DIARY FOR JUNE.

1. Thur. Open Day.
2. Frid. New Trial Day, Q. B. Open Day, C. P.
3. Sat. Easter Term ends. Open Day.
4. SUN. *Trinity Sunday.*
5. Mon. *St. Boniface.*
6. Tues. Last day for notice on trial for County Court
8. Thur. *Corpus Christi.* [except York.
11. SUN. *1st Sunday after Trinity. St. Barnabas.*
13. Tues. General Session and County Court Sitting in each County except York.
14. Wed. Last day for Court of Revision finally to revise Assessment Roll.
15. Thur. Last day for service of summons, County Court,
18. SUN. *2nd Sunday after Trinity.* [York.
20. Tues. Accession of Queen Victoria, 1837.
21. Wed Longest day.
24. Sat. *St. John the Baptist.*
25. SUN. *3rd Sunday after Trinity.*
26. Mon. Last day to declare for County Court, York.
29. Thur. *St. Peter.*

THE

Canada Law Journal.

JUNE, 1871.

WITNESS FEES TO REGISTRARS.

Registrars of titles are as a class exceedingly tenacious of their rights. By united efforts they have succeeded at different times in moving the Legislature to action, and we have had amendment of the Registration laws following upon amendment thereof. But these functionaries seem to have left unprovided for the matter which constitutes the heading of this paper.

By the late Ontario Act, 31 Vic. c. 20, s. 21, it is enacted that no Registrar shall be required to produce any paper in his custody unless ordered by a judge, upon which order a subpœna is to be issued in the usual way. This is in effect a statutory repetition of the rule of court: *Reg. Gen.* T. T. 1856, No. 31. But the act says nothing about the fees to which the officer shall be entitled upon the service of such subpœna, and to our certain knowledge no small squabbling has arisen at various trials to determine whether 75 cents or $4 was properly claimable for the *per diem* allowance.

The matter must be settled by reference to the rules of court regulating the allowance to witnesses. At common law the tariff fixed by the judges in pursuance of the Common Law Procedure Act, governs the practice. By that tariff the only persons entitled to receive $4 a day are, (1) barristers and attorneys, physicians and surgeons, and then only when called upon to give evidence in consequence of any professional service rendered by them, or to give professional advice; and (2) engineers and surveyors, and then only when called upon to give evidence of any professional services rendered by them, or to give evidence depending upon their skill or judgment. In all other but these exceptional cases witnesses are entitled to no more than 75 cents if residing within three miles of the court house, and $1 if residing over three miles therefrom. These rules are binding upon individual judges, and nothing short of a rule of the full court either special, in the particular suit, or general, regulating the whole practice, can entitle any person to a larger allowance. We find it stated in *Re Nelson*, 2 Chan. Cham. Rep. at p. 253, that in a case of *Bennet* v. *Adams* in 1859, Richards, C.J., ordered $4 to be taxed to a clerk of Assize who attended to give evidence in that capacity as a witness. So far as we can judge this order if appealed against would have shared the fate of the orders made by one judge for extra counsel fees, as determined by the full court in *Ham* v. *Lasher*, 27 U. C. Q. B. 357.

In Chancery the practice has been, both in England and Canada, to follow the Common Law tariff in the allowance to witnesses,—a matter of some surprise, considering the independent position which this court usually occupies (see *Clark* v. *Gill*, 1 K. & J 19). We find, however, in the case already referred to, *Re Nelson*, that the Common Law tariff is departed from. Special reasons are given by the late Chancellor for making a $4 allowance per day to the Registrar of the Surrogate Court.

This case is the stronghold of all public officers attending court under subpœna, and we shall therefore advert to the several reasons given for the extraordinary allowance. It is said (1) that the responsibility of the officer's position in keeping, searching for, and producing original documents should be regarded; (2) the trouble and loss of time in addition, which often occurs in searching for and producing such documents; (3) that in the case of an officer paid by fees, as he may be kept hours waiting in court before being called, he should be remunerated by a larger fee than is paid to ordinary witnesses. Now we do not doubt the power of the Court of Chancery, or a single judge of that court, to make special orders for the allowance of

extra witness fees, but we submit that it would be beyond all measure better so to regulate the tariff that all occasion for making special orders should be done away with. By this means also the proper sum would be taxed or paid in the first instance, and the trouble and expense of an appeal from taxation, or of an application for a special allowance, would be avoided.

We do not quarrel with extra compensation being made to all public officials who attend as witnesses, if the courts think fit to alter the tariff in that respect, but while there is a tariff it should be adhered to. Now we do not see that, in principle, *Re Nelson* is sustainable as laying down a general rule, applicable, for instance, to registrars of titles. Apart from rules of court, the practice here would be governed by the old Statute 5 Eliz. c. 9, s. 12, and under that the principle is that the witness is not entitled to any thing for loss of time. He is entitled to travelling expenses, and if he is away from home for some time he is entitled to his expenses for maintenance during that time: *Collins* v. *Gregory*, 1 B. & Ad. 950; *Collins* v. *Godfrey*, 1 B. & Ad. 950 *Nokes* v. *Gibbon*, 3 Jur., N. S., 282; s. c. 26 L. J. Ch. 208; *Lonergan* v. *Royal Exchange*, 7 Bing. 731.

In this country there is no Chancery tariff for witness fees; the Common Law tariff is against the special allowance we have been considering, and in the old law underlying the tariffs, responsibility, trouble and loss of time, and loss or diminution of official fees form no ground for compensation.

Again we say that if the judges decide that public officers should receive the fees awarded to professional witnesses when called to give professional evidence, we shall be the last to object to such a scale of compensation. But one cannot fail to see that the whole force of the reasoning in *Re Nelson* would warrant the payment of extra fees to every professional or scientific man called as a witness upon any point,—for what doctor, surveyor or lawyer, is ever subpœnaed who does not aver that he is losing money in attending as a 75 cent witness?

It would be very proper to have a general overhauling of the tariff as to witness-fees. We doubt not if the Registrars unite their exertions once more, that the thing will be done. It would be a breach of professional modesty for lawyers to move in the matter, doctors have too much internecine warfare to attend to, surveyors do not seem to possess sufficient vitality to agitate: it rests upon the harmonious, well-disciplined, aggressive band of Registrars to make the onslaught.

LAW SOCIETY—EASTER TERM, 1871.

BENCH AND BAR.

During this Term the time of those of the Judges on the rota for the trial of election petitions under the late act has been much occupied with hearing various applications for particulars and other motions thought necessary to prepare election cases for trial. The Chief Justice of the Common Pleas has especially devoted much time and careful attention to these matters, and is gradually moulding a practice following in the main the English cases, though differing in some respects where the English practice seems to work harshly.

During this Term the Hon. J. H. Cameron, an *ex-officio* Bencher, was unanimously re-elected by his newly appointed coadjutors under the recent Act, to the position he has worthily filled for many years, as Treasurer of the Law Society. Several committees of the Benchers have been formed to do the work of the Society, with the object of doing it more efficiently and at more convenient times than formerly; but so far there has not been much improvement in the attendance at Convocation. The Benchers have decided on publishing their advertisements in the *Law Journal*, instead of the *Gazette*, and the first is published in this issue—a change which we trust will not be displeasing to those interested.

Various prominent members of the Bar are off on their summer trip, and more will follow, though several will be detained for some time by the trial of election petitions, some half dozen of which will be tried before Vacation.

CALLS TO THE BAR.

During this Term the following gentlemen were called to the Bar:

Messrs. John Crerar, Hamilton; George O. Alcorn, Toronto: D. McGibbon, Milton; W. G. Falconbridge, Toronto (without an oral); J. Muir, Toronto; John Taylor, Ottawa; W. H. Fuller, Simcoe; John S. Ewart, Kingston; John L. Lyon, Ingersoll; D. T. Duncombe, Simcoe; J. C. Donaldson, Galt; W. McDowell, Kingston; W. H.

Bartram, London; J. Masson, Belleville; G. W. Badgerow, Toronto.

ATTORNEYS ADMITTED.

The following gentlemen were admitted as Attorneys:

Messrs. Alcorn, Crerar, Falconbridge, Duff, Secord, Lyon, Fuller (without oral), Moone, H. C. Gwyn, Greenlees, McCraney, Malone, R. Roblin, VanNorman, McDonald, Campaign.

Mr. Rowe also passed the examination, but cannot be admitted this Term, on account of a defect in the filing of his articles.

A word to the wise. There is such a thing as too much attention to external adornment, but we much doubt if this fault can be attributed to all of those who, during several Terms past, have presented themselves before the Courts to be sworn in as attorneys. This at least we know, that some of the judges have remarked upon the slovenly appearance of several of those who came before them. The occasion is surely of so much moment to those concerned—the commencement of a life long struggle for honor and distinction—as to call for a little extra neatness in attire; something we might suggest in accordance with what is expected of a barrister in court costume, with the exception of the gown and white necktie.

INTERMEDIATE EXAMINATION.

The intermediate examinations have resulted as follows:

Fourth Year.—Maximum, 240. Mr. Watson, 237; W. McDiarmid, 208; J. Roaf, 198; Crysler, 191; Robarts, 191; Luton, 191; S. S. Wallbridge, 191; Ball, 189; Payne, 184; Johnston, 182; N. N. Hoyles, 180; J. Barron, 175; Pousette, 174; Lloyd, 167; H. Hill, 163; Carman, 160; Bogart, 158; McPherson, 151; Brennan, 148; Mickle, 139; Malcolm, 135; Lees, 133; O'Brien, 124; R. Gamble, 122.

Third Year.—Maximum, 240. F. E. P. Pepler, 235; Dennistoun, 186; C. O. Z. Ermatinger, 176; Gordon, 173; T. Baines, 170; H. A. Reesor, 169; Kirkpatrick, 168; McKinnon, 163; McBride, 161; Ross, 159; Grote, 152; Lennox, 150; Murdoch, 147; A. E. Richards, 144; McDonell, 142; W. F. Burton, 133; T. Daly, 128.

These results are most satisfactory, and prove that the Act is accomplishing its purpose. We especially congratulate Messrs. Watson and Pepler on the stand they have taken — one which has never before been attained, and which reflects the very highest credit upon their ability and industry.

SELECTIONS.

CRITERIA OF PARTNERSHIP.

(Continued from page 123.)

A *community* of interest in the profits of a joint undertaking or business is said to be essential to the existence of a partnership; but this is true only so far as the manner in which the profits are taken serves to evidence and explain the contract between the parties. Profits being therefore the proper subject of partnership property, it is only requisite to inquire into the mode of participation, in order to determine whether the party interested is a partner or not. Suppose C. is suspected of being a partner with A. and B., by what proof is the fact established? A mere participation in the profits is not alone sufficient to charge him, for the *mode* of participation may be such as to prove directly the contrary. It must be shown that the supposed partner is in the same relation to the creditor that the known partners are; that is, they must all be immediate debtors to the partnership creditor for a joint benefit conferred simultaneously and directly upon them by the creditor. A. and B. are liable because they have received a benefit directly from the use of the creditor's property; and inasmuch as it is a joint benefit derived from a joint use and disposition of that property, the law attaches to them the joint liability of partners which, *ex hypothesi*, they have expressly assumed. Hence if C. can be shown to have a similar interest in the profits and thereby to sustain a similar relation to the creditor, it follows, as a matter of course, that he is liable in the same manner and to the same extent as the other partners are, and is himself a partner. In other words, the supposed partner must have the same privity of relation to the creditor that all the other partners have. And hence instead of saying "that he who shares in profits indefinitely, is liable as a partner to creditors, *because he takes from that fund which is the proper security to them for the payment of their debts;*" it seems more accurate to say—*because by having in the profits an interest similar in character to that of the other partner or partners, he has enjoyed a benefit conferred directly upon him by the creditor, and thereby through an implied contract, becomes as much his debtor, as the party or parties already known to be so indebted.*

How, then, is this privity to be ascertained? We answer—by showing that the profits are derived from a joint benefit moving *immediately* from the creditor to all the parties to be charged; or, what is the same thing, by proving that the interest of the party who ostensibly receives, and the interest of the party who actually shares the benefit or profits, are homogeneous;* that is, subsisting

* The words *homogeneous* and *homogeneity* strike us as far more accurate and convenient expressions for indicat-

in the same right and in the same subject-matter. Otherwise the contract cannot be presumed as between the supposed partner and the partnership-creditor.

The view here taken justifies the reasoning of Lord Eldon in *Ex parte Hamper*, 17 Ves. 404, where he makes a distinction between a stipulation for a proportion of the profits as a compensation for labor, skill or services, and an agreement to receive a sum of money equal to such a proportion of the profits and actually paid out of them; holding that the former constituted a partnership and the latter did not. And the distinction is obvious notwithstanding Mr. Justice Bramwell thought there was no "difference except in words, at least so far as creditors are concerned:" *Bullen* v. *Sharp*, L. R. 1 C. P. 126. The real difference consists in the different legal consequences of the two contracts. Where the agreement is to receive a proportion of the profits in consideration of services, these latter are to be regarded as component parts of the partnership stock belonging to, and being under the control of the firm, and the party who contributes them is thereby made a partner, in the absence of any special restriction to the contrary. While he labors to produce profits for others, he is at the same time producing them for himself and thus he has the same interest in his own services, as if he contributed only *money* to the partnership stock and bore his share of the expense which the firm would have to incur if it employed the labors of a hired servant, instead of his own. Moreover he derives his interest directly from the joint use of the partnership stock and is therefore an *immediate* debtor to the partnership creditor. But where it is expressly agreed that a sum of money *equal* to a proportion of the profits should be paid as a *reward* for services, the very words forbid the supposition of a partnership and merely provide a contingent measurement for the compensation to be paid, the payee not sharing the direct use and control of the partnership property, but receiving his interest through an intermediate party in whom the *ownership* had previously vested. And here we have an illustration of Mr. Parsons' favourite criterion of "ownership in the profits before they are divided" deduced from a rule which he himself denies.

But our conclusion as to the necessity of *homogeneity* in the interests of the parties as above explained, in order to create the partnership relation as to third persons as well as *inter se*, is only the ultimate development of the reasoning upon which the case of *Cox* v. *Hickman* was decided. The case was substantially as follows;—a manufacturing concern being heavily indebted conveyed all their property to trustees to carry on the business and out of the profits to pay off the debts. The trustees, in process of time, became involved, and *their* creditors attempted to fix a joint liability with the trustees upon the other creditors because they received the profits. But every consideration of common sense and common justice plainly urged the repudiation of a rule which led to so absurd a consequence, and the court realizing the necessity of finding some escape from its extravagant conclusions, boldly renounced and attacked the rule itself, holding that inasmuch as the trustees could not be regarded technically as the *agents* of the first creditors in contracting the subsequent liabilities, no partnership existed between them.

The necessity of founding the partnership liability upon a *direct and immediate contract* with the creditor, is thus distinctly recognised. The party to be charged *must* be shown to have made a contract, and if it does not appear that he contracted in person, the next naturally and logically is, did he make the contract through an agent? If neither, then he is not liable as a partner.

So there must be an *identity of relation* between the supposed partners in respect to the creditor, and hence the newly adopted rule requiries that the relation of principal and agent shall be *mutual*, so that the contract of one shall be the contract of both.

Whether the party actually contracting should be regarded as an agent *quoad hoc* is a question not more easily answered in many cases than the question of partnership itself, and herein, anywhere, the insufficiency of the rule is exposed.

