of the laws of Canada;" and of the care, patience and ability which will be required from those to whom the working of such courts may be entrusted.

What new courts are necessary, and how they should be constituted, we are not now discussing, we would merely refer again to the strong views we entertain and have expressed with reference to the necessity for a Court of Admiralty, competent to deal with the marine of what Canada now confessedly is, one of the most important of the maritime countries of the world.

NEW QUEEN'S COUNSEL.

A *Canada Gazette* extra of date June 29, 1867, announces that His Excellency, the Governor General, has been placed to appoint the following gentlemen to be Queen's Counsel, in and for Upper Canada: — Donald Bethune, Clarke Gamble, Philip Low, the Hon. Adam Johnston Fergusson Blair, John Crawford, John B. Lewis, Richard Miller, Robert G. Dalton, Richard W. Scott, Robert Dennistoun, John Bell, John D. Armour, and Robert A. Harrison, all of Osgoode Hall, Esquires, Barristers-at-Law.

As is usual in cases of this kind, there are those who say that the honor has not been conferred with as much discrimination as was

proper; and that only one of a certain party in politics has been chosen. But politics have, we think, nothing to do with such matters, and there is no respectable member of the profession, we trust, but would repudiate an opinion to the contrary. We think that no valid objection can be made to any of the above list, whether the appointment was made on the ground that the persons so appointed were entitled to the distinction on the score of seniority—from their position—as representing localities—for their general legal attainments, or as possessing the confidence of the profession and the public as eminent or successful counsel, combined, of course, with a good personal and professional reputation.

Whilst, however, expressing this opinion, we cannot help regretting that some few names that could be mentioned were, though we are sure merely from inadvertence, omitted from the list. Not many men in the profession are more thought of by their brethren than Mr. Daniel McMichael or Mr. Christopher Paterson. They are well known on circuit and in term, and both would do credit to a silk gown. The names of Mr. J. T. Anderson and one or two others perhaps, that we do not at the moment remember, might also be suggested. One name will doubtless suggest itself to one person and another to another, but though we do not think there is any great cause for dissatisfaction in the premises, we hope to see a few more names added to the list shortly. Any fresh appointments must we presume be made by the local government.

A short summary of the work done in the Court of Queen's Bench during Easter Term last, the first of the three-weeks Terms, may be interesting, and will give some idea of the amount of work which the judges of that court had to do during that period. It may be classified as follows:

Rules nisi granted	51
Rules nisi refused	15
Demurrers argued	13
Rules argued	45
Special cases argued	5
Judgments given during Term.	17

This is of course exclusive of some forty-three judgments delivered on the judgment days *after* Term.

It is announced by "authority" that County Judges, Students and others can be supplied with the current reports of Chancery, Queen's Bench and Common Pleas at the rate of two dollars per volume, and with the Practice Reports and Chancery Chambers Reports together, for two dollars, by remitting to the publisher *in advance*, the price of the series desired.

The name of the case in which the decision referred to on page *ante*, with respect to "Fees on references," was *Waddell* v. *Anglin*, not *Jordan* v. *Gildersleeve*, which was argued at the same time, but on another point.

JUDGMENTS—EASTER TERM, 1867.

QUEEN'S BENCH.

Present: Draper, C. J.; Hagarty, J.; and Morrison, J.

[Monday, June 24, 1867.]

Christie v. *Clark.*—Appeal from County Court of Brant, dismissed with costs.

Barbour v. *Gettings.*—Rule discharged.

Morgan v. *Quesnell.*—*Held*, that Treasurer's warrant was defective, not being under seal. Rule for new trial discharged. Leave to appeal refused.

Holland v. *Vanstone.*—Appeal from County Court of Huron, dismissed with costs. (Two cases.)

Stewart v. *Scott.*—Appeal from County Court of Peterboro' allowed, and rule to be absolute in Court below for new trial without costs.

Rogers v. *Scott.*—Appeal from County of Peterboro'. Appeal dismissed.

Reynolds v. *Scott.*—Appeal from County of Peterboro'. Appeal dismissed.

Sedgwick v. *Scott.*—Appeal from County of Peterboro'. Appeal dismissed.

Campbell et al. v. *Fox.*—Postea to plaintiff.

E. P. Ross v. *Commercial Union Assurance Co.*—Judgment for plaintiff on demurrer, and rule discharged.

E. P. & A. Ross v. *Commercial Union Assurance Co.*—New trial without costs.

N. & N. Ross v. *Commercial Union Assurance Co.*—Judgment for plaintiff on demurrer to fourth plea to first count, and rule *nisi* discharged.

Findlay v. *Phillips.*—Appeal from County Court. Rule absolute for new trial in Court below.

Moore v. *Grand Trunk Railway.*—Appeal from County Court of York. Appeal dismissed with costs.

Campbell v. *York and Peel.*—Judgment for plaintiff on demurrer.

Re Lount.—Rule absolute for mandamus with costs.

Lapoint v. *Grand Trunk Railway.*—Rule absolute to enter nonsuit.

Campbell v. *Pettit.*—Rule discharged with costs.

Re Woods.—Rule discharged with costs.

McCumber v *Doyle.*—Rule absolute with costs.

Joint v. *Thompson.*—Nonsuit sustained. Rule discharged.

Read v. *Board of Agriculture.*—Judgment for defendant on demurrer. Leave to amend on payment of costs.

Moffatt v. *Foley.*—Judgment for defendant.

Stobin v. *Dean.*—Judgment for plaintiff on demurrer.

McBeth v. *McBeth.*—Rule discharged.

Huskisson v. *Lawrence.*—Verdict reduced to $190.

Reg. v. *Mayor of Dundas.*—Rule absolute for mandamus.

Reg. v. *Faulkner.*—Rule discharged with costs.

Present: MORRISON, J., (the CHIEF JUSTICE and HAGARTY, J., being absent on official business.)

[Saturday, June 29, 1867.]

Payne v. *Goodyear.*—Rule nisi discharged.

Leonard v. *American Express Co.*—Rule absolute to enter non-suit.

Earnshaw v. *Tomlinson.*—New trial without costs.

Benjamin v. *Corporation of Elgin.*—Nonsuit to be entered.

Deal v. *Potter.*—Rule discharged.

Cushing v. *McDonald.*—Rule discharged.

McMillan v. *McDonald.*—Rule discharged.

Robertson v. *Joy.*—Rule discharged.

Doyle v. *Walker.*—New trial without costs.

Cawthra v. *Leys.*—Rule absolute to set aside nonsuit and to enter verdict for plaintiff for $1,568.

Anderson v. *Stow.*—Rule absolute for new trial without costs.

Delong v. *Oliver.*—Rule discharged.

Marrs v. *Davidson.*—Leave to appeal applied for.

Robertson v. *Joy.*—Rule discharged.

McMaster v. *Bennett.*—Amendment made at trial to strike out, and postea to defendant.

COMMON PLEAS.

Present: RICHARDS, C. J.; ADAM WILSON, J.; JOHN WILSON, J.

[Monday, June 24, 1867.]

Leinster v. *Stabler.*—Judgment for defendant on demurrer.

Whitney v. *Wall.*—Rule absolute for new trial. Costs to abide event.

Miller v. *Stitt et al.*—Rule nisi discharged. Leave to appeal refused.

Trust and Loan Co. v. *McGillis.*—Postea to plaintiff.

Burke v. *Battles.*—Rule nisi discharged.

Campbell v. *Fox.*—Special case. Postea to plaintiff.

Bank of Montreal v. *McWhirter.*—Rule nisi discharged.

Lynch v. *Bickett.*—Rule absolute unless plaintiff consents to conditions imposed.

Lynch v. *Stalter.*—Same.

Queen v. *Mason.*—Ordered that conviction be annulled, and an entry made on record that in the opinion of the Court the prisoner ought not to have been convicted.

Queen v. *Gogan.*—Same.

Hesketh v. *Ward.*—Rule nisi discharged.

Beatty v. *Beatty.*—Rule nisi discharged.

Whyte v. *Treadwell.*—Rule nisi discharged.

Miller v. *City of Hamilton.*—Rule absolute.

Vrooman v. *Vrooman.*—Rule discharged with costs.

Present: ADAM WILSON, J.; JOHN WILSON, J., (the CHIEF JUSTICE being absent on official business.)

[Saturday, June 29, 1867.]

Clark v. *Carroll.*—Judgment for defendant on demurrer.

Sweeney v. *Port Burwell Harbour Co.*—Postea to plaintiff with $49.72 damages. Leave to appeal granted.

Boulton v. *White.*—Rule absolute for nonsuit.

Ball v. *Town of Niagara.*—Judgment ready but delivered, as the court understands that a settlement is being negotiated.

Ball v. *Town of Niagara.*—Same as above.

Bain v. *McIntyre.*—Judgment for defendant on demurrer.

Carscaden v. *Shore.*—Rule absolute to set aside nonsuit with leave to plaintiff to amend his declaration as he may be advised, on payment of costs, and if not paid within eight weeks, rule to be discharged.

The Queen v. *Stittwell.*—The court refused to entertain the case, it not being properly before it.

Leslie v. *McLelland.*—Rule absolute for new trial, costs to abide event.

PRACTICE COURT.

Presiding: ADAM WILSON, J.

[Saturday, June 29, 1867.]

Jacques et al. v. *Nicholl.*—Rule discharged.

Adshead v. *Grant.*—Sheriff directed to return and account to execution creditor for $50 made on sale of debtor's goods.

Trust and Loan Co. v. *Covert.*—Rule allowing defendant Ruttan to add an equitable plea.

SELECTIONS.

DIGEST OF LAW COMMISION.

FIRST REPORT OF THE COMMISIONERS.

To the Queen's most Excellent Majesty.

We, your Majesty's Commisioners appointed "to enquire into the expediency of a Digest of the law, and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in Judicial Decisions," humbly submit to your Majesty this our first report.

I.—By the term Law, as used in your Majesty's Commission, we understand the Law of England, comprising the whole Civil Law, in whatever Courts administered, the Criminal Law, the Law relating to the Constitution, Jurisdiction, and Proceedure of Courts (including the Law of Evidence), and Constitutional Law.

In each of these divisons are comprised Laws derived from three distinct sources:

1. The first source is the Common Law, which consists of customs and principles, handed down from remote times, and accepted from age to age, as furnishing rules of legal right.

2. The second source is the Statute Law, which derives its authority from the Legislature

3. The third source is the Law embodied in, and to a great extent created by Judicial Decisions and Dicta. These, indeed, as far as they have relation to the Common Law and Statute Law, are not so much a source of law, as authoritative expositions of it; but, with respect to doctrines of Equity and rules of procedure and evidence, they may often be regarded as an original source of Law.

That serious evils arise from the extent and variety of the materials, from which the existing Law has to be ascertained, must be obvious from the following considerations:—

The records of the Common Law are in general destitute of method, and exhibit the law only in a fragmentary form.

The Statute Law is of great bulk. In the quarto edition in ordinary use, known as Ruffhead's, with its continuations, there are 45 volumes, although (particularly in the earlier period) a large quantity of matter is wholly omitted, or given in an abbreviated form, as having ceased to be in force. The contents of these volumes form one mass, without any systematic arrangement, the Acts being placed in merely chronological order, according to the date of enactment, in many cases the same Act containing provisions on heterogeneous subjects. A very large portion of what now stands printed at length has been repealed, or has expired, or otherwise ceased to be in force. There is no thorough severance of effective from non-effective enactments, nor does there exist in a complete form any authoritative index, or other guide by the aid of which they may be distinguished. Much, too contributes to swell the Statute Book, which is of a special or local character, and cannot be regarded as belonging to the general Law of England.

The Judicial Decisions and Dicta are dispersed through upwards of 1300 volumes, comprising, as we estimate, nearly 100,000 cases, exclusive of about 150 volumes of Irish Reports, which deal to a great extent with Law common to England and Ireland. A large proportion of these cases are of no real value as sources or expositions of Law at the present day. Many of them are obsolete; many have been made useless by subsequent statutes, by amendment of the Law, repeal of the statutes on which the cases were decided, or otherwise; some have been reversed on appeal or overruled in principle; some are inconsistent with or contradictory to others; many are limited to particular facts, or special states of circumstances furnishing no general rule; and many do no more than put a meaning on mere singularities of expression in instruments (as wills, agreements, or local Acts of Parliament), or exhibit the application in particular instances of established rules of construction. A considerable number of the cases are reported many times over in different publications, and there often exist (especially in earlier times) partial reports of the same case at different stages, involving much repetition. But all this matter remains incumbering the Books of Reports. The cases are not arranged on any system: and their number receives large yearly accessions, also necessarily destitute of order; so that the volumes constitute (to use the language of one of your Majesty's Commissioners) "what can hardly be described, but may be denominated a great chaos of judicial legislation."*

At present the practitioner, in order to form an opinion on any point of Law not of ordinary occurrence, is usually obliged to search out what rules of the Common Law, what Statutes, and what Judicial Decisions bear upon the subject, and to endeavor to ascertain their combined effect. If, as frequently happens, the cases are numerous, this process is long and difficult; yet it must be performed by each practitioner, for himself, when the question arises; and in some cases, after an interval of time, it may have even to be repeated by the same person. Without treatises, which collect and comment on the Law relating to particular subjects, it is difficult to conceive how the work of the Legal profession and the administration of Justice, which greatly depends on it, could be carried on; but, however excellent such separate treatises may be, they do not give the aid and guidance that would be afforded by a complete exposition of the Law in a uniform shape.

* Speech of the Lord Chancellor (Lord Westbury) on the Revision of the Law, House of Lords, 12th June 1863. Stevens and Norton. Page 8.

A digest, correctly framed, and revised from time to time, would go far to remedy the evils we have pointed out. It would bring the mass of the Law within a moderate compass, and it would give order and method to the constituent parts.

For a Digest (in the sense in which we understand the term to be used in your Majesty's Commission, and in which we use it in this Report) would be a condensed summary of the Law as it exists, arranged in systematic order, under appropriate titles and subdivisions, and divided into distinct articles or propositions, which would be supported by references to the sources of Law whence they were severally derived, and might be illustrated by citations of the principal instances in which the rules stated had been discussed or applied.

Such a digest would, in our judgment, be highly beneficial.

It would be of especial value in the making, the administration, and the study of the Law.

When a necessity arises for legislation on any subject, one of the principal difficulties, which those who are responsible for the framing of the measure have to encounter, is to ascertain what is the existing law in all its bearings. The systematic exposition, in the Digest, of the Law on the subject, would enable the members of the Legislature generally, and not merely those who belong to the Legal profession, to understand better the effect of the legislation proposed. And there would be this further benefit—that new laws, when made, would, on periodical revisions of the Digest, find their proper places in the system, and would not have to be sought for, as at present in scattered enactments.

The Digest would be of great use to every person engaged in the administration of the Law. All those whose duties require them to decide legal questions in circumstances in which they have not access to large libraries or other ample sources of information, would find in the Digest a ready and certain guide. Counsel advising would be spared much pains in searching for the Law in indexes, reports, and text-books; and Judges would be greatly assisted as well in hearing cases as in preparing judgment.