Reasoning upon the principles which we have contended for above, in their application to the case in question, it would appear that the relation of the *first* creditors and that of the trustees to the *subsequent* creditors were entirely different, and the difference is too obvious to be specifically point out. The legal title and actual ownership of the profits was in the trustees intervening between them and the first creditors, and so the legal ownership of the profits was likewise in the trustees, before they were actually paid over to the beneficiaries under the deed. There was no immediate relation or privity, and consequently no contract between the first and second creditors because the benefit conferred by the subsequent creditors did not move *directly* but *mediately* through the trustees, to the former creditors. The interest of the first creditors and that of the trustees not being homogeneous, the relation of partnership did not exist between them.

As a matter of course, many of the old adjudications will be found erroneous in the light of these later decisions, but it is useless to go into a consideration of them. Mr. Parsons, after citing numerous cases, admits the very manifest "difficulty, if not impossibility, of drawing from the decisions any definite principle, or rule applicable with certainty to

ing the interest of partners than the words *common* and *community*, which are usually employed for that purpose. This may have been the idea of Mr. Parsons when he said "the distinction taken is between different *kinds* of interests in or claims upon profits:" Pars. Part. 75, in note.

the question, who are partners as to third persons?"

All the cases where there is no express contract of partnership among the parties, may be reduced to the following formula:—

A contract between A. and B., C., having a legal claim against A., assumes that B. is subject to the same liability by reason of his contract with A.:

In construing the agreement between A. and B., the real question is, whether or not it raises the presumption of a contract between B. and C. According to the rule of *Cox* v. *Hickman*, it must appear that A. was the agent of B. in contracting the debt to C., and the agency is sufficiently proven by showing that the trade carried on by A. was in fact carried on in behalf of A. and B. We think the proposition is better stated thus:—A. being indebted to C. for a benefit moving directly and simultaneously from C. to A. and B., the same cause which makes A. a debtor necessarily makes B. a debtor also, and therefore they are partners.

In *Hesketh* v. *Blanchard*, 4 East 144, Lord Ellenborough held, in accordance with the prevailing doctrines on the subject, that a man might be a partner as to third persons, though so far from being a partner with his immediate contractor, that he might bring an action against him on their contract. This class of cases is thus disposed of by Bramwell, J., in *Bullen* v. *Sharp*, *ubi sup.* 124:—"Partnership means a certain relation between two parties. How, then, can it be correct to say that A. and B. are not in partnership as between themselves, they have not held themselves out as being so, and yet a third person has a right to say they are so as relates to him? But that must mean *inter se*, for partnership is a relation *inter se*, and the word cannot be used except to signify that relation." Now the "relation *inter se*" must always depend upon the contract *inter se*, and place the parties in the same relation to the creditor, for otherwise A.'s contract with C. cannot be B.'s contract with C.

There is a class of cases where the contract between A. and B. (adopting the foregoing formula) is one of bargain and sale, and the stipulation for profits is only intended to designate a mode of paying the price. The case of the bargain for a house* stated by Mr. Parsons is one of this kind, and shows to what extravagant lengths the rule of *Waugh* v. *Carver* may be carried. The idea of a partnership between A. and B. in such a contract as this, we venture to say, would never have entered any reasonable mind that was not misled and prejudiced by the unwarranted significance with the word *profits* gradually acquired on the authority of judicial interpretation.

The case of *Barry* v. *Nesham*, 6 C. B. 641, may be cited an illustration, and the following arrangement will simplify the meaning of the contract.

1. There was a sale of a newspaper by B. to A. for £1,500, payable in seven annual instalments; 2. B. guaranteed A. a clear annual profit of £150; 3. A. agreed in consideration thereof to pay B. all the profits in excess of the £150, until they reached the sum of £500; 4. If the surplus profits should amount to £500 during the seven years the instalments had to run, then A. agreed to pay in addition to what he had already promised, the existing liabilities of the paper, not exceeding £250; 5. B. should receive such surplus profits only until they amounted to £500; 6. A. might pay off all the purchase-money, assume all the liabilities of the paper, and become entitled to all the profits at any time; 7. B. might withdraw his guaranty of £150 at any time.

The question was whether B. was liable as a partner for goods supplied to the newspaper on A.'s order, and the court held that he was, on the ground that he was still the *owner of the owner*, and *participated in the profits*, as stated in the opinion of Maule, J.

Now, if B. continued to own the paper there can be no doubt of his liability for its debts; but whether as a partner or not, is another question. For if there was no sale, A. was in fact nothing more than a "salaried agent receiving a definite sum out of the profits as a compensation for services," and in this case he could have no interest in the surplus profits. But it seems that there *was* a sale, that all the subsequent stipulations had reference only to the mode of payment, and that the surplus profits did actually go to help pay what A. owned B. Nor was payment confined to profits alone, for A. might at any time have paid the whole price and become entitled to all the profits, or B. might have withdrawn the guarantee, and in either case there would have remained a simple undisguised contract of bargain and sale. It was not even a conditional sale, for B. retained no ownership in or claim upon the newspaper, nor was there a provision that he should take it back in any contingency.

If he was a partner then, it was because of the agreement that a third of the debt (£500) might *possibly* be paid out of the profits, and we say possibly, for this part of the agreement might have been rescinded. Was the mode of participation viewed in connection with all the circumstances, such as to constitute a partnership between A. and B.? We conclude that it was not, and we do so with the less hesitation because the decision of this case was expressly founded on the principle of *Waugh* v. *Carver*. Wightman, J., in *Cox* v.

* If two men were bargaining for a house and the seller says, "Your business is so prosperous, you can afford to pay me all I ask;" and the buyer replies, "You mistake, the profits of my business are not so large as you think;" and the seller rejoins, "Well, I will, at all events, take one-fourth of your next year's profits for the house," and a written contract is executed on these terms, it would be simply absurd to contend that this sale of a house made the seller liable for all the business debts of the buyer: Pars. on Part. 71.

Hickman, said: "I great doubt whether the creditor who merely obtains payment of a debt incurred in the business by being paid the exact amount of his debt and no more, out of the profits of the business, can be said to share the profits;" and the proposition that if one "limits his claim to be paid out of profits only, his limited right to payment creates an unlimited liability" was pronounced by Pollock, C. B., in another case, "unjust, absurd and at variance with natural equity." These *dicta* seem to settle the rule which governs such cases. Here B. was in fact a creditor, not of the supposed firm, but of A. individually; the debt was not even "incurred in," but was preliminary to, the business, and the application of profits being for the payment of an existing debt, there was not such a participation as to establish the relation of partners, between A. and B.

Applying our own reasoning to the case, it appears that the interests of the parties in the profits were not homogeneous, for all the profits belonged primarily and exclusively to A., as the fruit of his own capital and labor. B.'s interest in the profits—if he can be said to have an interest therein—was the result of a distinct and independant contract with A. and not of any implied contract with A.'s creditor. Under the existing agreement B. had no lien on the profits, but only a right of action against A. for so much as they were worth; consequently these interests did not subsist in the same right or necessarily in the same subject-matter, and therefore there was no partnership between them.

There is a class of cases where the contract between A. and B. is continuous on both sides and contains a provision for the continued payment of profits. Here, as in other cases, the relation of the parties must be gathered from the whole contract, and not postulated by mere force of the word *profits*.

In *Ex parte Langdale*, 18 Ves. 300 (in terms of the formula), it appears that A., the bankrupt, had kept a canteen, and that B. was a manufacturer of beer. The statements of the parties were conflicting: A represented that half his shop-rent was paid by B. in consideration of A.'s paying him 17s. per barrel of beer out of the profits. B. stated that he paid half the shop-rent and A. in consideration thereof paid him £4 5s. per barrel for beer, while other customers paid only £3 8s. Lord Eldon sent the case to a jury to determine "whether this was an agreement for a division of the profits, or B. stood only in the relation of a vendor of beer to this retailer at £4 5s. per barrel, in consideration of paying half his rent, selling to others at £3 8s." Now, if we seek to apply the rule of *Cox* v. *Hickman* to this case, we find it just as difficult to say whether A. and B. were mutually principal and agent, as it is to decide as an original question, whether they were partners or not. We shall not undertake to solve the problem, but will leave it to suggest its own solution, in the belief that this article has already exceeded its proper limits.

The reasoning contained in the foregoing observations may not *always* be capable of easy and useful application, still there may be many cases in which it will facilitate the solution of the main question the lead to satisfactorily conclusions. And especially is this likely to be true in cases of annuities and loans, or in cases like that of *Cox* v. *Hickman*, where it may be important to show that the liability is completely exhausted in some intermediate party and consequently cannot reach beyond. For as we have seen, the person to be charged must be a party to a contract either express or implied, and where it is not expressed and cannot be inferred from the actual relations of the parties, there can of course be *no* contract and by consequence no liability.

S. D. Davies.

—*American Law Review.*

THE ELECTION BILL AND THE PROFESSION.

The ballot makes personation easy and detection difficult; it vastly facilitates the process of bribery, by removing the fear of discovery and punishment.

Bribery will not be prevented by merely moral influences—that is proved by all experience. No party hesitates to resort to it when necessary to success. No man, however virtuous in profession, was ever known to vote against his party because they were winning by corruption; he is content to share the spoils of victory and ask no questions. In very truth, nobody really looks upon it as a crime or upon a man who gives or takes a bribe as he views a thief. Everybody would prefer to win an election by honest means, but he would prefer to win by bribery rather than be beaten. Nothing but fear of the penalties really operates to deter, and even they go no further than to introduce more contrivance and caution in the conduct of the business. Whatever reduces the risk of discovery enormously increases the temptation alike to give and to take bribes.

It is scarcely denied that the ballot makes bribery comparatively easy and safe; but its advocates contend that, though it will not make men less willing to take bribes, it will make them less ready to offer bribes, because they cannot secure the fulfilment of the corrupt contract. Voters, it is said, will accept bribes from all, and promise all, and can only give to one; a man who will take a bribe will not hesitate to break his promise. This argument, however, assumes much that is not true in fact. The truth is, as our readers very well know, the great majority of the voters who take bribes perform their contracts faithfully. There is a strange point of honour among electors in this matter. They do not look upon the taking of a bribe as a moral, but only as a legal, offence; in their estima-

tion there is nothing wrong in it, and it is only a question of safety from penalty. They think it very wrong to break a promise, and not one in twenty of those who accept a bribe without shame and without the most severe pricking of conscience vote otherwise than they had agreed to vote for the consideration given.

It must not, therefore, be hoped for that bribery will be dimished under the ballot, because the buyer will be unable to secure the vote he has bought. Even if individual votes could not thus be counted on, another form of bribery, practised largely in America, will certainly be adopted here. Wherever the ballot exists, bribery is conducted thus: Clubs, workshops, societies of men, sell themselves, not individually, but in the mass. The negotiation is conducted between a trusted man on both sides. It is intimated that the society will vote together; what one does all do; little is said, but much is understood; signs are more expressive than words: under a stone in a field, in a hole in a hedge, the representatives of the society after the conference with the Man in the Moon find a certain sum of money. It is divided among the members, and the ballot of all is for the same man. If it be asked how they can be trusted, the answer is, that they well know that if they were to prove false they would soon spoil the market. But if there is a fear of such a consequence, the last resort is to buy conditionally that the buyer is returned,—the purchase-money not being paid till after the election.

This is not a theoretical evil, but one rampant at every election in the United States, and as familiar to the people there as was the head money to the electioneerers of twenty years ago in this country.

The ballot will practically extend the area of corruption by providing facility for concealment of the facts. It will create a new and large class of corrupt voters.

Our readers experienced in elections are well aware that there are many voters who would gladly take a bribe, but dare not do so for fear of discovery. They have been partisans their lives through; they are connected with some church or chapel; they have always worn one colour, or called themselves by one name; and they know well that, if they were to vote against the party they had been associated with, all the town would be assured, as if it had been done before the eyes of all, that they had been bought. But these men, and they are many, would gladly put money into their purses if they knew that they could do so without discovery, and this the Ballot will enable them to effect without possibility of danger.

But it is said the penalties for bribery will continue as before; why should they be less effective to deter or to punish?

For this reason—that the means of detection are immensely diminished. Bribery is usually discovered now by this; that certain persons who had promised one party, or who were usually attached to one party, are seen to vote for the other party. It is then well known what was the inducement, and every detective engine is set in motion to obtain proof of the fact. But where the vote is not known, this is impossible; the clue to the act of bribery is lost, and in practice there is perfect impunity.

This, too, is confirmed by the experiences of the Ballot in all countries. If bribery is to be employed, the Ballot makes it easy and safe, as, indeed, its advocates do not deny; they assert merely that no man will think it worth his while to spend money in purchasing votes which he cannot secure. The answer to this is given above, and as it is contended it will be here so is it actually found to be in the United States.

Thus we encourage increased bribery and extended personation, for what?—to prevent one elector in a hundred from being influenced to vote against his will. To protect one coward twenty honest men are demoralised. Surely this is paying dear for a trifling benefit.

We have already shown that the much desired object of the promoters of the Ballot—the exclusion of the profession from the conduct of elections—is impracticable. The considerations here suggested with respect to the encouragement and protection it will provide for bribery, fully support that view.—*The Law Times.*

ARREST BY OFFICER WITHOUT WARRANT.

No part of the law is of such importance as that which bears upon the security of life, and hence the vital importance of all that relates to the legality of arrests by officers without warrant, for in the struggles which occur death too often ensues, and the recent case before Mr. Justice Hannen, at the Hertford Assizes, illustrates the importance of the subject. To resist an officer who is lawfully attempting to execute a legal warrant is, of course, unlawful; and if the officer is killed it is murder, while if death is inflicted by him necessarily in enforcing the arrest or resisting attack, it is justifiable homicide. If an officer attempts to arrest unlawfully, either without any warrant at all (in cases where one is required), or with one which is invalid, the attempt is unlawful, and the same principle applies—that if he kills the person arrested, he is guilty of murder; while if the person arrested necessarily kills him in resistance and defence of his personal liberty, then, in like manner, it is justifiable: (*Simpson's case*, 4 Inst. 333; Cro. Car. 537.) It may be laid down as a broad principle that in no case will the law justify homicide unnecessarily inflicted. But, on the other hand, where the law justifies the use of force, it justifies the homicide necessarily and naturally resulting from that lawful use of force.

In the recent case the question arose thus:

The prisoner was indicted for the murder of a police officer. There was a warrant against the prisoner for misdemeanor, and the officer had been instructed to execute it. This of course must be taken to have meant that he was lawfully to execute it, and according to a case decided some years ago (*Galliard* v. *Laxton*, 31 L. J. 193, M. C.), it could not be executed by an officer who had it not with him at the time, in order to show it to the man and satisfy him as to the right to arrest him. The officer, though he knew of the warrant, had not got it with him at the time he met the prisoner, and, therefore, it is to be presumed, did not attempt to arrest him on it —for that which is unlawful is never to be presumed—and there was no proof that he did attempt to execute the warrant, though the case for the prisoner was based on the assumption that he did. It did not appear that he knew the man, and called upon him to surrender, or attempted to arrest him. All that was proved was, that he was seen to lay his hands on the pocket of the man, in which was a gun, and that is quite consistent with the idea that he acted under Poaching Prevention Act (25 & 26 Vict. c. 114), which gives a power of seizure under circumstances of suspicion; circumstances which existed in this case, as the man had just fired a gun off. However, the case for the prosecution was that the officer attempted an arrest under the warrant. There was a protracted struggle, in the course of which the man struck two blows with his gun, which proved fatal. The prisoner's counsel, at the close of the case, submitted that an attempt to execute the warrant was illegal, as the officer had it not with him, and the learned Judge so held. Then it was proposed to rest the case for murder on the power in the Poaching Act, but the learned Judge most justly held that the case for the prosecution could not now be re-opened and put upon an entirely new ground; but that it must stand as it did. Thus the case for murder failed, for, of course, as the case stood, the attempt to arrest being illegal, the man had a right to resist it, and thus the offence could not be murder. The learned Judge, however, still thought that it was manslaughter, and so no doubt it would be according to the decisions if the homicide were not necessary to the resistance. But the learned Judge left no question for the jury on that point, and treated it as a matter of law. And undoubtedly there are authorities, at all events *dicta* of eminent judges—one of which he quoted—which might appear to support his view; but on the other hand, there are authorities perhaps stronger still the other way, and they require to be carefully considered. The earliest case on the subject—that of the Pursuivant of the High Commission Court, in the reign of James I.—is very strong. There the officer was known to have a warrant, and showed it; but the person against whom it was directed drew his sword and killed the officer. And all the judges held that as the warrant was illegal, the act was self-defence, and the verdict was "not guilty:" (*Simpson's case*, 4 Inst. 333.) In another case, in the reign of Charles I., where the officer had a valid warrant, but attempted to execute it unlawfully, by breaking into a house, and the owner, against whom the warrant was executed, slew the officer; it was held manslaughter only, because he knew the officer, and that he had the warrant, but it was said that if he had not known his business it would have been justifiable: (Cro. Car. cited 1 Hale P. C. 458.) Now in the present case there was no evidence that the prisoner knew that there was a warrant against him, or that the officer had any authority to arrest him. And it appears that there were two struggles, and that the prisoner used no deadly weapon, but struck two blows with the butt end of his gun, flyng as soon as he could, leaving the officer alive and able to walk, and (as was admitted) having no idea that he had inflicted a mortal wound. On the whole, it is impossible not to see that according to the old law he would have been held justified.

There are, however, more modern authorities or *dicta* which require to be noticed, and to one of which—though not to the latest—the learned Judge referred. In one or two cases it has been said that it may have been so under the circumstances. In the case referred to by the learned Judge, where the man unlawfully arrested, without any attempt to resist by other means, stabbed the officer. Baron Parke said that it was manslaughter, and that if he had prepared the knife for the purpose it would have been murder: (*Reg.* v. *Patience*, 7 Car. & P.) But it is not easy to reconcile this with the older authorities, unless upon the ground suggested, that the use of the knife was not necessary for the purpose of resistance. It is to be observed, moreover, that in that case the officer did not die—the indictment was for cutting and wounding, and the very essence of the offence was the use of the knife, which, man against man, could hardly be necessary in the first instance.

There was, however, a very recent case, to which the learned Judge did not refer, and which appears to have put the question on a very sensible footing. In that case the Judge ruled that if the violence used to resist the unlawful arrest was no greater than was necessary for the purpose, it was justifiable; otherwise it was manslaughter (*Reg.* v. *Lockley*, 4 F. & F.). According to that ruling it ought to have been left to the jury whether the violence was greater than necessary to resist the arrest, and they ought to have been told that the man was entitled to resist the arrest by any means necessary for that purpose, and even to the extent of inflicting death, if the arrest could not otherwise be avoided. Whether in the case of a protracted struggle the infliction of two blows with the butt end

of a gun was a wanton excess of violence, would have been for the jury to determine; but it is to be observed that a man engaged in such a struggle cannot measure very nicely the force of a blow, and it was admitted by the prosecution that the man did not think he had killed the officer. It appeared also that he ran away, as soon as he could. The question is whether, under these circumstances, it was a conclusion of law that the effect of striking those blows was manslaughter.

No doubt the sufficiency of provocation is a question for the Judge. And the learned Judge treated it as a question of provocation. But was it not according to the authorities a question of justification? If so, then unless there was wilful excess the man was entitled to an acquittal. As it was, he had a sentence of fifteen years' penal servitude for a homicide in self-defence, just the same sentence which the learned Judge inflicted at Maidstone in a case of deliberate homicide out of revenge. Both cases were treated as cases of mere provocation, and the distinction as to the use of a deadly weapon with intent to kill was apparently overlooked. In the poacher's case, however, according to the authorities, there was a question of justification arising out of self-defence against illegal violence. If so, it is manifest that there is an inconsistency in the judicial *dicta* on this most important subject.—*The Law Times.*

CANADA REPORTS.

ONTARIO.

PRACTICE COURT.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

County of Frontenac v. City of Kingston.

Judgment Roll—Form of—Where issues of law and fact, and declaration held bad.

Where defendant obtains judgment in demurrer because of the insufficiency of plaintiff's declaration, although there are also issues in fact and demurrers to pleas, the judgment roll should contain only the declaration, demurrer and judgment, omitting all intermediate proceedings.

[Prac. Court, Mich. Term, 1870:—Hil. Term, 1871.]

During Michaelmas Term, 1870, *Harrison*, Q C. obtained a rule to set aside the judgment and judgment roll in this cause, on the ground that the roll was not a transcript of the pleadings, omitting the first, third, fifth and sixth pleas of the defendants and the issues in fact joined thereon: that those issues were never tried, and were still subsisting, nor were they struck out or disposed of, or in and by the judgment decided or determined; and that until the same were decided, defendants had no right to enter judgment on the said pleas; and also that as judgment was given against the plaintiffs on demurrer for insufficiency of their declaration, no judgment was given in favour of defendants on the demurrers to their pleas, the rule for judgment in no manner authorising judgment to be entered for defendants for sufficiency of their pleas; and that judgment for defendants should have been entered simply for insufficiency of declaration.

During the same Term, *D. B. Read*, Q. C., obtained a cross-rule to amend the judgment roll by inserting therein a full transcript of the pleadings, and a suggestion that the plaintiffs' declaration being held insufficient in law, it became unnecessary to try any of the issues in fact, and that the same ought not to be tried, and that defendant do go thereof without day, &c., or to that effect, or why the issues of fact in the record should not be expunged.

Both rules were argued at the same time.

Harrison, Q. C., for plaintiff.

Read, Q. C., for defendant.

Morrison, J.—It appears from the affidavits and papers filed, that the defendants demurred to the plaintiffs' declaration, and also pleaded several pleas. The plaintiffs took issue on all the pleas, and also demurred to the second, fourth and seventh pleas. Judgment was given for the defendants on the demurrer to the declaration, and a rule for judgment for defendants on demurrer was taken out and judgment entered. The judgment roll only contained the declaration, demurrers thereto and joinder, the pleas demurred to (omitting the first, third, fifth and sixth pleas,) the replication, taking issue on all the pleas, and the demurrers to the second, fourth and seventh pleas, and the joinder in demurrer. The roll ended thus: "It appears to the court here that the said declaration is, and the several counts therein are bad in substance," and these words were interlined, "and also that the second, fourth and seventh pleas are good in substance. Therefore it is considered that the plaintiffs take nothing, &c.;" and then follows award of costs of defence.

Now, it is clear that the judgment roll should be a transcript of all the pleadings; and although the books of practice and forms do not give any practical directions as to the way of making up the roll and entering judgment, in a case like this, when the court have determined that the plaintiff's declaration shows no cause of action, at the same time expressing their opinion that if the plaintiff had shown a cause of action, certain of defendants' pleas demurred to were good pleas. Yet it appears to me that, as the rule and practice is that the judgment shall be against the party who makes the first default, that where the plaintiff fails, as here, in his declaration, and judgment is against him, the same being final, no matter what may be the state of the subsequent pleadings, the final entry on the roll should be judgment for the defendant, on account of the declarations being bad in substance, taking no notice of the subsequent pleadings demurred to.

Then as to the issues in fact, as they appear on the roll, it seems to me that the mode of entry adopted in the case of *Robins* v. *Crutchley*, 2 Wils. 118, is the proper and most convenient way of disposing of them. In that case the roll, after stating that plaintiff's replication was insufficient, proceeds: "Therefore, no respect being had to the issues aforesaid above joined between the parties to be tried by the country; it is considered that the plaintiff take nothing by her said writ, &c." I therefore think that the entry on the roll, as to the second, fourth and

seventh pleas of the defendants being good in substance, ought not to have been so stated, as the defendants had final judgment on account of the plaintiffs' declaration being bad in substance, and that it should be struck out. This, I understand, was the main ground of complaint on the part of Mr. Harrison. If the defendants desire it, their rule to amend the roll shall be absolute, the defendants paying to the plaintiffs 25*s.* costs; such amendment to be made within two weeks. If the amendment be not made within that time, the plaintiffs' rule to be made absolute for setting aside the judgment with costs.

Grant v. Palmer et al.

Record—What it should contain—C. L. P. Act, sec. 77.

Issues in law having arisen on the same pleadings with issues in fact, the former, which had been already argued but not determined, were omitted from the *nisi prius* record.

Held, an irregularity in omitting these issues on which contingent damages might have been assessed; and plaintiff was ordered, after verdict, to amend the record by inserting them.

The question, how far the *nisi prius* record should be a full transcript of the pleadings, discussed.

[Practice Court, Hilary Term, 1871.

This was an action brought on a promissory note made by the defendant Winstanley, and endorsed by the defendant Palmer. The latter pleaded three pleas, on all of which the plaintiff joined issue, and demurred to the first and third. The defendant Winstanley, pleaded one plea, on which the plaintiff joined issue.

During this Term a rule was obtained calling on the plaintiff to shew cause why the record or paper writing purporting to be a record of *nisi prius* in this cause and the verdict rendered in favour of the plaintiff herein should not be set aside, either wholly or as against the defendant Palmer for irregularity, with costs, on the grounds that such record or paper writing, purporting to be a record of *nisi prius*, is irregular and defective as such, in that it is not a complete transcript or copy of all the pleadings in this cause, but wholly omits therefrom the demurrer of the plaintiff to the first and third pleas of the defendant Palmer herein, and the joinder in demurrer thereto; and also that such record contains no entry of any intended assessment of damages, contingent or otherwise, with reference to such demurrer, or why the verdict should not be set aside on the merits, and on other grounds disclosed in the affidavits and papers filed.

Harrison, Q. C., shewed cause.

The question of irregularity only can be raised in this court.

The demurrers were argued before the trial, and stood for judgment, and judgment has been given on them since the trial.

The jury had nothing to do with the issues in law, because the demurrers were to pleas on which issues in fact were also joined, and all the issues in fact were on the record: *Harrington* v. *Fall*, 15 U. C. C. P. 541; *Campbell* v. *Kemp*, 16 U. C. C. P. 244.

The record should be a copy of the issue book: *Doe* v. *Cotterell*, 1 Chit. Rep. 277; *Shepley* v *Marsh*, 2 Str 1131; and must be passed by the proper officer: *Reeves* v. *Eppes*, 16 U.C.C P. 137. The issue book must also be made up: *Jones* v. *Tatham*, 8 Taunt. 634.

He referred also to *Skelsey* v. *Manning*, 8 U. C. L. J. 166; *Patterson* v. *McCallum*, 2 U C. L. J., N. S. 70; *Wood* v. *Peyton*, 2 D. & L. 441; Har. C. L. P. Act, (2nd ed.), 643, note (*x*). 287, note (*v*); *Welsh et al.* v. *O'Brien et al.*, 29 U. C. Q. B. 474.

M. C. Cameron, Q. C., supported the rule. The question is, are the demurrers a necessary part of the record? If they are, they should have been on the record.

The Common Law Procedure Act, section 77, enacts, that every declaration or other pleading shall be entered on the record made up for trial.

Section 203 provides for passing the record by the clerks of the crown or his deputy, and that it shall be signed by him.

The issue book is required to be made up only by rule of court.

The judgment roll is made up from the *nisi prius* record. The latter therefore should contain a full transcript of the pleadings. The practice is clear on that point: Arch. Pr., 12th ed., 929; Impey's Pr. K. B., 6th ed. 358; *Ferguson* v. *Mahon*, 2 Jur. 820.

Wilson, J.—In 2 Lush's Pr. 537-538, it is said if the record be right proceedings will not be set aside because the issue book is wrong: Bagley's New Pr. 165; Tidd's New Pr. 476; *Codrington* v. *Lloyd*, 8 A. & E. 449.

The defendant, it is admitted, is estopped from complaining of the defective issue book, but still the record has to be made up, passed and signed by the officer of the court.

The officer knows nothing of the issue book, he must make up or pass the record from and by the original pleadings on his file, which he has not done. The issue book is only a collateral proceeding.

The case in 15 U. C. C. P. 541, applies only to actions of ejectment, which are regulated by a practice under the special statute applicable to them.

It is said that a plea in abatement, on which judgment of *respondeat ouster* is given, is not entered on the roll: *Pepper* v. *Whalley*, 4 A. & E. 90; *Dubartine* v. *Chancellor*, 1 Ld. Ray. 329; 5 Mod. 399, and 12 Mod. 190.

In 1 Sellon's Pr. 425-429, it is said that all the pleadings in the cause must be regularly entered *verbatim* on the *nisi prius* record, and if there are proceedings on demurrer they must be set forth.

By Tidd's Pr. 9th ed. 775, the *nisi prius* record contains an entry of the pleadings, &c., as in the issue or paper book; and (p. 722) the issue book must contain all the issues in fact and in law.

By the present English practice it is a copy of the issue as delivered in the action which must contain the whole of the proceedings.

By section 203 of the Common Law Procedure Act the *nisi prius* record is to be passed and signed by the officer of the court in whose office the same is passed. The *nisi prius* record is referred to as a well known proceeding, and it is not said what it shall contain.

In *Pepper* v. *Whalley*, 4 A. & E. 90, the court

refused to set aside a verdict because the *nisi prius* record did not contain an entry of the plea in abatement on which a judgment of *respondeat ouster* had been given, because such proceedings were by the subsequent pleadings wholly immaterial.

In *Wadsworth* v. *Brown*, 3 Dowl. 698, the court made absolute a rule for a repleader, or for the plaintiff to amend, setting aside the verdict, when the plaintiff to a plea concluding with a verification, had not taken issue, but had only added a similiter.

In *Codrington* v. *Lloyd*, 8 A. & E. 449, there were issues of law and in fact. The plaintiff had got judgment on the issues in law. He then delivered the issue and notice of trial. The award of jury process in the issue was that the jury were to try the issues in fact, and not to assess the damages on the demurrer. It was contended that as the issues in fact went to the whole cause of action, the jury would of course assess damages on the whole cause of action, and so a direction to them to assess the damages on the demurrer was unnecessary. Lord Denman, C. J., apparently assented to that argument, if there had been no judgment on the demurrer, and if the damages had to be assessed contingently, for he says (p. 456), "This argument is quite just in the event of the jury finding for the plaintiff; but if they should find for the defendant it is still possible that the plea may be held bad, and that the court may give judgment for the plaintiff notwithstanding the verdict; if they should do so, and also give judgment for the plaintiff on the demurrer, he will be entitled to damages, and a second jury must be summoned to assess them. . . . . And as there is a possible state of circumstances which may lead to the necessity of summoning a second jury, if that form be not adopted (*i. e* to award a *venire tam quam*), this issue is incorrect in not adopting it."