The Digest would be most advantageous in the study of the Law; for it would put forth legal principles in a form in which they would be readily appreciated, contrasted, and committed to mind, and thus substitute the study of a system for the desultory contemplation of special subjects.

It is not unreasonable to expect that this condensation and methodical arrangement of legal principles would have a salutary effect upon the Law itself. It would give the ready means of considering, in connection with one another, branches of the Law which involve similar principles, though their subject-matters may widely differ. It would thus bring to light analogies and differences, and by inducing a more constant reference to general principles, in place of isolated decisions, have a tendency to beget the highest attributes of any legal system—simplicity and uniformity.

The persons charged with the framing of the Digest might be also intrusted with the duty of pointing out, from time to time, the conflicts, anomalies, and doubts, which in the course of their labours would appear. Thus the process of constructing the Digest would be conducive to valuable amendments of the Law. These amendments would be embodied in the Digest in their proper places.

Moreover, such a Digest will be the best preparation for a Code, if at any future time codification of the Law should be resolved on.

But great as are the advantages to which we have referred as likely to flow from the formation of a Digest of Law, the argument for it may, we think, be rested even on the higher ground of national duty. Your Majesty's subjects, in their relation towards each other, are expected to conform to the laws of the State and are not held excused on the plea of ignorance of the Law, from the consequences of any wrongful act. It is in these laws that they must seek the provisions made for their liberty, for their privileges, for the protection of their persons and property, for their social well-being. It is, as we conceive, a duty of the State to take care that these laws shall, so far as is practicable, be exhibited in a form plain, compendious, and accessible, and calculated to bring home actual knowledge of the Law to the greatest possible number of persons. The performance of this duty—a duty which other countries in ancient and modern times have held themselves bound to recognise and discharge—has, in this country, yet to be attempted.

On these grounds we report to your Majesty our opinion that a Digest of Law is expedient.

II.—Having arrived at this conclusion, we proceed to the consideration of the further inquiry which your Majesty has been pleased to intrust to us—namely, the best means of accomplishing a Digest of the Law.

It may be proper here to advert to what has recently been done in the State of New York. The laws of that State (as in other States also of the Union) rest generally, for their basis, on those of this country as they existed when the States declared their independence. Cases decided in our Courts before that time are still regularly cited before American tribunals, as they are in Westminster Hall; and, indeed, the Reports of our Courts, up to the present day, are largely cited and relied on in argument in American Courts. The work which has been lately accomplished by the Commissioners for framing Codes for the State of New York is, in form, a series of Codes laying down prospectively what the Law is to be, two of which Codes have already received the sanction of the Legislature. But, as a preparatory step to the formation of these Codes, a complete collection—or what, after

great examination, the Commissioners believed to be a complete collection—under appropriate heads, of the Law on each subject, was formed by gentlemen employed for the purpose under the commissioners.*

We do not desire to conceal that the task of forming such a Digest as we contemplate would necessarily require a considerable expenditure of time and money, though we are strongly of opinion that the benefits that would result from it would amply compensate for any such expenditure.

We think it clear that a work of this nature (regard being had especially to the importance of its carrying with it the greatest weight) could not be accomplished by private enterprise, and that it must be executed by public authority and at the national expense.

With respect to the means of accomplishing it, we have considered various plans. Any plan must, we think, involve the appointment of a Commissioner or Body for executing or superintending the execution of the work. It is obvious that, whatever arrangement is adopted, a certain number of functionaries must be employed, at a high remuneration, in the capacity of commissioners, assistant commissioners, or secretaries, and that there must be a considerable expenditure on the services of members of the Legal profession, employed from time to time in the preparation of the materials to be ultimately moulded into form by or under the immediate supervision of the Commission or responsible Body.

We are anxious to avoid any recommendation that would involve the necessity of immediate outlay on a large scale; and we therefore recommend that a portion of the Digest, sufficient in extent to be a fair specimen of the whole, should be in the first instance prepared, before your Majesty's Government is committed to an expenditure which will be considerable, and which, when once begun, must continue for several years, if it is to be at all efficacious.

We are not authorized, by the terms of your Majesty's commission, to undertake the execution or direction of such a work, but we are of opinion that it might be conveniently executed under our superintendence.

If this should be your Majesty's pleasure, we humbly submit that the necessary powers should be conferred on us to enable us to carry this recommendation into effect, and that means should be furnished to us of employing adequate professional assistance for this purpose.

In the progress of the work thus done, light will be thrown on the question of the best organization of the Body to be constituted for the completion of the Digest. A fair estimate will be formed of the time that will be required for the whole. Difficulties, not now foreseen in detail, will doubtless be encountered, and the best way to overcome them will be ascertained. The solution of questions which have already occurred to us will be attained, or at any rate promoted. Some of these questions are the following: What is the best mode of dealing with Statute Law in the Digest? How should conflicting rules of Law (if any), and doubts which have been authoritatively raised respecting particular cases or doctrines of Law, be treated? And what provision should be made on the important point of the nature and extent of the authority which the Digest should have in the Courts, and how that authority can best be conferred on it?

We propose, in this our First Report, to limit ourselves to the conclusions and recommendations we have now stated. The consideration of other questions arising from the terms of your Majesty's Commission, and a fuller treatment of some of the subjects here adverted to, we reserve for subsequent Reports.

All which is humbly submitted to your Majesty's gracious consideration.

Dated this 13th day of May, 1867.

Cranworth.
Westbury.
Cairns.
James Plaisted Wilde.
Robert Lowe.
W. P. Wood.
George Bowyer.
Roundell Palmer.
John George Shaw Lefevre.
T. Erskine May.
W. T. S. Daniel.
Henry Thring.
Francis S. Reilly.

—*Weekly Notes.*

* Mr. David Dudley Field, to whose exertions the State of New York is mainly indebted for this important work, was so good as to attend one of our meetings, and to give us full information respecting the course which had been pursued.

THE JUDICIARY OF LOWER CANADA.

The *U. C. Law Journal*, in noticing our reports of the *Ramsay Contempt Case*, takes occasion to make some rather severe reflections upon the Bench of Lower Canada. The purport of this article is, that such a case could hardly have occurred in the Upper Province, the Bench there being in the full enjoyment of the esteem and veneration of the Bar. The article concludes as follows:—

"For our part, indeed, we hope that this unpleasant episode respecting legal life in this Canada of ours may not be further agitated in the English courts, and that however interesting the points in dispute may be in themselves they may be considered settled as they now stand.

"That such a state of things as have resulted in the *cause célèbre* of *Ramsay*, plaintiff in error, v. *The Queen*, defendant in error, exhibits, could not well occur in this part of Canada, we may well be thankful for. That

such a boast may be as true of the future as it has been of the past, should be the constant aim and exertion of all those, who, on the bench at the bar, or in the study of the laws, desire the welfare of their country. The heritage left to us by those able, courteous and high-minded men who set the standard of the profession in Upper Canada cannot be too highly prized; and he who first, whether by his conduct on the bench or at the bar brings discredit upon their teaching, will, we doubt not, meet the universal contempt which such conduct would deserve.

"The bench of Lower Canada is not (with some honorable exceptions) what it ought to be. The conduct of Lower Canada judges has, on more than one occasion, caused Canadians to blush, and we regret to say that people abroad know no distinction between the bench of Upper and Lower Canada, and so in their ignorance cast upon the Bench of Canada, the obloquy which appertains to that of the Lower Province alone."

Hard words need not cause us any concern unless they are true. The question then, is are these things true?

We think that the majority of the gentlemen holding high judicial office in Lower Canada, will not compare unfavourably with the judges of Upper Canada or any other Province, but we must confess that there are exceptions, and it is these exceptions that have, unfortunately, brought discredit upon our Bench. The judges of England have obtained a wonderful repute for the calm and dispassionate discharge of their functions. Within the last two centuries they have become the pride and boast of the English people, and now it is a thing unheard of, for the faintest suspicion of partiality or prejudice to alight upon their decisions. In Upper Canada, the judges seem to be regarded with almost equal affection and reverence. Why cannot we say the same here?

Many of our readers will probably be able to answer this question quite satisfactorily for themselves, and in putting down the following observations, we are only expressing what is probably patent to all. In the first place, then, we believe that judges have sometimes been unfortunately selected from among men to whom the bench was not the scope of a noble aspiration, who did not regard the judicial office with the respect pertaining to it, who accepted it simply as a retreat from political uncertainties, or the inevitable incumbrance on the enjoyment of an official salary.

Secondly, men have been placed on the Bench, who were involved in pecuniary difficulties. A man may be perfectly honest and upright, though unable to meet his liabilities, but he is not so well qualified for an office of dignity. Lord Abinger was so strongly impressed with the belief that easy circumstances are necessary to keep up the respectability of a barrister, that it is stated he at one time intended to propose a property qualification for members of the bar. £400 a year was, in his opinion, the smallest income on which a barrister should begin. How much more necessary that the judge, who is every day called upon to dispose of cases involving large pecuniary interests, should have no fear of the bailiff in his house, of executions against his lands—should at least, if not endowed with worldly goods, be able to say that he owes no man anything! We feel bound to add here that our judges are not fairly treated with respect to remuneration. The judicial salaries, especially in the large cities, should at least be doubled, and the retiring pensions should be adjusted on a more liberal footing.

In the third place, men have sometimes been placed on the Bench who had no love for their profession, who lacked a sound judgment, who had not gone through the toil and study necessary to fit them for their high office, and whose private life was far from inspiring respect.

It may be expected by some that we should add to this list, the appointment of politicians. But, in our humble opinion, the appointment of lawyers who have been engaged in political affairs, cannot be condemned, if the record of their political career is fair and honorable, and if they have also been distinguished at the bar. It is but right and reasonable that lawyers of integrity and ability should seek to enter the Legislature, where their opportunities of usefulness are greater and more extended. The real difficulty is, that in Canada politics in the past have been too petty, too selfish, too full of personal animosities. Thus it may happen, that a hot politician of one party is appointed to the Bench, though personally obnoxious to members of the Bar of the opposite camp. We trust that under the new Dominion this will cease to be the case. There is now no excuse for improper appointments, for we have at the bar no lack of men of great attainments, eminently worthy of the judicial seat, and enjoying the esteem and confidence of the bar and the public generally.

We must repeat, in conclusion, that the majority of our judges are not deficient in ability, learning or integrity. No charge of corruption has been made against any of them, and in this respect we are infinitely better off than our American neighbors with their elective judiciary. It may confidently be anticipated that the exceptional cases which have caused a loss of dignity to the Bench, will gradually be eliminated. The community in general and the bar will therefore watch with peculiar interest the appointments soon to be made, for on them will it greatly depend whether the Bench in the Province of Quebec is to assume its proper position. — *Lower Canada Law Journal.*

UPPER CANADA REPORTS.

QUEEN'S BENCH.

HAMMOND v. McLAY.

Registrar—Tenure of office.

Defendant was appointed Registrar in 1859, under 9 V., c. 34, by which the Governor is authorized in general terms to appoint, and provision is made for removal on certain contingencies, to be proved in a specified manner. His commission conferred upon him the office, with all the rights, &c., thereto belonging, but expressed the appointment to be during pleasure. In 1864 he was removed, and defendant appointed, the admitted cause of such removal being alleged misconduct as returning officer at an election.

Held, that by the statute the plaintiff was subject to removal only for the reasons and by the means there provided; that the words "during pleasure," in his commission, could not deprive him of his statutory rights; that the 29 V., c. 24, passed after defendant's appointment, by which every Registrar then in office was continued therein, would not confirm such appointment if illegal; and that the interpretation Act, providing that a power to appoint shall include power to remove, could not apply.

The plaintiff therefore was held to be still Registrar, and entitled to the fees of such office received by defendant.

[E. T., 1866.]

The declaration contained two counts. The first for money payable by defendant to plaintiff for fees and emoluments received by defendant due and of right payable to the plaintiff as Registrar of the County of Bruce. The second, the common count for money had and received.

Pleas.—1st. Never indebted; 2nd. That the plaintiff was not Registrar of the county of Bruce at the time the fees and emoluments mentioned in the first count were received by defendant.

Issue thereon.

The case was entered for trial at the Autumn Assizes, at Goderich, before Hagarty J., when a verdict was entered for the plaintiff, with leave reserved to defendant to move to enter a nonsuit, or a verdict for himself, upon certain admissions then made.—

The following were the admissions made for the purposes of the trial:—

1. That by commission under the Great Seal of the Province, bearing date 13th June, 1859, the plaintiff was appointed Registrar for the County of Bruce "during our pleasure" and his residence in the county, together with all the rights, privileges, emoluments, fees and perquisites to the said office belonging or of right appertaining; and the town of Southampton was named as the place where the registry office was to be kept.

That on the 14th July, 1859, the plaintiff entered into the necessary recognizance with two sureties (approved by two Justices of the Peace) conditioned for the due performance of the duties of his office, and took the necessary oath of allegiance, all of which were duly filed of record with the Clerk of the Crown in the Court of Queen's Bench, on the 21st September, 1859.

3. That the plaintiff accepted the said office, and continued to discharge the duties of it until as hereinafter mentioned.

4 That by letters patent under the Great Seal of the Province, bearing date the 26th February, 1864—after reciting the letters patent of the 13th June, 1859, and that Her Majesty had been pleased to determine her Royal will and pleasure in relation to these letters patent—Her Majesty did cancel, revoke and make void the said letters patent, and did thereby discharge the plaintiff from the said office of Registrar.

5. That such discharge was grounded upon facts set forth in certain correspondence produced and put in as evidence, and not for any of the causes mentioned in secs. 66 or 67 of Consol. Stat. U. C., c. 89, or upon any presentment or conviction as in those sections mentioned.

6. By commission under the Great Seal of the Province, dated the 26th February, 1864, the defendant was appointed to be Registrar of the County of Bruce, in the room of the plaintiff, "removed," to hold "during our pleasure" and his residence in the county, together with the rights, &c., (as in the plaintiff's commission.)

7. Notwithstanding the foregoing facts, and disregarding a demand for the registry books which was made by defendant upon the plaintiff, the plaintiff kept possession of those books, and assumed to discharge the duties of Registrar until the 21st June, 1864, when defendant, against the will of the plaintiff, procured possession of the books, and thereafter exclusively continued to act as such registrar.

8. That during the period last aforesaid: viz, from the 26th February, 1864, till 21st June, 1864, defendant also assumed to act as Registrar.

And it was agreed that a verdict be entered for the plaintiff for six hundred dollars, with leave to defendant to move to set it aside and enter a nonsuit or a verdict for defendant, if on the foregoing facts and the documents put in, the Court should be of opinion that the plaintiff was legally dismissed from said office, and defendant legally appointed thereto, or if under the operation of the recent act, 29 Vic., ch. 24, sec. 9, the appointment of defendant was *ex post facto* legalized; either party to be at liberty to avail himself of any point of law fairly arising upon the evidence.