In the case referred to there could have been no assessment of contingent damages, even if judgment had not been given on demurrer, if the plaintiff failed on the issues in fact.

That case is then an authority that a general venire to try the issues in fact will be sufficient, although there are issues in law on the record, if judgment has not been given on them, and if the issues in fact go to the whole cause of action. It is very strongly an authority by implication also, that the issues in law must be actually entered on the record, so that damages may be assessed on them, contingently or otherwise, according to the fact. In *Ferguson* v. *Mahon*, 2 Jur. 820, a notice of trial was set aside because the issue book had been made up and served, omitting the issue in law. The court will not, when damages have not been assessed at the trial, award a writ of enquiry—it must be a *venire de novo: Clements* v. *Lewis*, 3 B. & B. 297.

It is the duty of the attorney in the cause to make up the record, and it is quite clear that the issues in law as well as in fact should have been entered, and that the officer of the court should not have passed and signed the record in its present form.

In this case the cause of action is founded on a promissory note made by Palmer, payable to his co-defendant Winstanley. Winstanley pleaded payment. Palmer pleaded three special pleas on which the plaintiff joined issue, and the plaintiff demurred to the first and the third pleas of Palmer. The plaintiff succeeded on all the issues in fact, so that the issues in law are of no moment, excepting as to costs, and since the trial the court has given judgment for Palmer on the demurrer to his first plea, and for plaintiff on his demurrer to Palmer's third pleas.

If judgment had been given before the trial for the plaintiff, on the demurrer, he should have entered it to have an assessment of damages, for, as in *Codrington* v. *Lloyd*, 8 A. & E. 449, the plaintiff might have failed in the issues in fact, and then he would be obliged of necessity to assess his damages on the issues in law. That would have been an argument against allowing the cause to go to trial, under such circumstances as in the case just referred to. But is it any argument after the trial has taken place, and the plaintiff has succeeded on the issues in fact and assessed thereon all the damages he can ever get? I am not satisfied that it is. As judgment was not given on the issues in law at the trial, the case stood thus. If the plaintiff succeeded on the issues in fact, he would get his damages assessed thereon, and as much as he could ever get even if his issues in law had been there as well. But the defendant might have succeeded on one or two of the issues in fact, and the plaintiff on the third issue, or the defendant might have succeeded on all three of his issues in fact, and the plaintiff on the issue of fact joined with Winstanley; in any of which cases the plaintiff should have been in a position to have assessed his contingent damages, so that if he got judgment afterwards on the demurrer, there would have been no necessity for any new assessment of damages to be made. It so happens that the result of the trial has not made a *venire de novo* necessary. But as a matter of practice is it expedient that causes should be so dealt with that they should be taken down to trial in this imperfect and improper manner? I do not think it is.

If this were an application before trial to set aside the notice of trial and the service of the issue book, I should certainly, on the express authorities before referred to in 8 A. & E. 449, and 2 Jur. 820, be obliged to do so, for the mischief apprehended might happen. Here, however, the trial is over and no mischief has happened. No new assessment of damages is required.

I am desirous to sustain the proceedings if I can; yet I am afraid of introducing a confusion and laxity of practice that may be very embarrassing.

The amendment too might have been made at the trial. Nothing has been said of waiver by not being objected to at the trial. Perhaps it might have been useless, as the cause was tried in the County Court. I think it can only be properly cured by amending the record now, if it is an amendment which I ought to make. It is true, as Williams, J., said, in *Ferguson* v *Mahon*, 2 Jur. 820, "Throwing a demurrer at the jury does not appear to be of much use, however ancient the practice may be." But there is

nevertheless an order, regularity and certainty that must be observed, for the very purpose of facilitating and expediting business.

On the whole, though with some doubt and hesitation, I think I should now amend this record by making it as it should have been, as the same assessment that was made will enure to the benefit of the plaintiff on the issues of law that have since been disposed of in his favour.

This defective record, which was and must have been passed and signed by the deputy clerk of the Crown, may be considered to have been the act of the officer of the court, just as the writ in *Reg.* v. *Conyers*, 8 Q. B. 981, was deemed to have been drawn by the officer of the court, and the defect to have been by his misfeasance, though he only sealed it, and it was drawn and settled in fact by a special pleader, whose mistake it really was. The plaintiff must however pay the costs of this application.

The rule will therefore be discharged on condition of the plaintiff amending the *nisi prius* record *nunc pro tunc* within two weeks, and upon paying to the defendant, Palmer, the costs of this application, or upon amending within two weeks after Palmer shall have filed his co-defendant's consent to the amendment being made; and, if Palmer shall not so file such consent within two weeks from this time, this rule will be discharged without costs, as Winstanley should properly have been called on by the rule to shew cause as well as the plaintiff.

Rule discharged as above.

MUNICIPAL CASE.

Reg. ex rel. Coyne v. Chisholm.

Municipal Election—Right of candidate to resign—C. S. U. C. c. 54, sec. 97, sub-sec. 5—Municipal Act of 1866, sec. 110, sub-sec 6, and sec. 113.

A candidate for the office of reeve, who is proposed and seconded at the nomination meeting, may, with the consent of his proposer and seconder and of the electors present, withdraw from his candidature.

A voter, who nominated another for a municipal office, having at the meeting permitted his candidate to retire from the contest, without expressing at the time any objection to his withdrawal, cannot afterwards insist upon having the name of his nominee published in the list of candidates, or entered as such upon the poll book.

[Chambers, Feb. 10, 1871,—*Mr. Dalton.*]

The statement of the relator complained that Kenneth Chisholm had not been duly elected, and usurped the office of reeve of the village of Brampton, under the pretence of an election held on the 2nd January, 1871.

The grounds stated were: that at the nomination the said Kenneth Chisholm, Jacob P. Clark, James Fleming, John Haggart, and the relator, were duly proposed and seconded as candidates for the said office of reeve, and that no other candidates were proposed within one hour after the meeting of the electors for the said nomination: that the said John Haggart was proposed for the said office by the said Kenneth Chisholm, and seconded by the said relator: that no one of the said persons so nominated retired or withdrew from the said nomination within one hour from the time the said meeting was held and the said nominations were made: that no poll was demanded for the said office of reeve, but a poll was granted and allowed by the said returning officer: that a show of hands was called for on behalf of John Haggart, and a large majority of the electors present appeared to be in his favor: that the said John Haggart then said (but after a considerable number of the electors who had been present had left the meeting) that he would retire from and not contest the said election: that the relator, who was his seconder on his said nomination, never consented to the retirement of the said John Haggart, and on the day following the said nomination informed the said returning officer that he must post up the name of John Haggart as one of the persons proposed as reeve, as he, the relator, insisted that Haggart should be voted for at the election: that John Haggart himself notified the said returning officer, two days before the election, that he was a candidate for the said office, and requested the returning officer to enter his name on the poll-book as a candidate: that the returning officer did not post up in the office of the clerk of the said village, or anywhere else, the name of John Haggart as one of the persons proposed as reeve, but refused so to do, and his name was not at any time so posted up: that on January 2nd, the day of the said polling, John Haggart presented himself as a candidate to the returning officer: that the returning officer would not place the name of the said John Haggart in his poll-book as a candidate for reeve, and would not record any votes for him, although many (some eighty-two) were tendered for him; and that if the returning officer had received votes for John Haggart, he would have been elected reeve of the said village, instead of Kenneth Chisholm, who was declared duly elected.

The returning officer, in his affidavit, swore as follows:

1. "That I was chairman of the meeting of electors held in the village of Brampton, on the 19th December last, for the nomination of candidates for the office of reeve, and I took the chair thereat at noon of the said day; and in the course of an hour thereafter, five candidates, being the same as are mentioned in the statement of the relator herein were duly nominated for said office; and after such nominations they all addressed the electors present at the meeting; and John Coyne, the said relator, and James Fleming, and John Haggart, at the close of their respective addresses, declared that they were not candidates for the said office, and withdrew from the contest therefor; and as each of them did so, I struck his name off the list of candidates for said office; and no person present at said meeting made any objection to the withdrawal of the said candidates; and although the relator was present at said meeting, and knew of the withdrawal of said Haggart and the said other candidates, he did not object thereto; and I believe the said relator and the said John Haggart also believed at the time that all the said withdrawals were complete abandonments of their candidatures by said parties.

2. "After the said relator and the said John Haggart and James Fleming had withdrawn as aforesaid, I read out the names of the defendant

and Jacob Paul Clark as the candidates for the said office (the relator being present and making no objection), and I adjourned the meeting to 2nd day of January, stating at the time that the candidates for the said office who remained on the list after the said withdrawals, were the defendant and said Clark.

3. "That there was no show of hands called for said candidates; but the said John Haggart, in his address to the electors, stated that if he was to be opposed, he would not contest the election; and in order to see what opposition he would be subjected to, he called on those who were in his favor as against Mr. Clark (who was thought to be the only person who would contest the election with him), to hold up their hands; but only a small proportion of the electors did so, and the majority of those who did, were in favor of said Haggart; and he then asked Clark if he intended to contest the election with him, and Clark said he did; whereupon the said John Haggart announced that he withdrew from the contest, and desired me to strike his name from the list of candidates, and I did so.

4. "All the proceedings aforesaid took place at said meeting, and were part of the proceedings thereof, before I announced that the only candidates standing were the defendant and said Clark; and no one made any objection to said proceedings or to any of the said withdrawals; and the relator was present during the whole time."

R. A. Harrison, Q. C., and *J. K. Kerr*, showed cause.

1. Though at first a candidate, yet, under the authorities and the circumstances of this case, Haggart was not, at the close of the nomination, a candidate.

2. The relator acquiesced in the withdrawal, and cannot now be heard: *Reg. ex rel. Rosebush* v. *Parker*, 2 U. C. C. P. 15; *In re Kelly* v. *Macarow*, 14 U. C. C. P. 457; *Reg. ex rel. Bugg* v. *Bell*, 4 Prac. Rep. 226.

3. Where there is no probability shown that a new election would make a change in the person elected, mere irregularity is no ground for setting aside the election. See *Morris* v. *Burdett*, 2 M. & S. 212; *Reg. ex rel. Charles* v. *Lewis*, 2 Ch. R. 171; *Reg ex rel. Walker* v. *Mitchell*, 4 Prac. Rep. 218.

J. H. Cameron, Q. C., and *Dr. McMichael*, supported the summons, citing *The Queen* v. *Mayor of Leeds*, 11 A. & E. 512; *Reg.* v. *Bower*, 1 B. & C. 585; *Reg.* v. *England*, 2 Leach, C. C. 767; *Reg.* v. *Woodrow*, 2 T. R. 731; *The King* v. *Burder*, 4 T. R. 778; Comyn's Digest, Title Indictment, D.; Municipal Act of 1866, sec. 186; Har. Mun. Man. p. 91; *Reg.* v. *Mooney*, 20 L. T. Q. B. 265; *The Queen* v. *Preece*, 5 Q. B. 94.

Mr. Dalton.—Upon the objection, which has been urged, to the defendant's election as reeve of Brampton, I will read the affidavit of Mr. McCulla, the returning officer, as containing a statement of the facts upon which I act. Mr. McCulla is in an official position, independent of both parties, and gives a very clear statement of what occurred, which I have no doubt is quite correct. Indeed I do not know that there is any dispute at all as to what took place at the nomination. He says: [Mr. Dalton here read the extract from the affidavit of the returning officer, which is given above.]

It seems to me to be very clear, whatever may be the derivation of the word, that a "candidate," in the sense of the statute, is one put forward for election, no matter whether with or against his own will; from which it would seem to follow that he cannot, without the assent of others, resign. His assent is not necessary to his candidature, but he must have a proposer and seconder. He need not be present at the meeting, and his dissent from the proceeding is unavailing.

But the question is, can a candidate, once nominated, be withdrawn? It is difficult to comprehend why this cannot be done before the close of the meeting, with the assent of all concerned; for every one then acts of his own free will, with a full knowledge of the facts. Contracts can be dissolved by the will of those who made them. There are exceptions, but it is *generally* true; and it is the *general* rule that the legal effect of all action may be annulled or reversed by the common agreement of *all* who are concerned. Why then, before being acted on, cannot a nomination be withdrawn, as here, by the candidate himself, his proposer and seconder, and the electors present? It is true that the clause of the Act does not speak of any power of resignation or withdrawal, but directs that the poll-book shall contain the names of the candidates "proposed and seconded," which no doubt means the names of *all candidates* proposed and seconded. But the answer to this seems to be, that when the nomination is withdrawn at the meeting by the agreement of every one affected by the nomination or withdrawal, it is as though that candidate had never been proposed and seconded at all; for he does not continue to be to the close of the meeting, and is not then, a "person proposed" for the office. That this is the construction put upon the statute in practice, is very clear; for nothing is more common than for a number of candidates to be proposed, where there is no intention on the part of any one that they should contest the election; and upon their withdrawal, it has never, that I know of, been suggested until now, that it may be demanded, after the meeting, that their names shall be entered in the poll-books.

From the nature of the proceeding, the electors and the returning officer are entitled to know, at the close of the meeting, who are the candidates; for in case there is but one candidate, the returning officer is to declare him elected; and in case there are more candidates than one, the returning officer, on the day following the nomination, is to post up the names of the candidates. So that I do not understand how Mr. Haggart's or Mr. Coyne's communications with the returning officer after the nomination day can affect this proceeding. But suppose the first case had happened, and Mr. Chisholm had been the only candidate remaining; then the returning officer, with the assent of all the other candidates, their proposers and seconders, and of the electors present at the meeting, would on the spot have returned Mr. Chisholm as reeve. If it is asserted that an election so conducted would be void, I must say that only judicial decision could make me assent to it. I have been speaking of the statute as though the relator here were an elector, not present at the meeting, who had afterwards voted at the election for Mr.

Haggart. His position would, in my opinion, be very different from that of Mr Coyne; for if I am wrong in supposing that the proceedings at the election were legal, there are still reasons which apply *ad hominem* to prevent Mr Coyne from setting up the objection. It was urged, upon the argument, that this proceeding was so much in the interest of the electors, that the truth of the facts must alone be regarded, and that the conduct of the relator or of Mr. Haggart could not here be set up to exclude the truth. But the cases cited by Mr. Harrison and Mr. Kerr are quite clear on the point that the conduct of the relator may waive objections otherwise good, or may estop him from alleging them. Indeed he is regarded as any other plaintiff, claiming in his private right.

Now, Mr. Coyne was present throughout the whole proceedings at the meeting. He must have heard the withdrawal of all the candidates but Mr. Clark and Mr. Chisholm; he must have heard the returning officer announce that they were the only candidates remaining; and yet he allowed the meeting to close—all present supposing such to be the fact—without expressing objection or dissent. I think he must be bound by the rule in *Pickard* v. *Sears*, 6 A & E 649, and the kindred cases. Surely this is estoppel by conduct. It is very easy to suppose cases where such a course would completely throw the electors—especially those opposed to Mr. Haggart—off their guard, if they were to find, the next morning, that Mr. Haggart was still in the field. I think the course taken in this election was legal; and that if otherwise, neither Mr. Haggart nor Mr. Coyne can be heard to urge this objection. I think there should be judgment for the defendant with costs.

ENGLISH REPORTS.

EXCHEQUER CHAMBER.

Brook v Hook.

Ratification—Forged instrument, adoption of.

A forged instrument cannot be ratified by the person whose name is forged, and he cannot adopt it so as to make himself liable thereon.