In Michaelmas term, *S. Richards*, Q.C. obtained a rule accordingly, on the following grounds:—That upon the facts admitted the plaintiff shows no right to recover; that the plaintiff was not Registrar of the County of Bruce during the time the said moneys or fees are alleged to have been received by defendant; that if there was any doubt as to the defendant being Registrar, his appointment is confirmed by the last Registry Act; that if the plaintiff were Registrar during the time the moneys were alleged to have been received, an action will not lie at the suit of the plaintiff for moneys which were paid for defendant's registration of deeds and instruments; that the plaintiff has not shewn any money to have been received by defendant for the use of the plaintiff.

Robert A. Harrison shewed cause, citing *Harcourt* v. *Fox*, 1 Show. 426; *Hunt* v. *Coffin*, Dy. 197 *b*; *Rex* v. *Toly*, Dy. 197 *b*; *Rex* v. *Blage* Dy. 197 *b*; Dy. 198 *a*, 198 *b*; *Sir Robert Chester's case*, Dy. 211 *a*; *Kent* v. *Mercer*, 12 C. P. 30; *Moon* v. *Durden*, 2 Ex. 22; *Midland R. W. Co.* v. *Ambergate, &c., R. W. Co.*, 10 Hare 369; *De Winton* v. *Mayor of Brecon*, 26 Beav. 533; *Pretty* v. *Solly*, Ib. 506; Chitty Prerog. 87.

S. Richards, Q.C., in support of the rule, cited *Chy Prerog.* 75; *Bac. Ab. Offices. A*; *Smyth* v. *Latham*, 9 Bing. 707.

The statutes cited are referred to in the judgments.

Draper, C. J.—The office of Registrar was first created in Upper Canada by the Stat. 35 Geo. III., ch. 5, which authorised the Governor for the time being to nominate and appoint one sufficient person to hold the office, and to appoint the place where he should be resident. It was provided that in case of a vacancy by death, forfeiture, or surrender of such Registrar, the Justices of the Peace for the county, at the General Quarter Sessions next after such vacancy, should in open Court draw up a memorial of such vacancy, and transmit it to the Governor, by whom within a month after the receipt of the memorial a new appointment was to be made. The Registrar was requred to take oath of office, and to give security by a recognizance with two sureties for the due performance of his duties. If he, or his deputy (whom the statute permitted him to appoint) neglected to perform the prescribed duties, or committed or suffered any undue or fraudulent practice in the office, and were thereof lawfully convicted, he should forfeit his office.

This Act, with some others affecting it, were repealed by 9 Vic., ch. 34. By this statute, which consolidated and amended the previous law, the Governor was authorized to appoint in any new county in Upper Canada a proper person to perform the duties of Registrar, as well as to fill up any vacancy which might occur by death, resignation, removal from office or forfeiture. The appointment, which had theretofore been made by commission under the hand and seal at arms of the Governor, was thenceforth to be under the great Seal of the Province. The Registrar and his deputy were to take an oath of office, and the Registrar was, as before, to enter into a recognizance with sureties.

Upon a full consideration of this statute, under which the plaintiff was appointed, I am of opinion that, notwithstanding in his commission the office was conferred "during pleasure," he acquired and took it during good behaviour, for the statute in my view creates an office of freehold, and the character of the office cannot be changed by the terms of the commission.

The language used in conferring the authority to appoint is general, containing no defined limitation as to the duration of the tenure of office, except that which arises from the death or the acts of the officer himself. The statute does not make the tenure dependent on the pleasure of the Governor nor even of the Crown.

There is, further, express provision that under certain circumstances, and after certain proceedings, the tenure shall cease, so that, while the statute says nothing to limit the appointment, it does provide for removal or forfeiture upon some expressed contingencies.

Thus, if any Registar does not keep his office in the place named for that purpose, or, not having himself a fire-proof office or vault, does not remove to that provided for him by the County Council, he is liable to removal by the Governor on a presentment of the grand jury at the Quarter Sessions, to be founded upon the evidence of two or more competent witnesses. So also, if the Registrar or his deputy neglect to perform their duty, or commit or suffer any undue or fraudulent practice in the execution thereof, and be thereof lawfully convicted, then the Registrar forfeits his office. And if he ceases to reside within his county or becomes, by sickness or otherwise, wholly incapable of discharging the duties of his office, the Governor may remove him on presentment by the grand jury, as aforesaid, founded upon the like kind of evidence.

The vacating of the office being provided for on the existence of certain causes, such existence to be established upon evidence and presentment or conviction founded thereon, it appears to me that the proper inference from the statute is that the Legislature intended the tenure to last until the Registrar violated one or other of these conditions, and such violation was moreover established in the manner pointed out. In my opinion, this is equivalent to declaring that the office is to be held during good behaviour, *i.e.*, so long as the prescribed conditions are faithfully observed.

And so far as the public service in regard to this office is concerned, the tenure during good behaviour is most likely to conduce to the public advantage, for, to borrow Lord Holt's language, in *Harcourt* v. *Fox* (1 Show. 515), the occupant "will be encouraged to endeavour the increase of his knowledge in that employment, which he may enjoy during life; whereas precarious dependent interests in places tempt men to the contrary."

It will scarcely be urged that by introducing the words "during pleasure" into the commission, the Registrar could be deprived of the protection which the statute gives him, that he must be convicted before he can be said to have forfeited his office, and presented by a grand jury before he is liable to removal. But if not, then for any of those serious omissions or breaches of duty which the statute does provide for, the Governor cannot remove, though the commission is during pleasure, while upon other grounds, and possibly grounds wholly unconnected with his conduct as Registrar, a person holding that office might be summarily dismissed. I cannot imagine that if the Legislature had contemplated a tenure at the will of the Crown, they would have only limited the exercise of the power of removal in those cases, in which the public interests would have most clearly justified its exercise.

The question seems to have arisen under the former Registry Act of Upper Canada more than fifty years ago. Before the year 1808, David McGregor Rogers held a commission as Registrar of the two counties of Northumberland and Durham. It is, I believe, also the fact that he was in that year, as well as before and perhaps after, a member of the house of Assembly; and it has been suggested that in some way he gave offence, in consequence of which an attempt was made to deprive him of his office as Registrar. the commission for which, both under the statute 35 Geo. III. and that of 9 Vic., has contained the words "during pleasure." And on the 15th March, 1808, a commission issued appointing Thomas Ward, Esq., Registrar for the counties of Northumberland and Durham. Rogers, however, held all the books and papers, and in Michaelmas term, 49 Geo. III. (November, 1808) the Attorney General, on the part of the King,

obtained a rule for the issue of a mandamus (*Nisi* I presume) ordering Rogers to deliver over these books, &c., to Ward. In Trinity term following, on the return of the mandamus, the Attorney and Solicitor General were heard in support of the application for a peremptory writ, and Mr. Rogers appeared and argued against it; and after taking time to consider, the Court of Queen's Bench, (Scott, C. J., and Powell, J.) during the same term refused the application. The entries of these proceedings are minuted in the term book of the Clerk of the Crown, but none of the affidavits or papers are forthcoming. But the preamble to the statute 10 Geo. IV., ch. 8, referred to by Mr. Harrison, recites that the appointment of Mr. Ward was adjudged by the Court of Queen's Bench to be invalid; and having ascertained that his commission was in the usual form, I infer that the ground of the judgment was that Rogers was not removable except for some one of the causes and in manner pointed out in the statute 35 Geo. III.—in other words, that he held an office of freehold.

The Interpretation Act (Consol. Stat. C., c. 5, s. 6, 22ndly) is invoked, however, on behalf of the defendant. This enacts that "Words authorizing the appointment of any public officer or functionary, or any deputy, shall include the power of removing him, re-appointing him or appointing another in his stead, in the discretion of the authority in whom the power of appointment is vested."

This provision must be considered in connection with sec. 3 of the same statute, which makes the interpretation clauses applicable, "except in so far as the provision is inconsistent with the intent and object of such act, or the interpretation which such provision would give to any word, expression, or clause is inconsistent with the context."

Assuming, as I think is shewn, that the language of the Registry Act makes the appointment *quam diu se bene gesserit*, it would be clearly inconsistent with the context to hold that the Governor had a general and unlimited power to remove a Registrar, because the power of removal is in express terms given by the statute, but given with a limitation as to the causes for which it may be exercised, and subject to the establishment of the matter of fact in a particular mode. If the power of removal were in this case to be treated as annexed to the power of appointment, and not as conferred by the Registry Act, the special provisions would be superfluous, and the officer would lose the protection which they were obviously designed to give him. He might be removed *ex mero motu*, without cause assigned at all.

Then the defendant relies on the 29 Vic. ch. 24, sec. 9, by which every Registrar in office when that act came into force (18th September, 1865), is thereby continued therein. The object of that section is primarily to confirm all appointments made in conformity with the pre-existing laws, which were by that act repealed. If the defendant was not lawfully appointed, I do not think this section would operate to confer the office on him; and if the plaintiff was in law the Registrar, though deforced, as it were, from his office, this section cannot be held to deprive him of his right. And though this act does not require either a presentment by the grand jury or a conviction, yet it expressly (sec. 16) sets forth the causes for which the Registrar may, "at the discretion of the Governor in Council" be dismissed. Probably it will be found that in order to vacate the office, which is conferred by commission under the Great Seal, some proceeding more formal than a mere minute in council may be necessary; but it is unnecessary to consider this, as neither the plaintiff nor the defendant were appointed under the authority of this act, and the validity of the removal of the plaintiff must depend on the former statute.

The only ground suggested as that upon which the plaintiff was dismissed or attempted to be deprived of office, is for misconduct in a duty imposed upon him by an entirely different act of Parliament.

By the election law, passed some years subsequent to the 9th Vic., (Consol. Stat. C.. ch. 6), the Registrar is constituted in certain cases *ex-officio* the Returning Officer at elections of members of the House of Assembly; and in sec. 31, subsec. 10, sec. 32, and sec. 34, subsec. 3, penalties are imposed for the refusal or neglect to perform certain duties imposed upon the Returning Officer; but the act contains no provision for the dismissal of the Sheriff or Registrar, the only two public officers who are *ex-officio* made Returning Officers, for any neglect or refusal to perform the duties of that office, and in fact it appears from the papers put in as part of the case, that the charge against the plaintiff was the alleged misappropriation of some moneys which he received to defray the charges of the election, an offence not provided for in the statute at all, and which was not adjudicated upon before any Court having civil or criminal jurisdiction; and though the Crown has the prerogative by letters patent to suspend a public officer whose appointment is for life, still after suspension the officer is entitled to receive the salary, though not to exercise the functions of the office—*Slingsby's* case (3 Swanst. 178).

I have not overlooked the case of *Smyth* v. *Latham* (9 Bing 692), which Mr. Richards cited, But the wide difference in the facts renders it inapplicable to the present discussion.

On the whole I am of opinion that the rule obtained by the defendant must be discharged.

As to the necessity of writ of discharge, see Sir George Reynel's case (9 Co. 98).

Hagarty, J.—I am unable to place any other construction upon the Registry Acts, than that the Registrar holds his office, as it were, of freehold, subject only to removal for one or more of the specially assigned causes.

The Consol. Stat. U. C., ch. 89, sec. 10, and the late act 29 Vic., ch. 24, sec 8, contain similar words of appointment under the Great Seal, with power to "fill up any vacancy occurring by the death, resignation, removal or forfeiture of office by any Registrar." Both acts prescribe certain cases in which the Governor General "may in his discretion remove the Registrar. The earlier act requires in addition a presentment of the facts by a grand jury.

At the time of the defendant McLay's appointment, the former act was in force.

The defendant urges that the plaintiff's appointment is by his commission expressly limited to the pleasure of the Crown

Once it is conceded that the statute provides *for* a tenure during *good* behaviour, or *at least* till the happening of certain specified events, I think there is no power lower than that of the Legislature that can limit the officer to a tenure during pleasure, even where the appointment is specially accepted on such a condition. This point is established by a number of cases, and is noticed in a recent judgment of our Court of Error and Appeal—*Weir* v. *Mathieson* (3 E. & A. Rep. 123); see also *Regina* v. *Governors of Darlington School* (6 Q. B. 682).

It is also argued that in the last Registry Act, as in the former, it is provided that every Registrar in office when the act took effect is thereby "continued therein, subject to the laws in force respecting public officers, and to the provisions and requirements of *this* act." *This, I think,* cannot have the very serious effect of turning an office, which I think the Legislature meant to be held during good behaviour, into one during pleasure, which would certainly be its effects so far as the County of Bruce is concerned.

Nor can I think that the Interpretation Act helps the defendant. That could have been only designed to supply the omission of formal words giving the power of removal, not to introduce a new power of removal at discretion in cases in which the Legislature have provided for removal for specified causes and in a specified manner.

If a particular tenure be created of an office, and a person be appointed to that office with all its rights and privileges, I do not see that the insertion of the words "during our Royal pleasure," can legally limit or narrow the statuable rights of the appointee, whatsoever those rights may be.

The facts of the case before us may, perhaps, induce an opinion that it might be as well for the interests of the public that the office should be held on no higher tenure than that of a Sheriff, and most other appointments under the Crown. This at least might be thought, so long as the duties of a Returning Officer at a contested election might be cast upon the person holding the office of Registrar.

Morrison, J. concurred.

Rule discharged

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, *Esq., Barrister-at-Law and Reporter in Practice Court and Chambers.)*

Chichester v. Gordon, Lacourse and Gallon.

Setting off judgments—26 Vic., cap. 45, secs. 2, 3.

Held, that under 26 Vic., cap. 45, secs, 2, 3, the absence of a formal assignment will not prevent a surety from enforcing a remedy which he would have if the assignment had been executed.

A judgment was recovered by B. U. C. v. A. Chichester, C Chichester, and Lacourse, also a judgment of A. Chichester v. Gordon, Lacourse, and Gallon. An application by Lacourse, who had paid the former to set it off against the latter was granted.

[Chambers, March, 23, 1867.]

In 1863 the defendant Lacourse, as attorney for Gordon, obtained judgment in the County Court of Peterborough and Victoria, against the above plaintiff, Arthur Chichester. The plaintiff, subsequently after an examination of the defendant, obtained an order for his committal for *unsatisfactory answers, unless he should give a note* endorsed by his sister Charlotte Chichester for the amount of the judgment. This note was eventually given, after the order had been partially enforced, under duress, as it was said, of such order. The note was given to Lacourse, who endorsed it over to the Bank of Upper Canada, who, in 1865, recovered upon it a judgment in the County Court of Victoria, against Arthur Chichester, Charlotte Chichester, and Lacourse, for about $170 which was paid by Lacourse.

Arthur Chichester brought this action against the present defendants (Gallon being Deputy Sheriff at the time) for an illegal arrest under the conditional order, and recovered a verdict for $200. *A certificate for full costs was refused.*

A summons was thereupon obtained by Lacourse to shew cause why the judgment of the Bank of Upper Canada, or so much thereof as might be necessary, should not be set off against so much of the judgment in this cause as should remain after the said Lacourse should have satisfied the lien of the attorney of the plaintiff, upon the judgment herein for his costs, as between attorney and client, &c.

C. W. Patterson shewed cause, and contended that the judgment of the Bank could not under the circumstances be set off, and that in this case the fact was, that the plaintiff's interest in the judgment in this case had been assigned to one Platt, and he filed the plaintiff's affidavit and the examination of Platt *in support of the statement.*

C. S. Patterson, contra, referred to 26 Vic., cap. 45. secs, 2, 3; Ch. Arch. Pr., pp. 723, 724, (12 ed.): *Edmonds* v. *S—B—*, 3 F. & F. 962; *Alliance Bank* v. *Holford*, 16 C. B. N. S. 460.