J. owned the plaintiff £20, and sent to him a promissory note for that amount, which purported to bear, and was believed by the plaintiff to bear, the signatures of J. and the defendant, who was J.'s brother-in-law.

Before the note became due the plaintiff met the defendant and mentioned the note to him. He denied the signature to be his, and the plaintiff thereupon said that it must be a forgery of J.'s, and he would consult a lawyer with the view of taking criminal proceedings against him. The defendant begged the plaintiff not to do so, and said he would rather pay the money than that the plaintiff should do so. The plaintiff then said that he must have it in writing; and that, if the defendant would sign a memorandum, he would take it. The defendant thereupon signed a document admitting himself to be responsible to the plaintiff for the amount of the note.

Held (by Kelly, C.B., Channell and Pigott, BB.), first, that the foregoing document was no ratification of the forged promissory note, but an agreement on the part of the defendant to treat the note as his own and to become liable upon it, in consideration that the plaintiff would forbear to prosecute J., and that this agreement was against public policy and void, as founded upon an illegal consideration; and, secondly, that the foregoing document was no ratification, inasmuch as the act done—that is, the forged signature to the note—was illegal and void, and that, although a voidable act might be ratified by matter subsequent, it was otherwise when an act was originally and in its inception void.

Held (by Martin, B.) that the above document was a good and valid ratification of the forged note, and that the defendant was liable to pay to the plaintiff the amount thereof.

[19 W. R. 508.]

This was an action upon a promissory note for £20. The defence was that the defendant's signature was a forgery. A verdict having been entered for the plaintiff, a rule *nisi* was obtained for a new trial. The facts of the case are fully stated in the judgments delivered by Kelly, C.B., and Martin B

Kingdon, Q. C., A. J. H. Collins, and *R. D. Bennett* showed cause —The plaintiff is entitled to the verdict. [Pigott, B.—Can a forgery be ratified?] The forged signature was an act done for the defendant within the principle laid down in Tindal, C J., in *Wilson* v *Tumman*, 6 M. & G. 242. [Kelly, C. B.—This was not an act done on the defendant's behalf.] In Byles on Bills, p 200 (10th ed.), it is said:—"If the drawee has once admitted that the acceptance is in his own handwriting, and thereby give currency to the bill, he cannot afterwards exonerate himself by showing that it was forged:" *Leach* v. *Buchanan*, 4 Esp 226. [Kelly C B—How was the plaintiff's position altered?] The principle of *Reg* v. *Woodward*, 31 L. J. M C 91, 10 W R. 298, applies to this case: it shows that there may be a ratification of a felonious act [Kelly, C B—In that case the ratification itself was a felony.] It seems to be admitted in *Wilson* v *Barker*, 4 B. & Ad 614, that in some cases a person by ratification may become a trespasser: *Bird* v *Brown*, 4 Exch. 786. It is clear from 2nd Greenleaf on Evidence par 66, p 50, that slight evidence of ratification is sufficient If the question what was the intention of the defendant at the time of signing the document of December 17 were left to the jury, they ought to be called upon to construe wills and deeds. In construing a document the Court may look at the surrounding circumstances: *Heffield* v. *Meadows*, L. R. 4 C. P. 595.

Lopes, Q. C. and *Poole*, in support of the rule —There can be no ratification of the forged signature, because the defendant and Jones did not stand in the relation of principal and agent: Story on Agency, s. 251 a (7th ed.). The defendant relies on the maxim there cited—*Ratum quis habere non potest, quod ipsius nomine non est gestum.* The judgment of Holroyd, J., in *Saunderson* v. *Griffiths*, 5 B. & C. 909, supports the defendant's contention. (They cited also *Routh* v *Thompson*, 13 East. 274; *Lucena* v. *Crawford*, 1 Taunt. 325; *Hagedorn* v. *Oliverson*, 2 M. & S. 485. The plaintiff's position was not altered after the document of 17th December was signed by the defendant, and the rule in *Pickard* v. *Sears*, 6 A. & E. 469, does not apply. It is clear from Story on Agency, ss. 240 and 241, that a felonious act being void cannot be ratified. The case of *Wilkinson* v. *Stoney*, 1 Jebb & Symes, 509, decided in the Court of Queen's Bench in Ireland, is conclusive in the present case, and shows that it was for the jury to say with what intention the document of December 17th was signed by the defendant. There is no

estoppel upon the defendant: *Heane* v. *Rogers*, 9 B. & C. 577.

Cur. adv. vult.

Jan. 27.—The following judgments were delivered:—

Martin, B.—This was an action upon a promissory note, tried before me at the last Bristol Assizes. The note was dated 7th November, 1869, whereby the defendant and one Richard Jones jointly and severally three months after date purported to promise to pay the plaintiff or his order £20 for value received. The plea traversed the making of the note. The plaintiff was called as a witness, and stated that in July, 1868, Richard Jones applied to him for a loan of £50, and told him that the defendant Hook (who was his brother-in-law) would join him in a note as surety; that a note was given to him purporting to be signed by the defendant and Jones, which was renewed and partly paid off; and that upon the 7th November, 1869, there was £20 remaining due; that upon that day he received by post the note sued upon, and believed the signatures to be those of the defendant and Jones; that upon the 17th December, 1869, whilst the note was current, he saw the defendant and showed the note to him, and said that the note purported to be signed by him; that the defendant denied the signature to be his; that the plaintiff said that if so it must be a forgery of Jones', and that he would consult a lawyer with the view of taking criminal proceedings against him; that the defendant begged him not to do so, and said he would rather pay the money than that he should do so; that the plaintiff then said he must have it in writing, and that if the defendant would sign a memorandum to that effect he would take it, and that the defendant then signed a memorandum as follows:—"Memorandum that I hold myself responsible for a bill dated November 7th, 1869, for £20 bearing my signature and Richard Jones' in favour of Mr Brook. Richard Hook. December 17th, 1869." That when the defendant signed the document the plaintiff understood the defendant denied the signature to be his; that he only knew the defendant from what Jones had said of him, and that he had no idea the note was a forgery until he saw the defendant. This was the plaintiff's case, and the learned counsel for the defendant proposed to call the defendant to prove that the note was a forgery, and that his name was forged. I stated that, in my opinion, that was an immaterial circumstance, and that if the defendant signed the memorandum of the 17th December the plaintiff was entitled to the verdict upon the issue joined, and that it was for me, and not for the jury, to determine what was the construction of that document. Thereupon the verdict was entered for the plaintiff, and I stayed execution until the fourth day of the following term. A rule has been obtained for a new trial upon the following grounds:—First, that the verdict was against the evidence; and, secondly, for misdirection, viz., that the judge directed the jury that the only question for them was, whether the memorandum of the 17th December was signed by the defendant. The statement as to my direction is substantially correct, and if I was wrong in holding that the signing and making by the defendant of the memorandum of the 17th December entitled the plaintiff to the verdict upon the issue joined, the defendant is entitled to have the rule made absolute, and to have a new trial. In the argument I asked the learned counsel for the defendant what he deemed to be the proper direction to the jury, and he stated it ought to have been as follows:—"That, having regard to what took place, and the circumstances under which the memorandum was given, the jury ought to have been asked whether the defendant intended to ratify and confirm what had been done by Jones in forging his name, or whether he intended to guarantee the payment of the note." Now I am of opinion that I could not lawfully have submitted this question to the jury; in the first place, I am of opinion that when the defendant signed a memorandum professing to be an entire and complete writing evidencing a transaction, the true construction of that document and not his intention other than shown by the writing, is the true test; and, further, that it is a matter of law for the judge to construe the document and its construction was not matter to be submitted to the jury. A case was cited from an Irish report, *Wilkinson* v *Stoney*, 1 Jebb & Symes, 509, showing that under the circumstances in that case there was a question for the jury. I have no doubt that the case was rightly decided; but there the writing was a letter, and there were other facts bearing upon the transaction; but the present was the case of a single writing made for the purpose of evidencing a transaction, and I entertain no doubt that such a writing is to be construed by the judge and not by the jury: if it were not so, there would be no certainty in the law; and, secondly, that there was no evidence that the document was a guarantee or intended to be a guarantee, but merely was intended to show that the defendant was responsible upon the note. I am therefore of opinion that I would have acted erroneously if I had submitted the above question to the jury. And I remain of opinion that under the circumstances of this case the only question for the jury was whether the memorandum of the 17th of December was the memorandum of the defendant, and that my ruling was right; that if it were, it was a ratification of the contract made in the name of the defendant, and binding upon him upon the legal principle that *omnis ratihabitio retrotrahitur et mandato æquiparatur*, Co. Litt. 207. I apprehend that the circumstance of Jones being a party to the note is immaterial, and that the question is the same as if the note were several and the defendant's name alone on it; and in my view of the case the facts may be taken to be that upon the morning of the 17th of December the defendant was not liable upon the note, because his signature was forged; that the plaintiff took and held the note believing that the signature was a genuine one, and that the contract to pay purported to be the contract of the defendant, and that the defendant, upon the statement that a lawyer would be consulted as to the criminal responsibility of Jones, signed the document of the 17th of December. In my opinion this was a ratification within the meaning of the above maxim, and rendered the defendant liable to

pay the note. A ratification is the act of giving sanction and validity to something done by another. Jones purporting to utter an obligatory and binding security had given to the plaintiff the note bearing the defendant's name, and the defendant by the writing signed by him declared that he held himself responsible upon it, it bearing his signature, and if that was not giving sanction and validity to the act of Jones in delivering the note so signed to the plaintiff, I am at a loss to know what a sanction or ratification is; to say it is not seems to me a plain misconstruction of a written document or the denial of a self-evident proposition. Suppose nothing had been said as to criminal proceedings against Jones, and that the defendant upon being shown the note by the plaintiff had merely said:—"The writing is not mine; but I am responsible for it;" can any one doubt that the maxim would have applied, and that the defendant would have ratified the transaction? It is so stated by Burton, J., in the case of *Wilkinson* v. *Stoney*, before cited, and he was one of the most eminent of modern lawyers. Then does the circumstance that the plaintiff said that he would consult a lawyer in regard to criminal proceedings against Jones make any difference? I think not. A ratification of a contract is not a contract; it is an adoption of a contract previously made in the name of the ratifying party; the contract, if a simple contract, must have been made upon a valuable consideration; if it were not, the adoption or ratification of it would be of no avail. This is the true meaning of the sections cited by Mr. Lopes from Storey on on Agency. If a contract be void upon the ground of its being of itself and in its own nature illegal and void, no ratification of it by the party in whose name it was made by another will render it a valid contract; but if a contract be void upon the ground that the party who made it in the name of another had no authority to make it, this is the very thing which the ratification cures, and to which the maxim applies *omnis ratihabitio retrotrahitur et mandato æquiparatur*. No words can be more expressive; the ratification is dragged back, as it were, and made equal or equipollent to a prior command. A ratification is not a contract and requires no consideration. It was so said by Burton, J., in the case before referred to. A contract that in consideration that the holder of a promissory note would not prosecute a man for the felony of forging a name to the note, the defendant would pay the note or guarantee the payment of it may be illegal and void; but there was no evidence of such a contract even in words in the present case, and if there were, there would be a legal principle to prevent its operation, for the written memorandum was made and signed for the purpose of evidencing the transaction, and there is not a word of contract in it either on behalf of the plaintiff or indeed of the defendant; it is what it was intended to be—a ratification or adoption by the defendant of the signature and contract made in his name, it may have been by a forgery or it may have been under circumstances which would not have justified a conviction for that offence. For the purpose of my judgment I assume it was a forgery, for which Jones might have been convicted. The case of *Wilson* v. *Tumman*, 6 M. & G. 236, was cited on both sides; it is a case of great authority, and is a considered judgment. It is there laid down "that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him; in such case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be found on a tort or contract, to the same extent and with all the same consequence which follow from the same act done by his previous authority." Several other cases were cited to the same effect, but there is no doubt about it. Tindal, C. J., lays it down as the known and well-established rule of law, and, as it seems to me, it is conclusive in favor of the plaintiff in the present case. But it was said that a forged signature cannot be ratified or condoned as regards the forger; but there is no authority whatever to distinguish the ratification of a parol contract and of a written one made by one person in the name of another without authority. Tindal's, C. J., expression is "made without any precedent authority whatever," which would clearly include a forged document. There is in Broom's Treatise on Legal Maxims, p. 867, a comment upon the maxim, and also in Story's, J., book, beginning at section 239, and in neither of these treatises is one word to be found drawing any distinction between the ratification of a written contract, which was in its inception a forgery, and one which was not of that character. The foundation of ratification of contracts is throughout deemed to be that the contract originally purported to be by and in the name of the person ratifying. But there is authority to the contrary. In the before-cited case of *Wilkinson* v. *Stoney*, Burton, J., clearly shows that he thought a forged acceptance of a bill could be ratified, and in *Ashpital* v. *Bryan*, 11 W. R. 297, 3 B. & S. 492, Crompton, J., stated that a cause had been tried before him, where a father was sued upon his acceptance forged by his son; the party who held the bill went to the father and said, "We shall proceed against your son; is this your acceptance?" and the father said, "It is;" and upon this evidence he thought the rule as to estoppel in *Freeman* v. *Cooke*, 2 Ex. 654, applied, and that the father was liable. He says that a bill of exceptions was tendered to his ruling by a very learned person, but after consideration it was abandoned. He goes on to say that he was not sure whether the party had knowledge that it was not the acceptance of the father, but he says that in his opinion that was immaterial, and that the person making the statement must be considered as saying, "The instrument may be treated as if accepted by me." This case seems to me to be identical with the present, and with me no higher authority exists than the judicial opinion of Mr. Justice Crompton. He put this case on the ground of estoppel. I think the doctrine of ratification the more applicable; but whether such a document as that of 17th of December operate by way of estoppel or by that of ratification, in my opinion it rendered the defendant liable. In my opinion my ruling at Nisi Prius was correct, and the rule ought to be discharged.

Kelly, C. B.—This is an action on a promissory note payable three months after date, and purporting to bear the signatures of one Jones and the defendant. The declaration is on the note, and the defendant has pleaded that he did not make the note. Upon the trial it appeared that ths signature of defendant to the note was not his own, and it was assumed by the learned judge who tried the cause and by counsel on both sides that it was a forgery; consequently, if the case had rested there, the defendant would have been entitled to the verdict. But it was proved that Jones having been indebted to the plaintiff upon a previous bill had partly paid it, leaving £20 still due; the note in question was handed by Jones to the plaintiff for that balance of £20. When the note was about to become due the plaintiff had an interview with the defendant, at which, upon the note being mentioned, the defendant at once declared that it was not his signature, and it was perfectly understood between them that it was, in truth, a forgery; whereupon the plaintiff said he should consult his solicitor with a view to proceed criminally against Jones; upon which the defendant said rather than that should be he would pay the money. Upon this the following paper was drawn up by the plaintiff, and signed by the defendant:—"Memorandum that I hold myself responsible for a bill, dated November 7, 1869, for £20, bearing my signatnre and Richard Jones's in favour of William Brook." Upon this evidence it has been contended, on behalf of the plaintiff that this paper was a ratification of the making of the note by the defendant, and upon the principle *omnis ratihabitio retrotrahitur et mandato priori æquiparatur* the jury were directed to find that the note was the note of the defendant, and that the plaintiff was entitled to the verdict. I am of opinion that this verdict cannot be sustained, and that the learned judge should have directed a verdict for the defendant, or at least have left a question to the jury as to the real meaning and effect of the memorandum and the conversation taken together; and this, first, upon the ground that this was no ratification at all, but an agreement upon the part of the defendant to treat the note as his own, and to become liable upon it, in consideration that the plaintiff would forbear to prosecute his brother-in-law, Jones; and that this agreement is against public policy and void, as founded upon an illegal consideration; secondly, the paper in question is no ratification, inasmuch as the act done, that is the signature to the note, is illegal and void; and that, although a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception void. Many cases were cited to show that where one sued upon a bill or note has declared or admitted that the signature is his own, and has thereby altered the condition of the holder, to whom the declaration or admission has been made, he is estopped from denying his signature upon an issue joined in an action upon the instrument. But here there was no such declaration and no such admission. On the contrary, the defendant distinctly declared and protested that his alleged signature was a forgery; and, although in the paper signed by the defendant he describes the bill as bearing his own signature and Jones's, I am of opinion that the true effect of the paper, taken together with the previous conversation, is, that the defendant declares to the plaintiff: "If you will forbear to prosecute Jones for the forgery of my signature, I admit, and will be bound by the admission, that the signature is mine." This, therefore, was not a statement to the plaintiff that the signature was the defendant's, and which being believed by the plaintiff induced him to take the note, or in any way alter his condition; but on the contrary it amounted to the corrupt and illegal contract before mentioned, and worked no estoppel precluding the defendant from showing the truth, which was that the signature was a forgery, and the note was not his note. In all the cases cited for the plaintiff the act ratified was an act pretended to have been done for or under the authority of the party sought to be charged; and such would have been the case here if Jones had pretended to have had the authority of the defendant to put his name to the note, and that he had signed the note for the defendant accordingly, and had thus induced to the plaintiff take it. In that case although there had been no previous authority, it would have been competent to the defendant to ratify the act, and the maxim before mentioned would have applied. But here Jones had forged the name of the defendant to the note, and pretended that the signature was the defendant's signature; and there is no instance to be found in the books of such an act being held to have been ratified by a subsequent recognition or statement. Again, in the cases cited the act done, though unauthorised at the time, was a civil act and capable of being made good by a subsequent recognition or declaration; but no authority is to be found that an act, which is itself a criminal offence, is capable of ratification. The decision at Nisi Prius of Crompton, J., referred to in argument, is inapplicable, it being uncertain whether the plaintiff in that case knew that the alleged signature of then defendant was forged, and there being no illegal contract in that case to forbear to prosecute; the same observation may be made upon the case from Ireland cited upon the authority of Burton, J. I am, therefore, of opinion that the rule must be made absolute for a new trial, and that upon this evidence the jury ought to have been directed to find a verdict for the defendant, or at all events (which is enough for the purposes of this rule), that if any question should have been left to the jury, it ought to have been whether the paper and the conversation taken together did not amount to the illegal agreement above mentioned.

My brother Channell and my brother Pigott concur in this judgment.

Rule absolute for a new trial.

It is said, authoritatively, by the *Law Times*, that the Judicature Bills, in their new form, will be laid before Parliament for the purpose of discussion during the recess, but will not be further proceeded with until the next session.

COMMON LAW.

Ellis v. McHenry.

Ellis and another v. McHenry.

Bankruptcy—Effect of English composition deed in colony.

Where a debt arises in a country over which the Legislature of another country has paramount jurisdiction, a discharge by the law of the latter may be effectual in both countries.

Therefore, where a debt arose in Canada under a contract to be performed there, and the debtor obtained a discharge here under the Bankruptcy Act, 1861,

Held, that such discharge was an answer to an English action on the contract, for it was a discharge of an original debt, binding in Canada as well as here.

But, where the action here was on a judgment obtained on such contract in Canada,

Held, that a similar discharge obtained here after breach, but before judgment in Canada, was no answer to the action, for the Canadian judgment was final between the parties, and the defendant was estopped from saying that the discharge might have been pleaded there.

[19 W. R. 503—C. P.]

In the first action, *Ellis* v. *McHenry*, the declaration was on a judgment recovered in the Court of Queen's Bench for Upper Canada, against the now defendant by the now plaintiff.

2nd plea.—That the causes of action, in respect of which such judgment was recovered, were debts and liabilities included in an inspectorship deed under the Bankruptcy Act, 1861, made between the defendant and all his creditors, and in respect of which the plaintiff, as a creditor, was entitled to a dividend under the deed, which was binding upon him and all the creditors of the defendant.

2nd replication to the 2nd plea.—That the defendant ought not to be permitted to plead the said plea, because the matters alleged therein could have been pleaded in the action in the Queen's Bench for Upper Canada as a defence to such action; wherefore the plaintiff prays judgment if the defendant ought to be admitted after judgment has been obtained in the said action as in the declaration mentioned to plead the said 2nd plea.

Demurrer to the above replication, on the ground that the deed, if pleaded, would not have been a good defence to the action in Canada.

3rd replication to the 2nd plea.—That the judgment in the declaration mentioned was obtained in respect of money payable by the defendant to the plaintiff under a contract between them for the execution of certain works by the plaintiff and the payment of certain money in respect thereof by the defendant to the plaintiff; and at the time of making such contract the plaintiff was, and has ever since been, domiciled in Upper Canada, and the said contract was made, and was to be performed wholly in Upper Canada, and the said works were to be wholly executed and the said money to be paid in Upper Canada.

Demurrer to the above replication, on the ground that it did not show why the inspectorship deed was not a bar to the plaintiff's claim.

In the second action, *Ellis and another* v. *McHenry*, the declaration was on the *indebitatus* accounts

2nd plea.—The same *mutatis mutandis* as the second plea in the first action.

2nd replication to the 2nd plea.—That the debts in the declaration mentioned arose under and by virtue of contracts made in Canada, and that the said contracts were wholly to be performed in Canada, and that the said debts were, under the provisions of the said contracts, to be wholly paid in Canada, and at the time when the first of the said contracts was made the plaintiffs were domiciled in Canada, and they continued so to be till the commencement of this action.

Demurrer to the above replication for showing no ground why the inspectorship deed was not a bar to the plaintiff's claim.

In last term, *Pollock*, *Q. C.*, (*Bompas* with him), argued for the plaintiff.

Quain, *Q. C.* (*Beresford* with him), argued for the defendant.

Cur. adv. vult.

Jan. 30.—Bovill, C. J., now delivered the judgment of the Court* as follows:—

The first of these cases was an action upon a judgment recovered by the plaintiff against the defendant in the Court of Queen's Bench in Upper Canada, the original cause of action having arisen upon a contract which was made in Upper Canada, and was to be wholly performed there.

The second action was not upon a judgment, but for a cause of action precisely similar to that in respect of which the judgment in the first action had been obtained.

In each case the defendant set up a deed operating as a discharge in bankruptcy under the English Bankruptcy Act, 1861 (24 & 25 Vic. chap. 134), which deed appears upon the proceedings to have been duly executed so as to be binding upon the creditors who had not executed it, and to have been so executed after the original cause of action in each case arose, though not after the recovery of the judgment on which the first action was brought. The principal and most material question that was argued before us was, as to the effect of this discharge upon the claims in these actions

In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England; and is a principle of private internationol law adopted in other countries It was laid down by Lord King in *Burrows* v. *Jemino*, 2 Stra 733; by Lord Mansfield in *Ballantine* v. *Golding*, Cooke's Bkcy. Law, 515; by Lord Ellenborough in *Potter* v. *Brown*, 5 East, 124; by the Privy Council in *Odwin* v. *Forbes*, Buck, 57; and *Quelin* v. *Moisson*, 1 Knapp, 265 b; by the Court of Queen's Bench in *Gardiner* v *Houghton*, 2 B. & Sm. 743; and by the Court of Exchequer Chamber in the elaborate judgment delivered by Willes, J., in *Phillips* v. *Eyre*, L. R. 6 Q. B. 28.

Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country: *Smith* v. *Buchanan*, 1 East, 6; *Lewis* v. *Owen*, 4 B. & Al. 654; *Phillips* v.

* Bovill, C.J., Willes, Keating and Brett, JJ.

Allan, 8 B. & C. 477; *Bartley* v. *Hodges*, 9 W. R. 692, 1 B. & S. 375.

But, thirdly, where the discharge is created by the legislature or laws of a country which has a paramount jurisdiction over another country in which the debt or liability arose, or by the legislature or laws which govern the tribunal in which the question is to be decided, such a discharge may be effectual in both countries in the one case, or in proceedings before the tribunal in the other case. This is only consistent with justice in the case of bankruptcy, as the debtor is thereby deprived of the whole of his property, wherever it may be situated, subject to the special laws of any particular country which may be able to assert a jurisdiction over it. In the case of the Legislature of the United Kingdom making laws which will be binding upon her colonies and dependencies, a discharge, either in the colony or in the mother country, may, by the Imperial Legislature, be made a binding discharge in both, whether the debt or liability arose in one or the other; and a discharge created by an Act of Parliament here would clearly be binding upon the Courts in this country, which would be bound to give effect to it in an action commenced in the English courts. In *Edwards* v. *Ronald*, 1 Knapp, P. C. 259, it was decided that an English certificate in bankruptcy was a good answer to a debt arising in Calcutta and sued for in the Supreme Court there In *Lynch* v *McKenny*, 2 H. Bl. 554, a defendant who was sued in England for a debt contracted in Ireland was considered as discharged by an English certificate. In *The Royal Bank of Scotland* v. *Cuthbert*, 1 Rose, 462, 486, it was held by the Court of Session that an English certificate was a bar in the Scotch courts to a debt contracted in Scotland. And in *Sidaway* v. *Hay*, 3 B & C. 12, a discharge under a Scotch sequestration in pursuance of an Act of the Imperial Parliament was held to be a good answer to an action in the English courts for a debt contracted in England It was also laid down by Bayley, J., in *Phillips* v *Allan*, 8 B. & C. 481, that a discharge of a debt pursuant to the provisions of an Act of Parliament of the United Kingdom, which is competent to legislate for every part of the kingdom, and to bind the rights of all persons residing either in England or Scotland, and which purported to bind subjects in England and Scotland, operated as a discharge in both countries. In *Armani* v. *Castrique*, 13 M & W. 447, Pollock, C.B., says: "A foreign certificate is no answer to a demand in our courts; but an English certificate is surely a discharge as against all the world in the English courts. The goods of the bankrupt all over the world are vested in the assignees; and it would be a manifest injustice to take the property of a bankrupt in a foreign country, and then to allow a foreign creditor to come and sue him here." In the recent case of *Gill* v. *Barron*, L. R. 2 P. C. 176, the following passage occurs in the judgment of the Court as delivered by Kelly, C B.: "It is quite true that an adjudication in bankruptcy, followed by a certificate of discharge in this country under the bankrupt laws passed by the Imperial Legislature, has the effect of barring any debt which the bankrupt may have contracted in any part of the world; and it would have the effect of putting an end to any claims in the island of Barbadoes or elsewhere to which the appellant might have been liable at the date of the adjudication." In referring to the English certificate being a discharge of debts contracted in any part of the world, the Lord Chief Baron was, of course, speaking of the effect of such a certificate in a British court. The same distinction between the effect of Colonial and Imperial Legislation was very pointedly recognised by Wightman and Blackburn, JJ., in *Bartley* v. *Hodges*, 9 W. R. 693, 1 B. & Sm. 375; see also *The Amalia*, 1 Moo. P. C. N. S. 471. The case of *Rose* v. *M'Cleod*, 4 Ct. Sess. Cas. 398, which was relied on by the plaintiffs, at first might seem to be opposed to these views, as it was there held that in a suit commenced in the Scotch courts an English bankruptcy and certificate were not a discharge of a debt contracted in Berbice. But the only question argued and really determined was, whether the debt was to be considered as having arisen in Berbice or in England; and the Court having decided that it was an English debt, it was assumed that it would not be barred by an English certificate, without any question having been raised or decided upon any other point. It is pretty clear from the statement of the law of Scotand in Bell's Commentaries, 6th ed p. 1300, that only the international view was presented to the Court in that case, and that the paramount effect of Imperial legislation was not considered. The case of *Lewis* v. *Owen*, 4 B & Al 654, was also relied upon by the plaintiff; and it was, no doubt, there held that a certificate under an Irish bankruptcy was no discharge of a debt contracted in England; but in that case the principal question which was raised and decided was, whether the debt arose in England or in Ireland, and it being held to have accrued in England it was considered that the debt was not barred by the Irish certificate. The point as to the effect of Imperial legislation, however, did not arise, as the Irish bankrupt law at that time in force depended on statutes of the Irish Parliament passed before the union; and, when a similar question arose as to the effect upon an English debt of an Irish certificate obtained under the provisions of an Act of the Imperial Legislature—viz., 6 & 7 Will. 4, c. 14—it was held that the Irish certificate was a bar to the English debt: *Fergusson* v. *Spencer*, 1 M. & G. 987. It was likewise held that a discharge in Scotland by a *cessio bonorum* under the general Scotch law, and which only discharged the person of the debtor, was no answer to an action brought in the English courts for recovery of a debt contracted in England: *Phillips* v. *Allan*, 8 B. & C. 477; but it was considered in that case, and there is the opinion of Bayley, J., before quoted, that the decision would have been the other way if there had been a absolute discharge created by an Act of the Imperial Parliament. And in *Sidaway* v. *Hay*, 3 B. & C., 12, it was expressly decided, as already mentioned, that a discharge under a Scotch sequestration, in pursuance of an Imperial statute, was a discharge in England from a debt contracted here. It has also been held that a discharge in Newfoundland under a special Act of the Imperial Parliament was a discharge in this country of a debt con-

tracted in England: *Philpotts* v. *Reed*, 1 B. & Bing. 294. These authorities, therefore, seem to establish the third proposition by which this case must be governed.

There are nice distinctions which may sometimes arise where, though a contract is made in country, it is to be performed or take effect in one another, or is made under circumstances which show that it is intended to be subject to some law other than that of the place in which it was made: *Lloyd* v. *Guibert*, 6 B. & Sm. 100, 120, L. R. 1 Q.B. 115. But no such point arises in these cases, as the contracts out of which these debts arose were both made and to be performed in Upper Canada.

In the present case the discharge obtained by the defendant in England, under what is equivalent to an English bankruptcy, was created by an Act of the Imperial Legislature, which, like the previous Bankruptcy Acts, is of general application, and must receive a similar construction; and by force of that statute the deed operates as a general discharge of all debts. The discharge would therefore, in our opinion, be binding in Canada, and it is also clearly binding and effectual as an answer to proceedings commenced in the courts of this country. The result of this would be that the deed would operate as a discharge of the original debt in each case, and, therefore, be a good answer to the second action.