Richards, C J.—The application being made to the equitable jurisdiction of the Court, we must look at the real position of the parties, and dispose of their rights in relation to that. Under the 26 Vic., cap. 45, secs. 2, 3, the defendant Lacourse would seem to be entitled to enforce the remedies against Chichester which the Bank had. The mere absence of a formal assignment does not seem to be a good reason to interpose to prevent the surety from enforcing his remedy, *which he would have if the assignment had taken* place. The case of *Edmonds* v. *S—B—*, 3 F. & F. 962, seems to sustain this view.

The general doctrine is laid down in Chitty Archbold, at page 724, (12 ed.) The judgments to be set off must be between parties substantially the same, though it is not necessary that they should be exactly the same parties, as in the case of a set-off under the statute of set-off, provided the funds to be ultimately resorted to in both actions be substantially the same. In the judgment of the Bank of Upper Canada, Chichester is the party who is the maker of the note sued on in that action, and the one whose funds should pay that debt. He is the person who is the plaintiff in the action in which the application is made, and *unless his interest in the claim has been assigned* he is the person to receive the funds that will go to pay the demand in this action so that there is

in that respect an identical interest in the two suits.

The defendant, Lacourse, under the statute, is the person clearly entitled to receive the proceeds of the judgment in favor of the Bank of Upper Canada as his own funds. He is also liable as a defendant to pay out of his own funds the amount of the plaintiff's judgment in this cause, and I think the interest he has in the two suits is sufficient to warrant the application of the principle of set-off in relation to them. In the cases referred to in the same edition of Chitty's Archbold, at page 723–4, the case of *Alliance Bank* v. *Holford*, 16 C. B. N. S. 450 to which I have been referred, also sustains the doctrine contended for by the defendant Lacourse.

After going over the affidavits and the examination of Platt, the assignee of the plaintiff's claim, I am of opinion that there has been no valid assignment of this claim to deprive the defendant of his right to set off this judgment,

The order will go to set off so much of the judgment of plaintiff as may exceed the costs of the plaintiff's attorney, to be taxed as between attorney and client on the judgment in the suit *Bank of U. C.* v. *Chichester et al.*

Order accordingly.

CLARKE v. CLEMENT.

Payment of costs precedent to notice of trial.

A nonsuit was set aside on payment of costs by plaintiff. Plaintiff, however, gave notice of trial without paying the costs. The notice of trial, copy and service were set aside.

[Chambers, April 6, 1867.]

The plaintiff was nonsuited at the last fall assizes for York. In Michaelmas term following a rule nisi was obtained to set aside the nonsuit, which was made absolute in Hilary Term on payment of costs by the plaintiff. The costs were taxed but not paid. The plaintiff's attorney nevertheless gave notice of trial, whereupon a summons was taken out to set aside the notice and copy and service on the ground that the costs had not been paid.

Doyle shewed cause, citing 2 Lush Pr. 641; 2 Ch. Arch. 1544; *Chase* v. *Goble*, 3 M. & G. 635; *Nichols* v. *Boyon*, 10 East. 185.

Robert A. Harrison, contra, cited *Skelsey* v. *Manning*, 8 U. C. L. J. 166; *Gore District M. F. I. Co.* v. *Webster*, 10 U. C. L. J. 190; *Doe McMillan* v. *Brock*, 1 U. C. Q. B. 482; *Grantham* v. *Powell*, 1 P. R. 256.

RICHARDS, C. J., made the summons absolute, the costs of the application to be costs in the cause for defendant.

Order accordingly.

WILSON v. MOULDS.

Revision of taxation—Vouchers not filed on original taxation.

Taxing officers should not allow any items for which there are not proper vouchers, and these vouchers (except briefs, &c) should be filed. On revision of taxations by Deputy Clerks of the Crown, the Master is not to allow any items which are not verified by vouchers which have been so filed on the original taxation.

[Chambers, May 8, 1867.]

This was an application for an order directing the Master, on a revision of the taxation of costs in this cause, to allow certain items taxed to the plaintiff by the Deputy Clerk of the Crown.

It appeared upon the taxation before the latter officer, that he had allowed certain charges for services and disbursements, &c., but the documents or vouchers authorising their allowance were not filed with the Deputy clerk on the taxation.

The Master upon the revision before him refused to allow such items, upon the ground that no vouchers justifying the charges were filed.

MORRISON, J.—I am of opinion, after consulting with the Master, that he properly rejected such items. The Deputy Clerk of the Crown ought not to allow any item for which there is not before him some authority or evidence to justify the allowance, and that upon the taxation he should require all proper vouchers or affidavits produced for that purpose (except such as briefs for counsel) to be filed with the papers in the cause. It is obvious that if allowances are taxed, such as disbursements to witnesses, counsel, and for various services, without filing some authority or evidence to justify the charge, parties interested would in many cases be deprived of an opportunity of satisfying themselves of the propriety or correctness of the charges, and, as in the present case, compel them to resort to a revision to ascertain the authority, if any, upon which the Deputy Master acted; besides such a practice is open to many other irregularities that might be suggested.

As it is sworn on this application that it was through an oversight that the vouchers were not filed, and as it was stated that the practice in the outer counties has not hitherto been uniform, the order will go in this case to allow the items upon the necessary documents being produced and filed with the Master,—but in future Deputy Clerks of the Crown and the attornies must see that all necessary vouchers are filed in the first instance.

NORTHERN RAILWAY CO. v. LISTER.

Special endorsement on writ of summons.

The special endorsement set out below held in sufficient compliance with the requirements of the C. L. P. Act.

[Chambers, June 11, 1867.]

The defendant was served with a writ of summons, with a special endorsement, as follows:

The following are the particulars of the plaintiffs' claim:

"To amount of machines				$500 00
1866.		CR.		
Aug.	By Cash		$11 00	
Oct.	"		21 00	
Dec.	"		25 00	
1867.				
Jan.	"		40 38	
Feb.	"		44 00	
March	"		33 00	
April	"		16 75	
				191 13
Balance due the Co.				$308 87

The plaintiffs claim interest on $308 87, from the 16th day of May, A.D. 1867, until judgment."

Final judgment for default of appearance was signed, whereupon defendant obtained a summons to show cause why the judgment should not be set aside, on the ground that the alleged special endorsement did not contain sufficient particulars of the plaintiffs' claim, and that the endorsement was not sufficient under the statute to entitle the plaintiffs to sign final judgment for want of an appearance, or upon the merits.

G. D. Boulton shewed cause.

D. McMichael contra, cited *McDonald* v. *Burton et al.* 2 U. C. L. J. N.S. 190; *Hoodsall* v. *Baxter*, 1 E. B. & E. 881; *Fremont* v. *Ashley*, 1 E. & B. 723.

John Wilson, J., refused to set the judgment aside as irregular, but allowed defendant to come in and defend on the merits.

ENGLISH REPORTS.

Reg. v. Gregory.

Misdemeanour—Soliciting to commit a felony where no felony committed—Counselling and procuring—24 & 25 Vic. cap. 94, sec. 2.

To solicit and incite a servant to steal his master's goods, where no other act is done except the soliciting and inciting, is a misdemeanour.

The statute 24 & 25 Vic. cap. 94, sec. 2, by which it is enacted that whoever shall counsel or procure any other person to commit a felony shall be guilty of felony, applies only where a substantive felony is committed.

[C. C. R., May 11, 1867.—15 W. R. 831.]

Case reserved by J. L. Hannay, assistant barrister at the Quarter Sessions for the borough of Leeds.

James Gregory was tried and convicted before me at the Quarter Sessions for the borough of Leeds, held there on the 20th of April, 1867, upon an indictment, the materials parts of which are as follows:--

The jurors, &c, present that James Gregory, on the 9th day of February, in the year of our Lord 1867, falsely, wickedly, and unlawfully did solicit and incite one John White, a servant of one James Kirk, feloniously to steal, take, and carry away a large quantity to wit one bushel of barley of the goods, &c., of Kirk, against the peace, &c.

A second count in the same form alleged the offence to have been committed on the 12th of February.

A third count alleged that the defendant wickedly and unlawfully did solicit and incite the said John White, and one Charles Evans and one Charles Knapton, they being servants of Kirk, feloniously to steal a large quantity of barley of the goods of the said Kirk against the peace, &c.

The indictment charging a misdemeanour, the jury were sworn accordingly.

There was evidence upon all the counts of the indictment in proof of the offence charged, but no one of the three servants named stole any barley in compliance with the defendant's solicitations or otherwise.

It was objected by counsel for the defendant that the offence proved (no felony having been committed by reason of the defendant's solicitation and incitement) came under the provision of the 24 & 25 Vic. cap. 94, sec. 2, which makes it a felony to "counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any act passed to be passed." And that although that section of the statute apparently contemplates that a felony must be committed by reason of the counsel, procurement, or command, yet that the Court of King's Bench, in the case *Rex* v. *Higgins*, 2 East, 5, which was apparently the last case on the subject, held it not to be necessary that the felony should be committed by reason of the counsel or procurement, and that the solicitations to commit the offence was an act done towards the commission of the offence which made it at that time *per se*, the offence of misdemeanour, and now the statute of Vic. changed the quality of the offence and made it a felony. The offence therefore of incitement to commit a felony under the ruling of *Rex* v. *Higgins*, and under the second section of the 24 & 25 Vic., cap 94, was now no longer a misdemeanour but a felony, and complete as a felony upon proof of the incitement alone. The indictment therefore not charging the incitement and solicitations of the prisoner to have been done "feloniously" was bad: *Reg.* v. *Grey*, 1 L. & C. 365, 12 W.R. 350.

I left the case to the jury, directing them, in accordance with the decision in *Rex* v. *Higgins*, that the soliciting a servant to steal his master's goods is a misdemeanour, although it be not charged in the indictment that the servant stole the goods, or that any other act was done except the soliciting and inciting. I also directed them that in my opinion the 24 & 25 Vic. cap. 94, sec. 2, did not affect a case where there was no principal felon or principal felony; but at the urgent request of the defendant's counsel I reserved this case for the consideration of the justices of either bench or Barons of the Exchequer.

The question upon which the opinion of the Court for the consideration of Crown Cases Reserved is respectfully requested is, whether since the passing of the 24 & 25 Vic. cap. 94, it is a misdemeanour to solicit and incite a servant to steal his master's goods, though no other act be done except the soliciting and inciting? I passed a sentence of six months' imprisonment upon the prisoner, and he is now in prison.

Campbell Foster for the prisoner.—The conviction is wrong. This indictment is framed upon *Rex* v. *Higgins, supra*; but 24 & 25 Vic. cap 94, sec. 2, has changed the character of the offence charged, and it is now a felony. That section provides that whosoever counsels, procures, or commands another to commit a felony, shall be guilty of felony. The effect of *Rex* v. *Higgins* is that it is a misdemeanour, though the act, to which the prisoner incites, be not done. It is now a felony to counsel, procure, &c., though there be no felony committed by the person so counselled, &c. The solicitation here charged is the same thing, and identical in meaning with counselling. The words of the second section are sufficient to include this indictment. [Kelly, C. B.—If no felony has been committed, how can there be a "principal felon?"] Byles, J., without this statute you would be out of Court on *Rex* v. *Higgins, supra*, and if the offence here charged is not within the statute *cadit quæstio*:

R. v. *Cross*, 1 Ld. Ray. 711: *R.* v. *Button*, 11 Q. B. 946.]

Waddy, contra, was not called on.

Kelly, C. B.—The prisoner is charged with a misdemeanour, and two questions are raised by Mr. Foster. 1. Whether the expressions soliciting and inciting are identical in meaning with counselling or procuring, so that, though a counselling or procuring is not laid in the indictment, an allegation of a soliciting and inciting is to be taken to be an allegation of a counselling or procuring; but it is not necessary to decide that, and it is sufficient to say that I think those expressions may have different meanings, and that I do not accede to the arguments of Mr. Foster. 2. As to the second point, looking at the provisions of this statute, I think that it is absolutely necessary, in order to support a conviction under the second section, that a substantive felony shall be committed by the person counselled. It is only necessary to look at the construction of the section, and at the ordinary rules of grammar, to see that. How can there be an accessory before the fact to the "principal felony," or a "principal felon, if no felony has been committed? The offence charged therefore is a misdemeanour, and the prisoner was properly convicted.

Conviction affirmed.

Readhead v. Midland Railway Company.

Railway—Carriers of passengers—Latent imperceptible flaw—Liability.

R., a passenger travelling on the M. Railway was injured by the breaking down and overturning of the carriage in which he was travelling. The accident arose from a fracture of one of the wheels of the carriage, the tire of which had split into three pieces owing to a latent flaw in the welding. The wheel was to all appearance sound and reasonably sufficient for the journey. Such a flaw may occur without any fault on the part of the manufacturer, and there were no means of detecting it beforehand.

Held, by Mellor and Lush, JJ., that the railway company were not responsible for the accident, having used due care and diligence.

By Blackburn, J., that the railway company were responsible for the accident, because the obligation of the carrier to the passenger was equivalent to a warranty of the reasonable sufficiency of the vehicle supplied.

[15 W. R. 831.]

The facts of the case and the arguments of the counsel appear sufficiently from the judgments.

Aspinwall, Q.C., and *Kemplay*, showed cause on behalf of the defendants to a rule obtained by *Manisty*, Q C., and cited *Bremner* v. *Williams*, 1 C & P. 416; *Sharpe* v. *Grey*, 9 Bing. 457; *Grote* v. *Chester and Holyhead Railway Company*, 2 Ex. 255; *Benett* v. *Peninsula Steamboat Company*, 6 C. B. 782.

Manisty, Q. C., and *T. Jones*, in support of rule, cited *Brown* v. *Edgington*, 2 M. & G. 279.

May 15.—the learned judges read their judgments as follows:—

Lush, J.—This was an action for an injury caused by the breaking down and overturning of the carriage in which the plaintiff was travelling as a passanger on the defendant's railway. The accident arose from the fracture of one of the wheels of the carriage, the tire of which had split into three pieces, owing, as it was afterwards discovered, to a latent flaw in the welding; and it was proved on the part of the defendants that, at the commencement of the journey, the wheel was to all appearance strong and sound; that such a flaw in the welding may occur without any fault on the part of the manufacturer, that there were no means of detecting it beforehand, and that, in fact, the carriage had been examined according to ordinary practice before the train had started on the journey, and had answered to all the usual tests of soundness. I directed the jury that if they believed this evidence the defendants were not responsible for the accident, and they accordingly found their verdict for the defendants. A rule was granted for a new trial on the ground that a carrier of passengers is bound at his peril to provide a roadworthy carriage, and is consequently liable if the carriage turns out to be defective, notwithstanding that the infirmity was of such a nature that it could neither be guarded against nor discovered.

The question thus nakedly raised is one of vast importance at the present day both to railway companies and passengers, and there being no case in our reports in which it has been argued and adjudicated, we took time to consider our judgment. Having done so and given to the subject the best consideration in my power, I adhere to the opinion that the law imposes no such liability on railway companies, though, as my brother Blackburn has come to a different conclusion, I express that opinion with some degree of diffidence.

It is not contended that the obligation of a carrier of passengers is co-extensive with that of a carrier of goods who, by the custom of the realm, is placed in the position of an insurer subject only to the exceptions of loss or damage by the "act of God, or the public enemies of the Crown." The reasons upon which that liability is based, and which are expressed by Chief Justice Holt in *Coggs* v. *Bernard* 2 Lord Raym. 918, and by Chief Justice Best in *Riley* v. *Horne* 5 Bing. 220, are inapplicable to a carrier of passengers. The latter has not the same control over persons which he has over goods; nor the same opportunities of abuse and misconduct, the apprehension of which gave rise to this rigorous rule of law; and, therefore, the law has never imposed upon him the responsibility of an insurer. "The undertaking of a carrier of passengers," says Mr. Justice Story in his work on bailments, s. 601, is not an undertaking to carry safely, but only to exercise due care and diligence in the performance of his duty."

But it is contended that, in this particular part of his duty—viz., the providing a suitable vehicle, his undertaking goes beyond the measure of due care and diligence and includes a warranty that the carriage which he provides is sound and free from defects which render it unfit for the service, though he has used every means in his power to make it sound; and, though he could not by any amount of care, skill, or vigilance, have ascertained that it was not so. The language of Story just quoted does not suggest any such qualification; and surely so important an element in the contract about which he is treating, would have been noticed by that learned writer if he had supposed it to exist. No such liability is, however, hinted at throughout the

work, nor, as I am aware of, in any other text-book.

The proposition is one which I cannot adopt without authority, because I can see no reason why a carrier should be held to warrant more than due care and diligence, can enable him to perform as repects the quality of his carriage, when it is admitted that he is under no such liability as respects the conduct or management of it, we were pressed with what were alleged to be the analogous cases of a ship-owner, who is held to warrant their fitness and sufficiency for that purpose.

As to ship-owners, I agree that there is abundant authority for the doctrine laid down; and, moreover, that there is no distinction in this respect between a carrier by water and a carrier by land. But it is to be observed, that wherever this particular liability of a ship-owner is mentioned it has reference to his obligation as the carrier of cargo. In that capacity he is an insurer of its safe delivery, subject only to the excepted perils. His warranty of seaworthiness in such a case springs out of, and necessarily results from, the absolute duty he has undertaken, and is not a warranty superadded to and exceeding the terms and measure of his contract to carry, as it would be if it were extended to a carrier of passengers. A carrier of goods by land may with equal propriety be said to warrant the road-wortbiness of his carriages, because he warrants against every casualty by which the goods might be lost or damaged on the journey.

As regards the second case put, viz.; that of the manufacturer who supplies goods to order for a given use or purpose. I do not stop to consider whether the analogy is so complete as the argument assumes it to be, because it does not appear to me that the case mainly relied on, viz., *Brown* v. *Edgington*, 2 M. & G. 279, sanctions the doctrine which is sought tc be deduced from it. Upon carefully examining the facts there, it will be found that no such question as that we have now to determine arose in the case. The insufficiency of the rope was attributable to causes which imply blame to the manufacturer, to a want of judgment, or a want of care or skill, both or all. The rope was not strong enough for the purpose for which it was known by the defendant to have been required, it having been made of too small a size or of faulty materials, or been badly put together; and whatever the cause of its failure was, it was one which might have been prevented, and it was assumed by the Court, as it was assumed in the case of *Jones* v. *Bright*, 5 Bing. 533, that the manufacturer might, and therefore ought to, have made it sufficient for the purpose. The main contest in the case was, whether the defendant was liable, seeing that he was not the manufacturer of the rope but had procured it of a rope maker. The question of liability for a hidden, undiscoverable, and unavoidable defect was not present to the mind of any of the judges who decided that case; I cannot, therefore, regard it as an authority to the extent necessary to sustain the plaintiff's argument, nor am I aware of any other case on that point which established such a position.

I do not feel it necessary to review in detail the cases which more directly bear upon the liability of a carrier of passengers. They are quoted by Story as the authorities for the rule which he lays down, and in my judgment they do not carry the liability further than he has stated it. In all of them, where it has become necessary to define that liability, the judges have carefully distinguished between a carrier of passengers and a carrier of goods, and have pointedly declared that the liability of the former stands on the ground of negligence alone. See *Aston* v. *Heaven*, 2 Esp. 533; *Christie* v. *Griggs*, 2 Camp. 79; *Crofts* v. *Waterhouse*, 3 Bing. 32.

Undoubtedly there are expressions used in some of those cases which, taken alone and without reference to the particular facts, favour the argument of the plaintiffs (see per Lord Ellenborough in *Israel* v. *Clark*, 4 Ex. 259; Best, C.J., in *Bremner* v. *Williams*, 1 C. & P. 416; and per Gaselee and Bosanquet, JJ., in *Sharp* v. *Gray*, 9 Bing. 457.) But reading such expressions as they should be read in connection with and as applicable to the facts of each case, it is to my mind evident that the learned judges who used them did not intend them to be understood in the sense now imputed to them. The decisions in those cases, in which such expressions are used, seem to me against the plaintiff rather than decisions in his favour. In *Sharp* v. *Gray*, the case most pressed in the argument by the plaintiff's counsel as also in the case of *Christie* v. *Griggs*, 2 Camp. 79, the axletree had, without any external cause to account for it, suddenly snapped. If there was such a warranty as is now insisted on, that warranty had clearly been broken, for the coach had turned out to be not road-worthy. There was nothing to go to the jury but the amount of damages therefore. Whereas in each case the question was left to the jury whether the defendant was liable as guilty of a want of due care or not. *Sharp* v. *Grey*, the jury found a verdict for the plaintiff, which the court refused to disturb; in *Christie* v. *Griggs* they found for the defendant, and no motion appears to have been made to set this verdict aside. Coming down to a more recent period, I find the same doctrine laid down by the Lord Chief Justice of this Court in *Stokes* v. *Eastern Counties Railway Company*, 2 F. & F. 691. That was a case exactly similar to the present. The wheel had broken from a latent flaw in the welding, and great injury had been done to several passengers. After a very lengthened trial, the jury found a verdict for the defendant; and although the plaintiff in that case, and many other persons, were deeply interested in questioning the ruling of the Lord Chief Justice, no attempt was made to set aside the verdict. As far, therefore, as the authorities in this country go, they are against the position taken by the plaintiff; and considering that many such accidents have occurred since the introduction of railways, the fact that this is the first time so extensive a liability has been insisted on, argues a general impression against it. But though the question has not before been presented for solemn adjudication in this country, it has been raised more than once in the courts of the United States, and in every case the judgment has been in favour of the carrier. In *Ingalls* v. *Bills*, 9 Metc., cited in the 7th edition of Story on Bailments, p. 565, the Court deliver-

ed an elaborate judgment, reviewing all the authorities, English and American, and affirming the doctrine that a carrier of passengers is liable only for negligence.

For these reasons I am of opinion that the rule must be discharged.

MELLOR, J.—In this case the plaintiff being a passenger on the line of defendants railway, sustained an injury by the breaking of one of the wheel tyres of the carriage in which he was travelling, owing to a latent defect in its construction, not discoverable by the most careful examination. My brother Lush, who presided at the trial, in leaving the case to the jury, told them that a carrier of passengers for hire was bound to use the utmost care, skill, and vigilance in everything that concerned the safety of the passengers, but that if the injury was due to a hidden defect in the carriage wheel, the utmost care and skill could not discover, the defendants were not responsible. I have come to the conclusion that such direction was right, and that the rule for a new trial must be discharged.

The propriety of that direction depends upon the nature and extent of the liability which a carrier of passengers for hire undertakes with regard to each passenger.

The reponsibility both of common carriers of goods for hire, and of common carriers of passengers for hire, notwithstanding some important differences between them, rests for its foundation upon the general custom of the realm: in other words, upon the common law, and the liability of each class of carriers, where it is not affected by some special contract, arises from a duty implied by law, although the law will raise a contract as springing from that duty: *Bretherton* v *Wood*, 3 Brod. & Bing 54; *Andsell* v. *Waterhouse*, 6 M. & S. 385 Until the time of *Dale* v. *Hall*, 1 Wilson, 281, it seems to have been the usual mode to declare against common carriers, either of goods or passengers, setting forth the custom of the realm, when it was supplanted by the modern mode of declaring, either in case for breach of duty, or on the contract arising out of the duty so implied by law. In *Coggs* v. *Bernard*, 2 Ld Raym. 918, I Smi. Lead. Cas 6th ed. 189, Lord Holt, in defining his fifth sort of bailment, says: "First, if it (the delivery of the goods) be to a person of the first sort (that is one that exercises a public employment)," and he is to have a reward, he "is bound to answer for the goods at all events. And that is the case of the common carrier, common hoyman, master of a ship, &c." The law charges this person thus entrusted to carry goods against all events, but acts of God and the enemies of the king.

"For though the force be ever so great, as if an unreasonable number of people should rob him, nevertheless he is chargeable, and this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing, else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And *this is the reason the law is founded upon in that point.*" And in the case of *Rowley* v. *Horne* 5 Bing. 220, Chief Justice Best, in treating upon the same subject, "When goods are delivered to a carrier, they are usually no longer under the eye of the owner, he seldom follows or sends any servant with them to the place of their destination. "If they should be lost, or injured, by the grossest negligence of the carrier, or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for reward (namely, that of taking all reasonable care of it), the responsibility of an insurer."

This judgment is cited with approbation by Mr. Justice Story, Law of Bailments, 591, 5th ed. and, as far as I am aware, has been generally considered truly to express the reasons upon which the policy of the law, with regard to common carriers of goods, has been founded.

The liability of a common carrier of goods is therefore that of an insurer, arising out of the policy of the law which superadds such a responsibility to that springing merely out of a contract to carry for reward, viz., "the taking all reasonable care of the goods delivered to be carried"

The policy of the law with regard to common carriers of goods for hire, and the reasons assigned for it by Lord Holt and Chief Justice Best, appear to have no application to the case of carriers of passengers for hire, and hence, by one writer on the subject, it has been stated that "a stage-coach owner, who carries passengers only, is not properly speaking a common carrier; he does not warrant the safety of passengers at all events, but only that so far as human care and foresight will go, their safe conveyance will be provided for:" Sm. Merc. Law, 7th ed. 282. We have, however, seen that his liability, like that of the carrier of goods, arises out of the duty implied by law, and that the declaration may be either in case for the breach of such duty, or on the contract springing from it, as was said by Holroyd, J., in the case of *Ansell* v. *Waterhouse*, 5 M. & S. 385. "It seems to me, therefore, that although the law will raise a contract with a common carrier to be answerable for the careful conveyance of passengers, nevertheless he may be charged in an action upon the case for a breach of his duty." Does, then, the law in the case of a carrier of passengers for hire superadd any liability beyond that of providing for the carefel conveyance of his passengers?

In *Crofts* v. *Waterhouse*, 3 Bing. 32, which was an action against a stage coach proprietor by a passenger injured by the overset of the coach, Best, C. J., said—"This action cannot be maintained unless negligence be proved. The coachmen must have competent skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses; a coach and harness of sufficient strength, and properly made, and also with lights by night. If there be the least failure in

any one of these things, the duty of the coach proprietor is not fulfilled, and they are answerable for any injury or damage that may happen; but with all these things, and when everything has been done that human prudence can suggest for the security of passengers, an accident may happen. If, having exerted proper skill and care, he from accident gets off the road, the proprietors are not answerable for what happens from his doing so." And Parke, J., in the same case, said "A carrier of goods is liable in all events except the act of God, or the King's enemies. A carrier of passengers is only liable for negligence." So, in *Aston* v. *Heaven*, 2 Esp. 533, it was contended that coach-owners were liable in all cases except where the injury happens from the act of God or the King's enemies; but Eyre, C. J., held "cases of loss of goods by carriers were totally unlike the case before him. In those cases the parties are protected, but as against carriers of persons the action stands alone on the ground of negligence. In *Christie* v. *Griggs*, 2 Camp. 79, in which the accident arose from the breaking of an axle-tree, Sir James Mansfield said "If the axle-tree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was answerable at all events; but he did not warrant the safety of passengers. His undertaking to them went no farther than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered. Thus we see that the test in case of a carrier of passengers is, has he, as far as human foresight can go, provided for their safe conveyance?" Of course this includes care and foresight in the making or procuring as well as in using the carriage. In the case of *Grote* v. *The Chester and Holyhead Railway Company*, 2, Ex. R. 255, where *Sharpe* v. *Grey*, 9 Bing. 457, to which I shall presently refer, was cited for the opinion of Alderson, B., that "a coach proprietor is liable for all the defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered on investigation," Parke, B., remarked "in that case the coach proprietor is liable for an accident which arises from an imperfection in the vehicle, although he has employed a clever and competent coach-maker." Lord Wensleydale, by that observation, merely intended to express that a coach-proprietor could not shelter himself from the consequences of using an unsafe coach by the fact that he had employed a competent coach-maker to make it, which differs materially from implying a warranty against a defect which no amount of care or skill could discover. The case of *Burns* v. *The Cork and Bandon Railway Company*, 13 Ir. Com. Law Rep. 546, comes the nearest in its facts to the present. In that case, in answer to an action for not carrying a passenger safely, it was specially pleaded in substance that whilst he was being carried in a carriage on the defendant's railway a fracture occurred in a crank pin in one of the leading wheels of the locomotive engine, which was occasioned by an original defect in the material and construction of such crank pin, which defect, before the fracture occurred, was not capable of being detected by the defendants upon due and proper examination or observation, and that the crank was purchased with the locomotive engine in due course of business from competent manufacturers, and was not made by them, and that before the commencement of the journey the defendaants duly examined the said engine and crank pin, and had not any notice of any defect in the same. To this plea the petitioner demurred, and Chief Baron Pigott, in delivering the opinion of the Court, stated the question to be whether taking all the averments in the plea together, they had stated facts which had exempted them from liability for the breach of contract admitted by the plea. He then proceeds—"I am of opinion they have not, according to the existing state of authorities. Although a carrier of passengers does not warrant the safety or the due arrival of his passengers, yet I consider that he must be considered as warranting that the vehicle in which he conveys them is, at the time of commencement of the journey, free from all defects, at least as far as human care and foresight can provide, and perfectly road-worthy. He then refers to *Christie* v. *Griggs*, *Sharpe* v. *Grey*, and *Grote* v. *Chester and Holyhead Railway Company*. He proceeds as follows:—"But applying Sir Mansfield's tests, have they shown in their plea that as far as human care and foresight could go they provided for the safety of their passengers? I think they have not. Their plea does not contain any averment as to the care and skill applied to the manufacture of the engine, or as to the care and skill exercised by them in the selection of inspection of it. All the averments in their pleas are quite consistent with gross and culpable carelessness on the part of the manufacturers. If they had been the manufacturers of the engine, they would have been bound to aver and prove that due care and skill had been exercised in the process of its manufacture, are they to be relieved from legal liability because they allege that they bought it from a competent manufacturer? I think that would be a distinction dangerous to the public, and that as Alderson, J., says, railway companies might buy ill-constructed or unsafe vehicles, and the public be without remedy." Now, although one or two ambiguous phrases are used by the Chief Baron, in his judgment, arising out of some error in the collocation of the words, he never intended, as it appears to me to assert that there existed an implied warranty against latent defects, which no amount of skill or care could have discovered, otherwise I should have expected it to have been so expressed and have rendered further reasons unnecessary. I think that the course of the argument, and of the judgment, show that the discussion really turned upon the question of negligence and not of warranty.