The first action, however, is upon a judgment which was recovered after the deed was completed. In the view which we take of this case the deed might have been set up as a defence to the action brought in Upper Canada; and it is averred as a matter of fact in the third replication, and not denied, that it might have been so pleaded. The question then arises whether it can now be brought forward in these proceedings as an answer to the judgment. When a party having a defence omits to avail himself of it, or, having relied upon it, it is determined against him, and a judgment is thereupon given, he is not allowed afterwards to set up such matter of defence as an answer to the judgment, which is considered final and conclusive between the parties. We are accustomed and indeed bound to give effect to final judgments of courts of other countries and of our colonies, where they possess a competent jurisdiction which has been duly exercised; and the correctness of such judgments is not allowed to be again brought into contest in our courts. The only ground on which the judgment in the first action was sought to be impeached upon the pleadings before us was that there was a defence to the original claim by the discharge under the deed; but that would go to impeach the propriety and correctness of the judgment, and is a matter which cannot be gone into after the judgment has been obtained, or in this action which is brought to enforce it—*ne lites immortales essent dum litigantes mortales sunt: Henderson* v. *Henderson*, 6 Q. B. 288; *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *De Cosse Brisac* v. *Rathbone*, 6 H. & N. 301; *Scott* v. *Pilkington*, 2 B. & S. 11; *Vanquellin* v. *Boward*, 12 W. R. 128, 15 C. B. N. S. 341; *Castrique* v. *Imrie*, 19 W. R. 1, L. R. 4 H. L. 414. If it had been sought to impeach the judgment on the ground of fraud the case might have been different: *Earl of Bandon* v. *Becher*, 3 Cl. & F. 479; *Phillipson* v. *Earl of Egremont*, 2 Q. B. 587; and the opinions of the majority of the Judges in *Castrique* v. *Imrie*, 19 W. R. 1, L. R. 4 H. L. 414.

Upon the argument a further question was raised as to the validity of the deed itself; and it was objected that it was invalid by reason of its containing a covenant by the creditors that they would not sue for their debts, and that, if they did so, the deed might be pleaded as an accord and satisfaction, and in bar of the suit or other proceeding. The effect of that, however, is not that the creditor is to forfeit his debt and to lose his dividend under the deed, but simply to prevent any action or proceedings to recover the debt itself, leaving the right to the dividend untouched; and this, according to the authorities, does not render the deed void.

Upon these grounds we are of opinion that our judgment should be, in the first action, in favour of the plaintiff, and in the second action, in favour of the defendant.

Judgments accordingly.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR NOVEMBER AND DECEMBER, 1870, AND JANUARY, 1871.

(Continued from page 140.)

LANDLORD AND TENANT.

1. D. was a lessee for years at a rent payable quarterly, and S. was mortgagee of the reversion; D., having no notice of the mortgage, paid to his lessor the amount of two quarters' rent before any of it was due: afterwards and before rent-day the mortgagee gave him notice to pay the rent to him. *Held*, that the transaction between D. and the lessor was not a payment of rent due, and that D. must pay the rent to the mortgagee.—*De Nicholls* v. *Saunders*, L. R. 5 C. P. 589.

2. Covenant in a lease that the lessors would at all times during the demise maintain and keep the main walls, main timbers, and roofs in good and substantial repair, order, and condition. *Held* (MARTIN, B., dissenting), that an action on the covenant could not be brought against the lessors without notice of the want of repairs.—*Makin* v. *Watkinson*, L.R. 6 Ex.25; 7 C. L. J. N. S. 128.

3. A debtor assigned by deed, for the benefit of his creditors, all his personal estate to the defendant, who executed the deed and acted under it. The debtor was a tenant from year to year of the plaintiff, but the defendant did no act to show his acceptance of the lease. *Held*, that the lease passed to the defendant

by the assignment, and that he was liable for the rent.—*White* v. *Hunt*, L. R. 6 Ex. 32.

Lease.—*See* Contract, 1, 2; Landlord and Tenant.

Legacy.—*See* Annuity; Executor, 2; Lien, 1.

Lex Fori.—*See* Conflict of Laws, 1.

Lien.

1. A testator bequeathed a legacy to each of his daughters on condition that they should convey to his sons certain real estate; in case of their not performing the condition the legacies were to form part of the residuary estate, all of which he bequeathed to his sons. The daughters conveyed the real estate, but the legacies were not paid. *Held*, that the legacies did not constitute a charge on the real estate in the nature of a vendor's lien.—*Barker* v. *Barker*, L. R. 10 Eq. 438.

2. The articles of a company provided that the company should have a lien on the shares, debentures, and dividends of any member absolutely or contingently indebted to the company. H. was a member and a holder of debentures; he mortgaged his debentures, and certificates were issued to the mortgagees certifying that they had been entered on the register as the proprietors, but no notice was given to them of the company's lien. Subsequently calls were made on the shares of H., which were not paid. *Held*, that the company had waived their lien by their own conduct.—*In re Northern Assam Tea Co.*, L. R. 10 Eq. 458.

Life Estate.—*See* Will, 2.

Limitations, Statute of.

The Statute of Limitations (3 & 4 Wm. 4, c. 27, sec. 28), provides that a mortgagor shall not bring a suit to redeem but within twenty years, unless an acknowledgment of his title shall have been made in writing signed by the mortgagee; and when there shall be more than one mortgagee, such acknowledgment shall be effectual only against the persons signing it. Two joint mortgagees had been in possession for more than twenty years, and one of them made the acknowledgment. *Held*, that the acknowledgment must be by both in order to entitle the mortgagor to redeem.—*Richardson* v. *Younge*, L. R. 10 Eq. 275.

Maintenance.—*See* Equity, 1.

Malice.—*See* Slander.

Malicious Prosecution.—*See* Master and Servant, 1.

Master and Servant.

1. Actions for assault, false imprisonment, and malicious prosecution. There was "a scuffle" in a railway-station yard between A. and two persons; W., the plaintiff, denied that he took part in it, but after he had left the station and was walking away he was delivered into custody by A. A. was a constable in the employ of the defendants, under a rule by which he might "take into custody any one whom he may see commit an assault upon another at any of the stations, and for the purpose of putting an end to any fight or affray; but this power is to be used with extreme caution, and not if the fight or affray is at an end before the constable interposes." *Held*, that the act of A. was beyond the scope of his employment.

The defendants' attorney appeared to conduct the prosecution of W. The depositions of A. and other servants of the company contained evidence of violent assaults upon them in the exercise of their duty. *Held*, that there was no evidence of ratification, it not appearing that the original act was done on behalf of the company, nor that the attorney knew of the circumstances of the imprisonment; *held also*, that the *onus* was on the plaintiff to shew absence of probable cause, and there was no proof of it.

S. took part in the struggle above mentioned, and was wrongfully given into custody by A. *Held*, that there was evidence that A. was acting within the scope of his employment.—*Walker* v. *South Eastern Railway Co.*; *Smith* v. *Same defendants*, L. R. 5 C. P. 640.

2. The defendant owned a vessel, and employed K., a stevedore, to unload it. K. employed other laborers, and among them the plaintiff and D., one of the defendant's crew, all of whom were paid by K. and were under his control. While at work the plaintiff was injured by D.'s negligence. *Held*, that D. was acting as K.'s servant, and that the defendant was not liable—*Murray* v. *Currie*, L. R. 6 C. P. 24.

See Equity, 1.

Misrepresentation.—*See* Vendor and Purchaser, 3.

Mistake.—*See* Arbitration; Carrier; Principal and Agent, 4.

Mortgage.

A mortgagee in possession sold, under a power of sale, part of the mortgaged estate for a sum greatly exceeding the interest and costs due. *Held*, that after paying the interest and costs due at the time of the sale, the mortgagee must apply the balance in part discharge of the principal, or pay it over to the mortgagor.—*Thompson* v. *Hudson*, L. R. 10 Eq. 497.

See Executor, 1; Extinguishment; Limi-

tations, Statute of; Security; Ultra Vires, 3.

Negligence.

Servants of a railway company left cut grass and hedge trimmings by the side of the railway for a fortnight; the summer was exceedingly dry, and a fire caught near the rails shortly after the passing of two trains, and a strong wind blowing at the time, ran across a stubble-field for two hundred yards, crossed a road, and set fire to the plaintiff's cottage. *Held*, that there was evidence for the jury that the defendants were negligent in not removing the cuttings, and that the fire originated from sparks from the engine; *also*, that they were responsible for the natural consequences of their negligence, and the distance of the cottage from the point where the fire originated did not affect their liability —*Smith* v. *London and South Western Railway Co.*, L. R. 6 C. P. (Ex Ch) 14; s. c. L. R. 5 C. P. 98; 4 Am. Law Rev. 717; 7 C. L. J. N. S. 102.

See Carrier; Master and Servant, 2.

Notice.—*See* Assignment, 1; Landlord and Tenant, 2; Patent, 1.

Novation.

1. H. effected an insurance in the A. Company. Soon afterwards the A Company amalgamated its business with that of the L. Association, and transferred it to their property and liabilities, the Association agreeing to indemnify the company. Afterwards the D Association amalgamated its business with that of the B. Company. H. had notice of both amalgamations, and after the last one he received an allotment of profits from the B. Company, and took from them receipts for premiums. *Held*, that there was a novation of the contract with the B. Company.—*In re Anchor Assurance Co.*, L. R. 5 Ch. 632.

2. B. insured his life in the M. Association, which afterwards transferred its business to the C. Company; B. continued to pay his premiums to the latter, but the only evidence of his knowledge of the arrangement was the receipts, some of which stated that the M. Association was "Incorporated with the C. Company." *Held*, that the evidence was insufficient to establish a novation of the contract. —*In re Manchester and London Life Assurance and Loan Association*, L. R. 5 Ch. 640; s. c. 9 Eq. 643.

Parties.—*See* Principal and Agent, 2.

Partnership.

Partnership articles provided that each year a balance-sheet should be made and signed by the partners, and should not afterwards be opened unless a manifest error should be discovered therein, and then only to rectify such error; and on December 31 after the death of any partner, a similar account should be stated by the surviving partners, and the amount appearing to be due to the deceased partner should be paid by them to the executors. A partner died, and the books were balanced in the usual way. After the amount was made up, some of the assets then due to the firm were discovered to be irrecoverable. It was the practice of the firm to deduct an asset, which in calculating the profits of any year, had been dealt with as a good asset, and was afterwards discovered to be bad, from the profits of the year in which it was discovered. *Held*, that there was no mistake to be corrected and that the amount ought not to be interfered with.—*Ex parte Barber*, L. R. 5 Ch. 687.

Patent.

1. The 15 & 16 Vic. c. 83, s. 35, provides that assignments and licenses under letters patent shall be registered, and that until such registry "the grantee or grantees of the letters patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters patent, and of all the licenses and privileges thereby given and granted." *Held*, that although the assignment was unregistered, the assignee could maintain a suit for an injunction against the assignor and subsequent licenses of the assignor with notice. *Semble*, that when the assignment was registered, it would relate back.—*Hassell* v. *Wright*, L. R. 10 Eq. 509.

2. A chignon-maker obtained a patent for the use of "wool, particularly that kind known as Russian tops, or other similar wools or fibre, in the manufacture of artificial hair, in the imitation of human hair, and also in the manufacture of crisped or curled hair for furniture, upholstery and other like purposes." *Held*, that the specification was too extensive; *also*, that the simple use of a new material to produce a known article is not the subject of a patent —*Rushton* v. *Crawley*, L. R. 10 Eq. 522.

See Equity, 2.

Payment.—*See* Landlord and Tenant, 1.

Perpetuity.—*See* Power, 3; Will, 6.

Pleading.—*See* Criminal Law, 1.

Pledge.—*See* Executor, 1.

Power.

1. By a marriage settlement lands were conveyed to trustees upon trusts for husband and wife for life, and after their decease for such of the children of A. as the wife should appoint; power was given to the trustees to

sell and re-invest. The wife appointed the lands as to four-fifths upon trust for four of the children of A. in fee; and as to one-fifth for another child of A. for life, and after his decease for the four first named in fee; the child last named was of unsound mind, but not so found by inquisition. *Held*, that the trustees still had the power to sell and re-invest. —*In re Brown's Settlement*, L. R. 10 Eq. 349.

2. F. by will gave his property to trustees, upon trust to raise £500 for such persons as his daughter M. should appoint by will, and to hold the residue upon trust for such of his other children in such shares as M should appoint by will. M. by will gave all her real and personal estate, "whatsoever and wheresoever, and of which I have any power to appoint or dispose of this my will" to her brothers, to convert and out of the proceeds to pay her debts, and as to the surplus upon trusts in favor of her brothers and sister. M.'s debts did not exceed £500. *Held*, that both the general and special power were well exercised.—*Ferrier* v. *Jay*, L. R. 10 Eq. 550.

3. By a marriage settlement property was settled upon trust for E., the wife, for life, and after her decease for such of the children of marriage, with such provisoes and conditions as she should appoint. She appointed one-fifth of the trust funds in trust to her daughter F. for life, for her separate use, "and so that she shall not have power to deprive herself thereof by anticipation," and after her decease, for such persons as she should appoint. E. died. *Held*, that the restraint upon anticipation violated the rule against perpetuities and was void, but the rest of the appointment was valid.—*In re Teague's Settlement*, L. R. 10 Eq. 564.

See Confidential Relation; Extinguishment.

Practice.—*See* Action; Principal and Agent, 2.

Preference.—*See* Executor, 1.

Presumption.—*See* Bills and Notes, 1; Revocation; Trust.

Principal and Agent.

1. The defendant employed the plaintiffs, tallow-brokers, to purchase 50 tons of tallow for him. The plaintiffs having other orders, made contracts in their own names for the aggregate quantity ordered, which was the usual course of business, and sent the defendant a bought note signed by them as brokers for 50 tons, "Bought for your own account." The defendant refused to accept the tallow. *Held* (by Bovill, C. J., and Montague Smith, J.), that the defendant was bound by the usage, although not aware of it, and was liable for the tallow; *held* (by Willes and Keating, JJ.), that the plaintiffs were authorized to buy for the defendant and not to sell to him, and that the custom could not change the character of the transaction—*Mollett* v. *Robinson*, L. R. 5 C. P. 646.

2. S. was an attorney practising under the name of S. & C.; C., also an attorney, was his clerk at a salary, but not a partner. The defendant employed the firm and was liable to them for a bill of costs. The jury found that C. had authorised S. to contract in behalf of both, and that he had so contracted. *Held*, that S. being the real principal might sue alone for the bill of costs.—*Spur* v. *Cass*, L. R. 5 Q. B. 656

3. The defendants were trustees under a a creditor's deed executed by P., a debtor, by which P. was to carry on his business under their superintendence, and pay over all his gains to the plaintiffs, who weekly paid to him money for the disbursements of the ensuing week; he had no actual authority to pledge their credit. The plaintiffs furnished goods upon P.'s order. *Held*, that under the deed the relation of principal and agent did not exist as to the business, and that the defendants were not liable.—*Easterbrook* v. *Barker*, L. R. 6 C. P. 1.

4 The defendant wrote to the plaintiffs to send a sample rifle, and that he might want fifty. Afterwards the defendant sent by telegraph a message to send three rifles. The telegraph clerk by mistake telegraphed the word "the" instead of "three," and the plaintiffs sent fifty rifles; the defendants refused to accept more than three. *Held*, that the defendant was not responsible for the clerk's mistake, and that there was no contract for more than three rifles.—*Henkel* v. *Pape*, L. R. 6 Ex. 7.

See Action; Master and Servant, 1.

Privilege.

A solicitor on examination was asked, "Where is J. C. residing at present?" The witness declined to answer the question, because he was the solicitor of J. C., and his residence came to the witness's knowledge in his professional capacity, and in the course and in consequence of his professional employment, and in no other way. *Held*, that the witness was not privileged from answering, the fact not having been communicated for the purpose of obtaining professional assistance.—*Ex parte Campbell*, L. R. 5 Ch. 703.

See Slander.

Probable Cause.—*See* Master and Servant, 1.

Proximate Cause.—*See* Insurance, 5; Negligence.