The authorities to which I have referred sufficiently illustrate the distinction between carriers of goods and that of carriers of passengers. The liability of the former is that of an insurer, whilst that of the latter is only for negligence. It further appears from these cases that the negligence which renders a carrier of passengers

liable is something which might have been avoided by the exercise of care, skill, or foresight, and that an accident which results from some cause which no amount of care, skill, or foresight could have discovered, cannot be said to be the result of negligence of the carrier. In the case of carriers by water the same distinctions hold so far as I am aware. In *Lyon* v. *Mells*, 5 East, 428, Lord Ellenborough said—"In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter, or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that his vessel is tight, and fit for the purpose or employment, for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so. The law presumes a promise to that effect without actual proof, and every reason of sound policy and public convenience requires it should be so (5 East 437.) To the same effect there are many authorities, which it is not necessary to cite. If it be said that it is a strange thing that a warranty of sea-worthiness should be *implied by law* in the case of goods and not passengers, I can only answer that in case of goods the warranty of sea-worthiness is incidental to the liability of the carrier *as an insurer*.

In *Coggs* v. *Barnard*, Lord Holt makes no distinction in this respect between carriers by land and carriers by water, and many of the reasons stated by him and Chief Justice Best to be the foundation of the liability of the carrier of goods by land, apply with equal force to the carrier of goods by water, and certainly in no case, so far as I am aware, has there been a suggestion that the foundation of the liability of a carrier of passengers by water depends upon other considerations than those which regulate the liability of carriers of passengers by land.

In the present case, the direction of my brother Lush to the jury appears to me to have been unexceptionable, and in strict conformity with the cases above referred to. The fracture of the wheel-tire by itself, and unexplained, might have been sufficient to raise a presumption of negligence against the defendants: *Skinner* v. *The London and Brighton Railway Company*, 5 Exch. 787; *Carpue* v. *The London and Brighton Railway Company*, 5 Q. B. 747; *Bird* v. *The Great Northern Railway Company*, 28 L. J. Ex. 3. But upon the direction of my brother Lush, when the explanatory evidence had been given, it must be taken to have been in fact found by the jury that the breaking of the wheel-tire *was due to a hidden defect which no amount of care or skill could have discovered either in the manufacture, purchase, or use.*

I was at one time in doubt whether the principles applied and explained in the case of *Brown* v. *Edgington*, 2 M. & G. 279, said by Parke, B., in *Sutton* v. *Temple*, 12 M. & W. 64, "to be well settled law," did not govern this case; but I am now satisfied that they do not. In that case, although the "scienter or guilty knowledge," as it was termed, was negatived by the jury, there was nothing to prove that the insufficiency of the rope might not have been discovered upon a careful examination, and I can find nothing to show that the doctrine now contended for was in the minds of the judges who decided it. If the liability of a carrier of passengers for hire springs, from the custom of the realm, or from an actual contract made, why are we to imply a warranty as to the *absolute sufficiency of the carriage*, when we do not imply any such warranty with regard to *the other incident of the journey*. It would appear to be quite as reasonable to imply a warranty against accidents as against a hidden defect which no amount of skill or care could discover. I think that it would be extremely dangerous, and somewhat inconsistent, to extend the doctrine of implied warranty beyond the possible means of the alleged warrantor to guard against the defects to which his warranty is supposed to extend.

The cases cited in support of the plaintiffs' right to recover, do not, I think, when examined, go the length attributed to them, and they are neither so consistent nor precise as to conclude us from exercising our own judgment upon the facts before us; and notwithstanding some expressions attributed to Lord Ellenborough and Chief Justice Best, I cannot but think that those learned judges had not present in their minds the idea that there existed in the case of carriers of passengers, any absolute warranty of road-worthiness.

In *Israel* v. *Clark*, 4 Esp. 259, where the injury arose from the breaking of an axle-tree, the expressions used by Lord Ellenborough are very wide—viz, that "he should expect a clear land-worthiness in the carriage itself to be established;" still it is by no means certain that he had in view a case of latent defect, which no skill or care could discover. No opinion was expressed showing whether he considered that the cause of action rested upon negligence or the doctrine of implied warranty.

In *Bremmer* v. *Williams*, 1 C. & P. 416, Chief Justice Best is reported to have said that "every coach proprietor warrants that his stage-coach is equal to the journey it undertakes;" and "it is his duty to examine it previous to the commencement of every journey." The latter words show to what matters he supposed the warranty to extend, and I think that it is only fair, considering the opinions already cited from other cases in which, with more consideration, he had treated this subject, to assume that he did not refer to latent defects which could not be discovered on examination.

The decision which was next discussed before us is the case of *Sharpe* v. *Grey*, 9 Bing. 457, but I am bound to say that although the opinions expressed by Justices Gazelee and Bosanquet in that case, are apparently in antagonism to the direction given by my brother Lush, it is not very easy to see that the judges who decided it had in their minds a case of latent defect not discoverable by any amount of care or skill, or that they were unanimous in laying down any clear or precise rule of law which ought to govern us in this case; and it is to be observed that the Chief Justice Tindal left the case to the jury as a question of fact, although in somewhat loose and general terms—viz., "whether there had been on the part of the defendant that degree

of vigilance which was required by his engagement to carry the plaintiff safely," and Parke, B., is reported to have said it was a question of fact for the jury, and Alderson, Bt, limits the extent of any implied warranty against defects to those "which could be seen at the time of construction;" he adds, "and if the defendant were not responsible the coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy.

There are several modern cases not referred to in the argument, but which show that the judges who tried them considered the action against carriers of passengers for hire to be founded in negligence. In *Stokes* v. *The Eastern Counties Railway Company*, 2 F. & F. 732, Chief Justice Cockburn thus expressed himself, "You are entitled to expect at the hands of a railway company, all that skill, care, and prudence can do to protect the public against danger and accidents, but you must carry that principle into application as reasonable men. If you are of opinion that the flaw or crack had become unsafe prior to the accident, that upon careful examination, not with the aid of highly scientific authorities and scientific instruments, but on an ordinary, reasonable, proper, and careful examination, such as all feel ought to be made before the engines are used on which the safety of a whole train may depend, this flaw might have been discovered, and that either the examination did not take place, or if it did, and the flaw was discovered, but the man with careless disregard of his own safety and the safety of others whose lives and limbs might be involved, treated all this with supine and reckless indifference, then, undoubtedly, there is negligence established for which the company are, and ought to be, responsible." That case is important because the verdict was for the defendant, if the doctrine now contended for by the petitioner be the correct exposition of the law, the verdict in that case, if questioned, must have been set aside.

Again, in *Ford* v. *South-Western Railway Co.*, 2 F. & F. 732, Chief Justice Erle, on summing up the case to the jury, said—"The action is founded on negligence. The railway company is bound to take reasonable care, care, to use the best precautions in known practical use for securing the safety and convenience of their passengers; also in *Pym* v. *Great Northern Railway Company*, *ibid* 621, per Cockburn, C. J., to same effect. In this state of the authorities in our own Courts and in Ireland we are much assisted in arriving at a conclusion by several cases decided in the Courts of the United States, cited in a note to the 7th ed. of Story on Bailments, 565. In *Ingalls* v. *Bills*, 9 Metc. R. 15, the late Mr. Justice Hubbard, in a very able judgment, in which the English and American authorities are reviewed, states it to be the conclusion of the Court "that carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against, and if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of it, such accident must be ascribed to negligence, for which the owner is liable, in case of injury to a passenger, happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a thorough and careful examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilent foresight, then the proprietor is not liable for the injury; but the misfortune must be borne by the sufferer as one of that class of injuries for which the law gives no redress in the form of pecuniary recompense."

This extract from the judgment of Mr. Justice Hubbard, in my opinion, truly expresses the rule of law applicable to the present case, and is in strict conformity with my brother Lush's direction to the jury, and were it not for the opinion of my brother Blackburn to the contrary, I should have considered that it was supported by the weight of English authority. As the majority of the Court are in favour of the defendant, and think my brother Lush's direction right, the rule obtained by the plaintiff will be discharged.

BLACKBURN, J.—This was an action brought by a passenger on the defendants railway to recover damages for an injury he had received owing to the breaking down of the carriage in which he was travelling.

On the trial before my brother Lush it appeared that the carriage was one belonging to the London and North-Western Railway Company, which had been for some time in use by them, and had come into the possession of the defendants in the ordinary course of traffic, and was according to the ordinary arrangements between the different railway companies used by the defendants till they could return it.

Evidence was given that when the carriage was put into the train by the defendants it was to all outward appearance reasonably sufficient for the journey; the tire of the wheel being of proper thickness and apparently of sufficient strength, but that in fact there had been an air-bubble in the welding which rendered the tire much weaker than it appeared, so that in fact it was not reasonably fit for the journey, and that the breaking of this tire occasioned the accident. Evidence was given that this defect was one which could not be detected by inspection, nor by any of the usual tests, as it would ring to the hammer as if perfectly welded, and that there was no neglect on the part of the defendants or their servants, who took every reasonable precaution in examining the carriage.

My brother Lush left the case to the jury, telling them that if the accident was occasioned by any neglect on the part of the defendants they should find for the plaintiff; but that if it was occasioned by a latent defect in the wheel, such that no care or skill on the part of the defendants could detect it, the verdict should be for the defendants, and it is not disputed that if the direction was right their verdict was justified by the evidence. A rule *nisi* was obtained for a new trial on the ground of misdirection, as it was contended that the defendants, as carriers of passengers, were bound at their peril to supply a carriage that really was reasonably fit for the journey, and that it was not enough that they made every reasonable effort to secure that it was so; in other words, that the obligation of

the carrier to the passenger was equivalent to a warranty of the reasonable sufficiency of the vehicle he supplied.

Cause was shown in the sittings after Trinity Term, before my brothers Mellor, Lush, and myself, when the Court took time to consider.

This is a question of very great nicety and importance, but after some consideration and doubt I have come to the conclusion that on the balance of English authority, and I think upon the whole, on principle and the analogy to other cases, there is a duty on the carrier to this extent, that he is bound at his peri. to supply a vehicle in fact reasonably sufficient for the purpose, and is responsible for the consequences of his failure to do so, though occsioned by a latent defect, and therefore that the evidence was wrong and that there should be a new trial.

I have come to this conclusion with much doubt and hesitation; and as my two brothers are of a different opinion, I need not say that I am very far from being confident that I am not wrong; but still I think it best to state the reasons why I differ from them.

I quite agree that the carrier of passengers is not like the carrier of goods, an insurer who undertakes to carry safely at all events, unless prevented by excepted perils; the carrier has not the control of the human beings whom he carries to the same extent as he has the control of goods, and therefore it would be unjust to impose on him the responsibility for their safe conveyance. In order, therefore, to render the carrier of passengers liable for an accident, it is necessary to allege and prove that the accident arose from some neglect of duty on the carrier's part. But if the obligation on the part of the carrier to provide a vehicle reasonably fit for the journey is absolute, a failure on his part to fulfil that obligation is quite enough to make him liable for all the consequences. And I own I see nothing to diminish the obligation to provide a reasonably safe vehicle in the fact that it is to be provided for the safety of life and limb, and not merely of property. The carrier supplies and selects the carriage for the purpose of carrying the passenger, who is obliged to trust entirely to the carrier, the passenger having no means of examining the carriage and no voice in the selection of it. Now it has been decided that one who contracts to supply articles for a particular purpose, does implicitly warrant that the articles he supplies are fit for that purpose: *Brown* v. *Edgington*, 2 M. & G 279. The principle of that case, as I understand it, is that expressed by Maule, J., who says that the defendant having accepted an order for a rope for a particular purpose, which rope he was to select and procure, did undertake to furnish one for that purpose, and was therefore liable as on a breach of his contract, if he furnished one unfit for the purpose, though that unfitness arose from a latent defect, and this principle would seem to apply to the carrier of passengers who supplies a vehicle. On the same principle I think it is that a ship-owner warrants to the person who ships goods that his vessel is seaworthy. Lord Tenterden, in Abbot on Shipping (5th Ed. p. 218, 6th Ed. by Shee, p. 295), states the law thus:—"The first duty is to provide a vessel tight and staunch, and furnished with all tackle and apparel necessary for the intended voyage. For if the merchant suffer loss or damage by reason of any insufficiency of these particulars at the outset of the voyage, he will be entitled to a recompense. An insufficiency in the furniture of the ship cannot easily be known to the master or owners; but in the hold of the vessel there may be latent defects unknown to both. The French ordinance directs that if the merchant can prove that the vessel at the time of sailing was incapable of performing the voyage, the master shall lose his freight, and pay the merchant his damage and interest. Valin, in his commentaries on this article, cites an observation of Weytsen, "That the punishment in this case ought not to be thought too severe, because the master by the nature of this contract of affreightment is necessarily held to warrant that the ship is good, and perfectly in a condition to perform the voyage in question under the penalty of all expenses, damages, and interest." And he himself adds "That this is so, although before its departure the ship may have been visited according to the practice in France, and reported sufficient because on this visit the exterior parts only of the vessel are surveyed, so that secret faults cannot be discovered, for which, by consequence, the owner or master remains always responsible, and this the more justly, because he cannot be ignorant of the bad state of the ship; but even if he be ignorant he must still answer, being necessarily bound to furnish a ship good and capable of the voyage." Lord Tenterden then notices the opinion of Pothier, that in such a case the owner shall not be answerable for damages occasioned by a defect which they did not nor could know, though he agreed that they shall lose their freight; and Lord Tenterden observes in a note that this opinion of Pothier is not quite consistent with his own principles laid down in the Traits de Louage. However this may be in the old French law, or the civil law, it is, I think, clear that according to English law, either there is a breach of warranty, in which case the owner is responsible for all the consequences, or there is not, in which case there is no ground for depriving him of his freight. And I think that there is ample authority (in addition to what I have cited from Abbott on Shipping) for saying that by English law such a warranty is implied where the carriage is by water.

In *Lyons* v. *Mells*, 5 East. 428, Lord Ellenborough, in delivering the considered judgment of the Court, says:—"In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel, ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, and implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so. The law presumes a promise to that effect of the carrier without any actual proof; and every reason of sound policy and public convenience requires that it should be so. The declaration here states such a promise to have been made by the defendant, and it

is proved by proving the nature of his employment, or in other words the law in such a case without proof implies it." In *Gibson* v. *Small*, 4 H. L. 404, in explaining the reason why in a voyage policy of insurance there was an implied condition that the ship was seaworthy as much when the insurance is on goods as when on the vessel, Parke B., says the shipowner "contracts with every shipper of goods that he will do so," (*i. e.*, make the ship seaworthy). "The shipper of goods has a right to expect a seaworthy ship, and may sue the shipowner if it is not. Hence, the usual course being that the assured can and may secure the seaworthiness of the ship either directly, if he is the owner, or indirectly if he is the shipper, it is by no means unreasonable to imply such a contract in a policy on a ship on a voyage, and so the law most clearly has implied it." It appears from this that this most learned judge thought it clear that the undertaking of the shipowner to the shipper of goods as to sea worthiness is co-extensive with the undertaking of the goodsowner to his insurer I am certainly not aware of any case in which the question has arisen whether there is a similar warranty between a shipowner and a passenger; but it seems to me that every reason that can be urged in favour of the warranty, applies as much to the one case as the other. The passenger trusts to the shipowner to select a proper ship as much as the shipper of goods does; and all those circumstances exist which induced Valin (in the passage cited in Abbot on Shipping) to say that the shipowner, from the nature of his contract, was "necessarily bound to furnish a ship good and sufficient for the voyage;" or, as Lord Ellenborough says in *Lyon* v. *Mells*, that his promise so to do is proved by proving the nature of his employment. Indeed, in the very probable case of a person shipping merchandise by the same vessel in which he himself takes his passage, it would seem rather extraordinary if the law were to hold that, as far as the goods were concerned there was an implied undertaking to furnish a seaworthy ship; but, as regarded the personal safety of the passenger, there was none. It is true that the carrier of goods is an insurer, except against certain excepted perils, and that the carrier of passengers is not; but the question whether the carrier of goods is bound at his peril to supply a seaworthy vessel, can only arise where the immediate cause of the loss is an excepted peril, or for some other reason the contract to insure does not apply.

Assuming then that there is such a warranty implied where the carriage is to be by water, is there any difference when the carriage is by land? The principle which I understood to be laid down in *Brown* v. *Edgington*, 2 M. & G. 279, is this, that where one party to a contract engages to select and supply an article for a particular purpose, and the other party had nothing to do with the selection, but relies entirely upon the party who supplies; it is to be taken as part of the contract, implied by law, that the supplier warrants the reasonable sufficiency of the article for that purpose; and I think *Lyon* v. *Mells* lays down a very similar principle as generally applicable, though the particular instance was that of a lighterman. If this principle be a general one, it applies equally to the case of the shipowner supplying a ship, and the carrier by land supplying a vehicle, whether it is supplied for the carriage of goods or passengers In *Brass* v. *Maitland*, 6 E. & B 470, 4 W. R. 617, this principle was much discussed. I think the effect of the reasoning of the judgment of Lord Campbell and Wightman, J., shows that in their opinion this is a general principle of law; whilst the effect of the judgment of Crompton, J., is such as to show that he did not think the principle general, and was not inclined to carry it further than the decisions had already gone. My respect for his opinion is very great and if ever the question whether there is such a general principle of law should come before me in a court of error, I should endeavour to consider it carefully as an open question without being too much biassed by my present impression in favour of it; but sitting here in the same Court in which that case was decided, I am bound to consider the decision of the majority right, and to act upon it as far as it bears on the present question. The authorities on the very point now before us are not numerous In *Israel* v. *Clarke*, 4 Esp. 259, Lord Ellenborough is reported to have said that the carriers of passengers by land "were bound by law to provide sufficient carriages for the safe conveyance of the public who had occasion to travel by them; at all events he would expect a clear landworthiness in the carriage itself to be established." This seems to show that in his opinion the doctrine which in *Lyon* v. *Mells* was laid down as to the persons furnishing lighters for the conveyance of goods was applicable to those furnishing carriages by land for the conveyance of passengers, and that they were bound at their peril to provide vehicles in fact reasonably sufficient for the purpose. And in *Bremner* v. *Williams*, 1 C. & P. 414, Chief Justice Best is reported to have ruled the same way. These are, it is true, only *nisi prius* decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the judge was rightly understood. On the other hand, in *Christie* v. *Griggs*, 2 Camp. 79, Chief Justice Mansfield told the jury that "if the axletree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that as far as human care and foresight could go he would provide for their safe conveyance. Therefore if the breaking down of the carriage was purely accidental, the plaintiff had no remedy for the misfortune he had encountered," and we may depend upon the accuracy of this reporter. Chief Justice Mansfield here does not very accurately distinguish between the possible view of the case that the misforfune might have arisen though the vehicle was reasonably fit for the journey, and so be purely accidental, and the possible view that the accident and the circumstances attending it showed that the coach could not in fact have been reasonably fit for the journey; but on the whole I think it must be

taken that he thought there was no warranty, such as would make the coach-proprietor liable for a latent defect in the coach, but this was only an opinion at *nisi prius*.

In *Sharp* v. *Grey*, 9 Bing. 457, Tindal, C. J., is stated in the report in Bingham to have directed the jury to consider whether there had been that degree of vigilance which was required by his engagement to carry the plaintiff safely, which leaves it in doubt whether he told the jury that the defendant was bound at his peril to provide a fit vehicle, a failure to fulfil which duty would be properly described in the declaration as negligence, and left it to them to say if it was in fact reasonably fit; or whether he left it to the jury to say whether he had not neglected some reasonably practicable means of ascertaining its fitness; but the counsel, in moving for a new trial, treat it as a direction that the defendant would be responsible, though he had conducted his business with all the caution that could be reasonably required; and the judges, in refusing the rule, all appear to have so understood the ruling, and to hold it right.

I have already said that on the balance of reasoning I am inclined to think that such ought to be the view; but at present, sitting in a court of co-ordinate jurisdiction with the Common Pleas, I think it enough that the decision is in point.

In an American case, *Ingalls* v. *Bills*, 9 Met. 1, given at length in the editor's note to Story on Bailments, sec. 592, 7th edition, page 565, the court, after considering the English cases, came to the conclusion opposite to that which I have come to, expressly stating that they do not agree with the opinion of the Court of Common Pleas in *Sharp* v. *Grey*, if it is understood as I think it must be. It will be very fit, if the case at first is taken into a Court of Error, that the reasoning of the American court should be carefully and respectfully considered; and if it appears to the Court of Error satisfactory, they may act upon it, and overrule the case of *Sharp* v. *Grey*. But it is clear that we in the Court of Queen's Bench cannot treat the American decision as an authority to be placed on the same footing as the decision of the Court of Common Pleas.

The judgment in this case has been delayed until the argument in a case of *Hands* v. *London, Chatham and Dover Railway* was heard, as it was anticipated that a similar point might arise in that case; but it was not necessary to decide it. I think that the Irish case of *Burns* v. *Cork and Bandon Railway Company*, 13 Ir. Com. Law Rep. 543, really throws no light upon the point before us. In that case a plea was pleaded, which was clearly intended to raise the very point before us, and which I own I should myself have thought did raise it. The Irish Court of Exchequer, in giving judgment against the plea, say that if there is a warranty the plea was clearly bad; and that even if there was only a duty to take every care, the plea did not sufficiently show the fulfilment of that duty, and was therefore bad. Probably the court were not agreed on the question, and intended to avoid expressing any opinion on it, though I should rather conjecture, from the language used, that the learned judge who wrote the judgment inclined to the opinion that there was a warranty.

I have only to add that I do not think that the duty to supply a seaworthy ship, or a sufficient vehicle by land, is equivalent to a duty to provide one perfect, and such as never can, without some extraordinary peril, break down, which would have the effect of making the carrier an insurer against all losses arising from any failure in the vehicle which cannot be shown to arise from some unusual accident. I had occasion, in the case of *Burges* v. *Wickham*, 3 B. & S. 669, 11 W. R. 992, to consider what was the meaning of the term "seaworthy" as applied to a ship, and I see no reason to change the opinion which I then expressed, that it meant no more than that degree of fitness which it would be usual and prudent to require at the commencement of the adventure; and applying a similar principle to a land journey, I agree with what I understand to have been the direction of Erle, C. J., in *Ford* v. *London and South-Western Railway Company*, 2 F. & F. 732, that the railway company were not bound to have a carriage made in the best of all possible ways, but sufficiently fulfilled their duty by providing a carriage such as was found in practical use to be sufficient. In other words, I understand that the obligation to be not to furnish a perfect vehicle, but one reasonably sufficient. But in the present case the carriage was not such as to be reasonably sufficient. Had the parties who sent it out known of the existence of this defect in the tire there would have been strong ground for accusing them of manslaughter if death had ensued. They did not know it and could not discover it till the tire broke, and they are therefore free from all moral blame or criminal responsibility.

The question therefore is distinctly raised, whether the obligation of the carrier of passengers to the passenger is merely to take every precaution to procure a vehicle reasonably sufficient for the service whether by sea or by land, in which case the direction was right, or whether it is, as I think, an absolute obligation at his peril to supply one, or be responsible for any damage resulting from a defect. Taking the view of the law which I do, I think the rule for a new trial ought to be made absolute; but the majority of the Court being of a different opinion it must be discharged.

Rule discharged.

Basebe v. Matthews.

Malicious prosecution—Conviction outstanding—No power of appeal.

An action is not maintainable for malicious prosecution where the plaintiff has been convicted, and the conviction is outstanding, although there is no power of appeal from the Court where the conviction took place.

[C. P. 15 W. R. 839.]

Declaration.—That the defendant falsely and maliciously, and without reasonable and probable cause, appeared before a justice of the peace, and charged the plaintiff with assaulting the defendant contrary to the statute, and by scandalous and malicious statements caused the said justice to convict the plaintiff of the supposed offence, and to fine him, which fine the plaintiff was obliged to pay, there being no appeal.

Demurrer.

Beresford in support of the demurrer, contended that the declaration was without precedent. He cited *Barber* v. *Lissiter*, 29 L. J. C. P. 161. [He was then stopped by the Court.]

C. W. Wood, in support of the declaration, contended that it was good, because, although it averred that the plaintiff was convicted, it also alleged that there was no Court of Appeal to which the plaintiff could apply in order to have the conviction reversed. He cited *Whitworth* v. *Hall*, 2 B. & Ad. 695; *Mellor* v. *Baddeley*, 2 C. & M. 675; *Fitzjohn* v. *Mackinder*, 29 L. J. C. P. 167, 8 W. R. 341; *Steward* v. *Gromett*, 29 L. J. C. P. 170; *Churchill* v. *Siggers*, 23 L. J. Q. B. 308, 2 W. R. 551; *Venafra* v. *Johnson*, 10 Bing. 301.

Byles, J.—We should be disturbing previous cases if we doubted that criminal proceedings must have terminated before the civil action is commenced. The fact that there is no appeal from the criminal court makes no difference.

Keating, J., concurred.

Smith, J.—In *Castrique* v. *Behrens*, 30 L. J. Q. B. 162, the Court says, "There is no doubt on principle and on the authorities that an action lies for maliciously, and without reasonable and probable cause, setting the laws of this country in motion to the damage of the plaintiff; but in such a case it is essential to show that the proceeding alleged to be instituted maliciously, and without probable cause, has terminated in favour of the plaintiff, if from its nature it be capable of such a termination." Mr. Wood says that this case is distinguishable because here there was no court of appeal from the criminal court, but if we gave judgment for the plaintiff in this case we should be establishing a court of appeal where the Legislature has said there should be none. The decision of the magistrates is binding, and when they have decided a case it is not open to the plaintiff to impeach their judgment by a civil action.

Judgment for the defendant.

Worth v Gilling and another.

Animals—Negligence—Negligently keeping a ferocious dog—Scienter.

It is not necessary, in order to sustain an action against a person for negligently keeping a ferocious dog, to shew that the animal had actually bitten another person before it bit the plaintiff: it is enough to shew that it has, to the knowledge of its owner, evinced a savage disposition by attempting to bite.

[C. P., M. T, 1866.]

The declaration stated that the defendants unlawfully kept a dog of a fierce and mischievous nature, well knowing that the said dog was of a fierce and mischievous nature *and accustomed to bite mankind* * and that the said dog, whilst the defendants so kept the same, attacked and bit the plaintiff, whereby the plaintiff was wounded, &c., and was prevented from carrying on his business, and incurred expense for medical and other attendance, &c.

The defendants pleaded,—first, not guilty,—secondly, that they at the said time when, &c., carefully and properly kept the said dog chained up on their own land for the protection of their property, and that the plaintiff at the said time when, &c., was trespassing on the said land without leave of the defendants,—thirdly, a similar plea, but alleging that the plaintiff, having notice of the premises, carelessly, negligently, and improperly went near to the said dog, and that the injury complained of was caused by his own negligence and want of due and proper care. Issue.

The cause was tried before Willes, J., at the last summer assizes at Hertford. It appeared that the defendants, who were engravers and watch-dial finishers, in the neighbourhood of Clerkenwell, had their work-shops and counting-house in a paved yard having an entrance in the public street which was common to two or three other tenants of premises in the same yard; that, for the protection of their property, the defendants kept a dog, which was chained to a kennel, at one side of the yard; that the yard was about twenty feet wide, and the chain about seven feet long; that the plaintiff was going across the yard towards one of the workshops, when the dog attacked and severely bit him in the arm.

The dog had been purchased by the defendants on the 5th of June, 1865, and the injury to the plaintiff was on the 17th of July in the same year.

There was no evidence that the dog had ever before bitten any person; but it was proved that he had uniformly exhibited a ferocious disposition, by rushing out of his kennel when any stranger passed, and jumping up as far as the chain would allow him, barking and trying to bite. One of the other tenants in the yard, who spoke to the savage disposition of the dog, also said he had complained to the defendants about it, and told them that the dog should be more closely secured: but on cross-examination would not say whether this was before or after the injury had been inflicted on the plaintiff.

On the part of the defendants it was submitted that there was no evidence that the animal was ferocious and accustomed to bite, and, at all events, none that the defendants knew he had such a propensity.

The learned judge left it to the jury to say whether or not the dog was of a savage and dangerous disposition, and whether the defendants were aware of it and neglected to take due precautions to guard against injury to persons lawfully coming upon the premises.

The jury returned a verdict for the plaintiff, damages £10.

Thesiger, pursuant to leave reserved to him at the trial, moved to enter a verdict for the defendants or a nonsuit. In order to sustain an action of this sort, the plaintiff is bound to prove that the dog is of a savage and ferocious disposition, and that the defendant had notice thereof: Com. Dig.* In *Beck and Wife* v. *Dyson*, 4 Camp. 198, it was held not to be sufficient to shew that the dog was of a fierce and savage disposition, and usually tied up by the defendant, without proving that he had before bitten some one.

[Byles, J.—In *Judge* v. *Cox*, 1 Stark. 285, it was ruled by Abbott, C J., that, in an action for negligently keeping a dog, proof that the defen-

* The words in italics were added by way of amendment, at nisi prius.

* Action upon the case for negligence (A. 5).

dant had warned a person to beware of the dog lest he should be bitten, was evidence to go to a jury in support of the allegation that the dog was accustomed to bite mankind.

Erle, C. J.—It was not necessary to prove that the dog had actually bitten another person. If the evidence shewed the animal to be of a fierce and savage nature, that it had on former occasions evinced an inclination to bite that will be enough to sustain the action]

There was no evidence whatever in this case to shew that the defendants, who had only had the dog in their possession a few weeks, knew that it was ferocious. In *Hartley* v. *Harriman*, 1 B. & A. 620, an averment in a declaration that the defendant's dogs were accustomed to worry and bite sheep and lambs, was held not to be supported by proof that they were of a ferocious and mischievous disposition, and that they had frequently attacked men: Holroyd, J saying: "If the allegation as to the habit of these dogs were struck out of the declaration, a sufficient cause of action would not remain. Then it follows that it is material, and absolutely necessary to be proved. And it will not do to prove another fact, which, if inserted in the declaration instead of this, might have been quite sufficient to support the action; for, the allegation itself must be proved"

Erle, C. J.—I am of opinion that there should be no rule. Although there was no evidence that the dog had ever before bitten any one, it was proved that he uniformly made every effort in his power to get at any stranger who passed by, and was only restrained by the chain. There was abundant evidence to shew that the defendants were aware of the animal's ferocity: and, if so, they were clearly responsible for the damage the plaintiff had sustained.

Willes, J.—There was evidence that the dog was in the habit of jumping at every one who passed his kennel, endeavouring to bite, and that the defendants knew it. It is true that he did not appear to have succeeded in biting any person until he unfortunately caught the plaintiff. The defendants admitted that the dog was purchased for the protection of their premises Unless of a fierce nature, he would hardly have been useful for that purpose.

Byles, J. and Keating, J., concurred

Rule refused.

GENERAL CORRESPONDENCE.

Is the interest of a person in Crown Lands before patent issues saleable under fi. fa.

To the Editors of the Law Journal.

Gentlemen,—I would like to have your opinion upon a point which I conceive to be of some interest to the public.

A. purchases a piece of land from the government, makes several payments, and then assigns his interest to B., taking the promissory notes of B. as security for the consideration agreed to be given for the assignment. Before any of the notes are paid B. dies intestate. The widow of B. takes out administration to her husband's estate, and A. sues her upon the notes, and obtains judgment. The personalty is exhausted by prior claims. A writ of *fi. fa.* against lands is issued, and under this the sheriff sells the interest of the deceased B. in those lands, which is bought by A. All this time the fee is in the Crown, no patents being issued. A. upon this claims that by the sheriff's sale and conveyance to him he acquired the interest of the deceased, and is entitled to stand in his place, and, upon completing the payments to government, to obtain the patent.

Is he right in so claiming? In short, is the interest of a purchaser of Crown Lands before patent issues liable to sale under execution? The point is disputed. If the interest is not saleable, it occurs to me, there is a very grave defect in our laws. It would practically enable a dishonest debtor to invest a large sum in Crown Lands (leaving a small sum unpaid) and put his creditors at defiance.

Your obedient servant,

A Barrister.

Prescott, July 9, 1867.

[The question is not, we think, one which comes within our rule to answer. At the same time our columns are open to any one who may desire to express his opinion on the subject, a course frequently adopted in the English law periodicals.—Eds. L. J.]

A question under the Bankrupt Law.

To the Editors of the Law Journal.

Gentlemen,—In my letter to the *Local Courts' Gazette* for last month, I drew the attention of the learned Editors of that Journal, and the legal public to a question under the Bankrupt laws. I am hoping to see your comments on it, as well as other legal lights from the pens of legal contributors, in your forthcoming July number. The question is, "*is a debt not included in the Schedule of debts attached to the assignment of an insolvent, under the law, discharged by his certificate of discharge or not?*"

I contend that it is not, and although I cannot at this time lay my hands upon any adjudged case it seems to me that every principle of law, and common sense, is against a con-

trary construction. The real object of the Bankrupt act, is to enable honest debtors to get a discharge, upon giving up all the property they have for the *benefit, and upon due notice to every creditor great and small.* Every creditor should have notice and by our insolvent act, as construed, every creditor has to be once notified at least. To bar a man of his debt without notice seems very unfair. Another object in having every creditor put in the list, is that no favouritism may be shown to one more than to another. If the insolvent can leave out of his list a creditor of say $50, with impunity, so he can leave out with equal legality one having a claim of $500. Supposing him to have an estate (a precious rare thing it is true) that will pay 5*s.* in the £, then certain preferred or included creditors are paid, and excluded ones get nothing. That your readers may know in what places in our insolvent law, reference is made to the necessity of giving a full list of creditors I mention the following, viz.; Section 2 of the act says "At such meetings he (the insolvent) "shall exhibit a statement showing the position of his affairs and particularly a schedule (form B) containing the names and residences of all his creditors." See also subsection 2 of section 2: subsection 16 of section 3: subsection 2 of section 5: subsection 6 of section 2: section 11."

The English Bankrupt act has a special clause as to the effect of the certificate of discharge, different from ours. It says "that after the discharge the Bankrupt shall not be sued for any *debt provable* under the Bankruptcy." Our act only excludes certain specified debts of a trust nature, and I think supposes that all debts have been put in the Schedule! A debt to *be provable* must be one acknowledged by the debtor or at least alluded to in his list. The Bankrupt act should be construed liberally for creditors whose rights are by it infringed on.

Scarboro.

Toronto, July 15, 1867.

[Our correspondent has evidently thought over this subject carefully. Is there not some case in our own courts affecting the question? Our correspondent will perhaps look this up. —Eds. L. J.]

REVIEWS.

The Law Gazette. San Francisco: Hope & Chaplin.

This periodical is welcome after its long journey. It comes with news of what is transpiring at the far west, in the legal world.

It touches upon a variety of subjects, and gives many extracts from the English Reports, though in a more disjointed manner we should think than would be convenient to its readers. A summary of the different cases in one of the District Courts, as published in the *Gazette*, shews that a "fusion" of law and equity, to say nothing of matrimonial matters, is a matter of a matter of the past in the State of San Francisco, for we see that actions of assumpsit, debt, damages and ejectment, suits for divorce, applications to quiet titles, foreclosure suits, and assessment cases are adjudicated upon in the same Court. A Judge there had need to be a man of prodigious intellect to be able to decide satisfactorily to himself or to suitors, cases involving such a variety of legal lore. Mr. Hope, one of the editors, is, we believe, a member of the Law Society of Upper Canada.

Alphabetical Index of the Statutes passed by the Parliament of Canada, since the Consolidated Statutes. By T. P. Butler, B.C.L., Advocate, Montreal. Ottawa: G. E. Desbarats, 1867. Price 50c.

The above includes an appendix shewing the amendments to all the Consolidated Statutes—a useful addition to a useful pamphlet.

The above does not pretend to be more than an index, not aspiring to the dignity of a digest, but as giving in a compact form the result of the legislation in this Province from the time of the Consolidated Statutes to the end of the last session before the confederation, it will be of great service to practitioners, and in fact to all who have occasion to refer to the statutes.

Though the apparent scope of the compilation does not permit any great amplitude in the titles used, the subjects are indexed in such a way as to be found without difficulty, which, by the way, is saying a good deal, when the editor can scarcely be expected to know much about the legal phraseology of this end of the Dominion.

CANADA.

By the Queen.

A PROCLAMATION.

For uniting the Provinces of Canada, Nova Scotia, and New Brunswick, into one Dominion, under the name of Canada.

Whereas by an Act of Parliament, passed on the twenty-ninth day of March, one thousand eight hundred and sixty-seven, in the thirtieth year of Our reign, intitutled: "An Act for the Union of Canada, Nova Scotia and New Brunswick, and the Government thereof and for purposes connected therewith," after divers recitals, it is enacted, "that it shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honorable Privy Council, to declare, by Proclamation, that on and after a day therein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia and New Brunswick shall form and be One Dominion under the name of Canada, and on and after that day those Three Provinces shall form and be One Dominion under that name accordingly;" and it is thereby further enacted, "that Such Persons shall be first summoned to the Senate as the Queen by warrant, under Her Majesty's Royal Sign Manual, thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union;" We, therefore, by and with the advice of Our Privy Council, have thought fit to issue this Our Royal Proclamation, and We do ordain, declare and command that on and after the first day of July, one thousand eight hundred and sixty-seven, the Provinces of Canada, Nova Scotia and New Brunswick shall form and be One Dominion under the name of Canada:

And We do further ordain and declare that the persons whose names are herein inserted and set forth are the persons of whom We have by Warrant under our Royal Sign Manual thought fit to approve as the persons who shall be first summoned to the Senate of Canada:

For the Province of Ontario.

John Hamilton.
Rodedrick Matheson.
John Ross.
Samuel Mills.
Benjamin Seymour.
Walter Hamilton Dickson.
James Shaw.
Adam Johnson Fergusson Blair.
Alexander Campbell.
David Christie.
James Cox Aikins.
David Reesor.
Elijah Leonard.
William MacMaster.
Asa Allworth Burnham.
John Simpson.
James Skead.
David Lewis Macpherson.
George Crawford.
Donald Macdonald.
Oliver Blake.
Billa Flint.
Walter McCrea.
George William Allan.

For the Province of Quebec.

James Leslie.
Asa Belknap Foster.
Joseph Noël Bossé.
Louis A. Oliver.
Jacques Olivier Bureau.
Charles Malhiot.
Louis Renaud.
Luc Letellier, de St. Just.
Ulric Joseph Tessier.
John Hamilton.
Charles Cormier.
Antoine Juchereau Duchesnay.
David Edward Price.
Elzear H. J. Duchesnay.
Leandre Dumouchel.
Louis Lacoste.
Joseph F. Armand.
Charles Wilson.
William Henry Chaffers.
Jean Baptiste Gouévremont.
James Ferrier.
Sir Narcisse Fortunat Belleau, Knight.
Thomas Ryan.
John Sewell Sanborn.

For the Province of Nova Scotia.

Edward Kenny.
Jonathan McCully.
Thomas D. Archibald.
Robert B. Dickey.
John H. Anderson.
John Holmes.
John W. Ritchie.
Benjamin Wier.
John Locke.
Caleb R. Bill.
John Bourinot.
William Miller.

For the Province of New Brunswick.

Amos Edwin Botsford.
Edwin Baron Chandler.
John Robertson.
Robert Leonard Hazen.
William Hunter Odell.
David Wark.
William Henry Steeves.
William Todd.
John Ferguson.
Robert Duncan Wilmot.
Abner Reid McClelan.
Peter Mitchell.

Given at our Court, at Windsor Castle, this twenty-second day of May, in the year of our Lord, one thousand eight hundred and sixty-seven, and in the thirtieth year of our reign.

God Save the Queen.

CANADA.

By His Excellency the Right Honorable Charles Stanley Viscount Monck, Baron Monck, of Ballytrammon, in the County of Wexford, in the Peerage of Ireland, and Baron Monck, of Ballytrammon, in the County of Wexford, in the Peerage of the United Kingdom of Great Britain and Ireland, Governor General of Canada, &c., &c., &c.

To all whom these presents shall come—Greeting:

A PROCLAMATION.

Whereas Her Majesty the Queen, by Her Letters Patent, under the Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, on the first day of June, in the Thirtieth year of Her Reign, hath been graciously pleased to constitute and appoint me to be Governor General of Canada, with all and every the powers and authorities in the said Letters Patent contained, and which belong to the said office; Now Know Ye, and I have therefore, with the advice of the Queen's Privy Council for Canada, thought fit to issue this Proclamation to make known, and I do hereby make known Her Majesty's said appointment; of all which Her Majesty's loving subjects, and all others whom it may concern, are to take notice thereof and govern themselves accordingly.

Given under my Hand and Seal at Arms, at Ottawa, this First day of July, in the year of Our Lord one thousand eight hundred and sixty-seven, and in the thirty-first year of Her Majesty's reign.

Monck.

By Command,

John A. Macdonald.

Canada Gazette, July 1st, 1867.

The Law of Evidence.—The bill which has passed the House of Representatives, removing the disability of witnesses from interest, &c., in civil cases, is so entirely in accordance with the progress of the age we live in, that we are surprised that it has not long ere this been made a part of the law of Pennsylvania. In the courts of the United States, New York, New Jersey, and many of the other States, the old doctrine has been repudiated, and everywhere to the great satisfaction of the bar and bench. We are fully satisfied that the majority of our bench and bar are in favor of the change, and hope the Senate will not fail to concur in the action of the House, and that the bill may become a law at the present session.—*Legal Intelligencer.*

Sir Thomas Wilde and the Princess d'Este—After Sir Thomas Wilde (subsequently Lord Truro) married Augusta Emma d'Este, the daughter of the Duke of Sussex and Lady Augusta Murray, that Lady, of whose legitimacy Sir Thomas had vainly endeavoured to convince the House of Lords, retained her maiden surname. In society she was generally known as the Princess d'Este; and the bilious satirists of Inns of Court used to speak of Sir Thomas as "the Prince." It was said that one of Wilde's familiar associates, soon after the lawyer's marriage, called at his house and asked if the Princess d'Este was at home. "No, Sir," replied the servant, "the Princess d'Este is not at home, but the Prince is!"—*Jefferson's Book about Lawyers.*

Jeffreys and the Fiddler.—Though Jeffreys delighted in music, he does not seem to have held its professors in high esteem. In the time of Charles II. musical artists of the humbler grades liked to be styled "musitioners;" and on a certain occasion, when he was sitting as Recorder for the City of London, George Jeffreys was greatly incensed by a witness who, in a pompous voice called himself a musitioner. With a sneer the Recorder interposed—"A musitioner! I thought you were a fiddler!" "I am a musitioner," the violinist answered stoutly. "O indeed," croaked Jeffreys. "This is very important—highly important—extremely important! And pray Mr. Witness, what is the difference between a musitioner and a fiddler?" With fortunate readiness the man answered, "As much sir, as their is between a pair of bagpipes and a recorder."—*Jefferson's Book about Lawyers.*

APPOINTMENTS TO OFFICE.

CORONERS.

LEANDER HARVEY, of Watford, Esquire, M.D., to be an Associate Coroner for the County of Lambton. (Gazetted 22nd June, 1867.)

PETER F. CARSCALLEN, of Tamworth, Esquire, to be an Associate Coroner for the County of Lennox and Addington. (Gazetted 22nd June, 1867.)

CHARLES FRANCIS BULLEN, of Wellington Square, Esquire, to be an Associate Coroner for the County of Halton, in Upper Canada. (Gazetted 29th June, 1867.)

GEORGE LANDERKIN, of the Village of Hanover, Esquire, M.D., to be an Associate Coroner for the County of Grey, in Upper Canada. (Gazetted 29th June, 1867.)

COMMISSIONERS.

JAMES BREUD BATTEN, of Westminster, England, Esquire, Solicitor, to be a Commissioner for taking affidavits in and for the Canadian Courts in England. (Gazetted 15th June, 1867.)

NOTARIES.

NELSON GORDON BIGELOW, Esquire, Attorney-at-Law, &c., to be a Notary Public for Upper Canada. (Gazetted 29th June, 1867.)

HENRY POTTEN, of Brantford, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted 29th June, 1867.)

TO CORRESPONDENTS.

"A Barrister"—"Scarboro'"—under "General Correspondence"