Railway.

When land is taken from a railway, no claim of statutory compensation can be made in respect of damage for which the claimant would not have had an action if the Railway Act had not been passed. The damage must be damage done in the execution of the works, and not afterwards when the railway is completed; and anticipated damages from noise of trains and smoke, which may accrue hereafter, are not proper subjects of compensation before they happen.—*City of Glasgow Union Railway Co.* v. *Hunter*, L. R. 2 H. L. Sc. 78.

See Master and Servant, 1; Negligence; Ultra Vires, 1.

Ratification.—*See* Conflict of Laws, 2.

Receiver.

A receiver will no be appointed in a case of contested heirship to real estate, and a special case must be made out for the appointment of a receiver where an administrator has been appointed.—*Hitchen* v. *Birks*, L.R. 10 Eq.471.

Registration.—*See* Patent, 1.

Remainder.—*See* Settlement, 2.

Remoteness.—*See* Will, 6.

Rent.—*See* Landlord and Tenant, 1; Vendor and Purchaser, 2.

Revocation.

A will duly executed was found among a testator's papers; the signature had been cut out, but afterwards gummed on again. *Held*, that the presumption was that the testator cut it out with the intention of destroying the will, and that the presumption was not altered because the signature had been pasted on again.—*Bell* v. *Fothergill*, L. R. 2 P. & D.148.

Sale.—*See* Estoppel, 2.

Salvage.

The N. and the S. were steam-ships belonging to the same owners. The N., while on a voyage, observed the S. in a disabled condition, and by the exertions of her crew succeeded in bringing the S. into port. *Held*, that the crew of the N. were entitled to salvage.—*The Sappho*, L. R. 3 Ad. & Ecc. 142.

Security.

L. & Co. mortgaged an estate in Guiana to K. & Co. to secure a cash credit to the extent of $75,000; K. & Co. accepted bills for L. & Co. Both firms became insolvent. *Held*, that the mortgage was a security against the payment of the bills by K. & Co., and the bill-holders were entitled to the benefit of the security.—*City Bank* v. *Luckie*, L. R. 5 Ch. 773.

See Bills and Notes, 1; Estoppel, 1.

Settlement.

1. An unmarried woman, soon after attaining twenty-one, gave £3200 to trustees, and by a settlement it was declared that it should be held in trust for her for life, and for her children after her decease as she should appoint, and other trusts in default of appointment; the settlement gave her no power of revocation, nor of selecting new trustees. Upon a bill filed nine years after, *held*, that the settlement was improvident, and should be declared void.—*Everitt* v. *Everitt*, L. R. 10 Eq 405.

2. By a marriage settlement it was covenanted that all the property, real and personal, which the husband or wife, or either of them, in right of the wife, should at any time during the coverture "become seised or possessed of, or entitled to," should be settled upon the trusts expressed in the settlement. The wife was long before her marriage entitled to a rematnder in land after the decease of a tenant for life, who outlived her, so that the remainder did not fall into possession during coverture. *Held*, that the remainder was not included within the covenant.—*In re Pedder's Settlement Trusts*, L. R. Eq. 585.

3. By a marriage settlement the funds were to be held upon trust to "pay the income to the said (wife) for her separate use, independently of the debts or control of her said intended husband," without power of anticipation. The husband died, and the wife married the plaintiff. *Held*, that the income was limited to her separate use for life, and that the trust revived upon her second marriage.—*Hawkes* v. *Hubback*, L. R. 11 Eq. 5.

See Power, 1, 3; Will, 2.

Ship.—*See* Charter Party; Insurance, 1; Salvage.

Slander.

The plaintiff was solicitor of H., who was rector of the parish in which the defendant lived; H. was also trustee for a widow and her children. The defendant said to H. in the presence of others: "Your name is pretty well up in the town of B.; your and your scoundrel solicitor's names are ringing through the shops and streets of B.; you are spoken of as robbing the widow and orphan—you to build your church, and he to marry his daughter." The jury negatived malice. *Held*, that the communication was privileged, as the reports affecting H. could not be stated to him without stating those affecting the plaintiff.—*Davies* v. *Snead*, L. R. 5 Q B. 608.

Solicitor.—*See* Privilege.

Specific Performance.

1. The plaintiff agreed to purchase, and the defendant to sell, certain real estate for $24,000; and also that the furniture, which was worth about £2000, should be valued by valuers mutually agreed upon, and taken by the plaintiff at their valuation. The defend- refused to appoint a valuer, or to complete. *Held*, that the plaintiff was entitled to a decree for specific performance of the contract so far as it related to the real estate.—*Richardson* v. *Smith*, L. R. 5 Ch. 648.

2. A municipal corporation passed a resolution that it agreed to let to the plaintiff for three hundred years, certain land to be stumped out at the expense of the plaintiff, who should build a terrace as shown in a plan. A copy of the resolution was sent to the plaintiff, and he stumped out the land, entered into possession, built a terrace according to the plan, and paid the rent to the corporation for five years; at the end of that time they refused to give a lease. *Held*, that the agreement was made certain by the acts of the plaintiff in which the corporation had acquiesced and that he was entitled to specific performance.—*Crook* v. *Corporation of Seaford*, L. R. 10 Eq. 678.

See Vendor and Purchaser.

Statute.

By 3 Geo. 4, c. 126, s. 32, persons going to or returning from "their usual place of religious worship" are exempted from all toll on turnpikes. A minister of the Primitive Methodist Connexion had assigned to him, by the persons having authority, the services at F. on three Sundays in a quarter, and at four other places on other Sundays. *Held*, that he was exempt from toll in going to and returning from F. on the three Sundays indicated.—*Smith* v. *Barnett*, L. R. 6 Q. B. 34.

See Conflict of Laws, 2; Jurisdiction.

Surety.—*See* Contribution.

Telegraph.—*See* Principal and Agent, 4.

Trover.—*See* Estoppel, 2.

Trust.

L. H. by his will in 1845 gave to each of his son's three daughters the interest of £1000 Reduced Annuities; in 1847 he transferred £3200 Reduced Annuities, being all his property, into his son's name, without any declaration of trust, and in 1849 died, having lived for the last ten years of his life with his son, who was a man of property. *Held*, that as the transfer was made to a child, the presumption was that it was intended as an advancement to him for his own benefit.—*Hepworth* v. *Hepworth*, L. R. 11 Eq. 10.

See Confidential Relation; Gift; Power, 1, 2; Principal and Agent, 3; Settlement, 3; Will, 3.

Ultra Vires.

1. A railway company being about to apply to Parliament for an act to make a branch railway which was to pass through the plaintiff's land, agreed with him that, in the event of the bill being passed, they would purchase certain land of him for £2000, and pay him £2000 more for damages; and the plaintiff agreed that he would sell the land and would not oppose the passing of the bill. The bill passed, but the company did not take any of the plaintiff's land. *Held*, that the agreement was not *ultra vires*, being dependent on the passing of the act, therefore to be regarded as if made after it had been passed.—*Taylor* v. *Chichester and Midhurst Railway Co.*, L. R. 4 H. L. 628; s. c. L. R. 2 Ex. (Ex. Ch.) 356; 2 Am. Law Rev. 284; 4 H. & C. 409.

2. The deed of settlement of an insurance company empowered the directors "to do and execute all acts, deeds, and things necessary, or deemed by them proper or expedient for carrying on the concerns and business of the society, and to enforce, perform, and execute all acts and things in relation to the society, and to bind the society, as if the same were done by the express assent of the whole body of members thereof." *Held*, that this clause gave the power of borrowing.—*Gibbs and West's Case*, L. R. 10 Eq. 312.

3. The articles of a company gave the directors power to borrow, and as security to "pledge, mortgage, or charge the works, hereditaments, plant, property, and effects of the company." *Held*, that this gave them no power to mortgage future calls.—*In re Sankey Brook Coal Co.* (No. 2), L. R. 10 Eq. 381.

See Company, 1.

Usage.—*See* Principal and Agent, 1.

Vendor and Purchaser.

1. In a contract for the sale of a house, it was stipulated that the purchase should be completed on the 26th February; and if it should not then be completed, the purchaser should pay interest on the purchase-money until the completion. The vendor failed to show within the specified time a good title to a portion of the land. The purchaser's object (as he informed the vendor), was to occupy the house as a residence, and he required immediate possession. A month after the day fixed the purchaser made requisitions on the

title, and negotiations continued until the 7th April, when the purchaser gave notice of abandonment of the contract. *Held*, that if time was of the essence of the contract, it was waived by continuing the negotiations; and that the purchaser had not given reasonable notice of abandonment; specific performance decreed.—*Webb* v. *Hughes*, L. R. 10 Eq. 281.

2. In 1867 the plaintiff agreed to sell to a railway company a house in which he carried on business, the purchase-money to be paid on the 25th March, 1869; the plaintiff to be tenant to the company at a certain rent, the tenancy being determinable on the 25th March, 1869, by seven day's notice; and the company to pay interest on the purchase-money till completion. The interest and rent were paid up to the 25th March, and the plaintiff gave due notice to determine the tenancy on that day, but the company failed to complete the purchase, and the plaintiff refused to give up possession. A bill was filed for specific performance. *Held*, that the plaintiff was entitled to the purchase money with interest, and that the company was not entitled to rent after the 25th March, 1869.—*Leggott* v. *Metropolitan Railway Co.*, L. R. Ch. 716.

3. The plan of a small piece of land offered for sale showed as one of the boundaries a straight line including a space about ten feet wide filled with shrubbery; trees in other parts of the land were drawn on the plan. The defendant, with the plan in hand, inspected the property, and saw on this side a small iron fence, apparently the boundary, outside of a belt of shrubs, and including three large ornamental trees. Supposing that the trees were included in the property he purchased it at auction. In fact, the fence and trees stood on the adjoining land. *Held*, that the defendant was deceived in a material point by the negligence of the vendors, and that the sale could not be enforced.—*Denny* v. *Hancock*, L. R. 6 Ch. 1.

See Assignment, 1; Damages, 4; Lien, 1; Specific Performance.

Voluntary Conveyance.—*See* Settlement' 1.

Waiver.—*See* Lien, 2.

Warranty.—*See* Contract, 2; Insurance, 1.

Way.—*See* Damages, 2.

Wife's Separate Estate.—*See* Settlement, 3.

Will.

1. Devise upon trust for the testator's four children in equal shares during their respective lives, and after the decease of his children respectively, for such of their respective children as should attain twenty-one, or die under that age leaving issue, and their heirs, so that the child or children of each of his children should take his or their parent's share only; and in case of a failure of such issue of either of his children, then in trust for his other surviving children or child in like manner as their original shares were given. One of the testator's children died in his lifetime leaving a child, E. V. After the testator's death another child, J., died without issue. *Held*, that the words "other surviving" should be read "other," and that E. V. would be entitled to a third of J.'s share, if she should attain twenty-one.—*In re Arnold's Trusts*, L. R. 10 Eq 252.

2. A testator empowered his trustees to purchase fee-simple or freehold estates, and directed that the estates so purchased should be settled "in strict settlement," and to the same uses and upon the same trusts as his personal property. The personal property was limited to his daughter and her sons successively for life, with remainders to their children. *Held*, that in the settlement of the estates purchased, the tenants for life should not be unimpeachable for waste.—*Stanley* v. *Coulthurst*, L. R. 10 Eq. 259.

3. A testator gave to his wife his freehold estate, A., and all his personal property, "to be at her disposal in any way she may think best for the benefit of herself and family." *Held*, that the widow took a fee-simple in the real property, and an absolute interest in the personal property.—*Lambe* v. *Eames*, L. R. 10 Eq. 267.

4. Devise of real estate to testator's wife for life, remainder to his brothers, *nominatim*, in fee, as tenants in common; "and in case of the death of either of them in the lifetime of my said wife, leaving lawful issue, I give and devise the share of him so dying to all his children," in fee, as tenants in common; in case of the death of any of his brothers in the lifetime of his wife, without issue living at his death, his share to go to the surviving brothers. Three of the brothers died in the lifetime of the tenant for life; all had had children, a part only of whom survived their fathers. *Held*, that only those who survived their fathers were entitled to take.—*Hurry* v. *Hurry*, L. R. 10 Eq. 346., 2 C. L. T. N. S. 268.

5. Testator devised land to his son J. for life, remainder to his children; "and, in case my said son J. shall depart this life without leaving any lawful issue, then unto and equally between my sons G. and R. in the same manner as the estates hereinafter devised are limited to them respectively, subject, nevertheless,

to the proviso hereinafter mentioned, in case my said son J. should leave a widow." He then devised separate lands to his sons G. and R., in terms precisely similar *mutatis mutandis*, and subject to the same proviso, which was as follows: "Provided that, in case any or either of my sons shall depart this life leaving a widow, then I give the premises so specifically devised to such one or more of them so dying unto his widow" for life. *Held* (Byles, J. dissenting) that the widows were entitled to a life-interest in the estates accruing to their husbands upon the death of one of the sons, as well as in the estates directly devised to them.—*Melsom* v. *Giles*, L. R. 5 C. P. 614.

6. Property was given by will upon trust to pay the income to S. for life, remainder to the eldest son of S. for life, remainder to E. for life, and after the decease of the survivor of S., his eldest son, and E., to transfer the same to all the children of S., and the child or children of such of the children of S. as shall then be dead; but in case there shall be no child or grandchild of S. then living, then to pay the same to the children of E. At the death of the testator S. had no child, but afterwards had four children. *Held*, that the children of S. were a class to be ascertained on the failure of the tenants for life, and that the gift to them was therefore void for remoteness.—*Stuart* v. *Cockerell*, L. R. 5 Ch. 713.

7. Testator gave all his estate, real and personal (subject to a life-estate in his wife), to M., her heirs, executors, &c., absolutely, if she should be living at the time of the death of his wife; but in case M. should die during the lifetime of his wife without leaving lawful issue her surviving, then over. M. died in the lifetime of the wife, leaving issue who survived her. *Held*, that M. took an absolute estate, with an executory gift over in the event of her dying without issue, and that her children were entitled.—*Finch* v. *Lane*, L. R. 10 Eq. 501.

See Ambiguity; Annuity; Charge, 2; Election; Exoneration; Lien, 1; Power, 2; Revocation.

Winding Up.—*See* Contract, 3; Executor, 2; Jurisdiction.

Witness.—*See* Privilege.

Words.

"*In strict settlement.*"—*See* Will, 2.

"*Nephew.*"—*See* Ambiguity.

"*Other surviving children.*"—*See* Will, 1.

"*Over.*"—*See* Contract, 1.

"*Port of loading.*"—*See* Insurance, 2.

"*Until.*"—*See* Insurance, 4.

"*Usual place of worship.*"—*See* Statute.

REVIEWS.

La Revue Critique de Legislation et de Jurisprudence. Montreal: Dawson, Bros. January and April, 1871.

We welcome this publication with no ordinary pleasure. It is of much promise, and the articles carefully selected and well written.

The prospectus, referring to the work, says, that "the editing committee have imposed upon themselves the task of combating, without hesitation, the errors and chief faults which present themselves in legislation or jurisprudence;" and it was, we understand, with especial reference to various unsatisfactory features in the conduct of business by their own judiciary that this Review was first thought of. Among its contributors, and those who have promised their support, we notice the names of the best men at the bar in Lower Canada.

It is a difficult and invidious task for individual members of the bar to call to account persons holding judicial positions with whom they are daily thrown in contact, nor is it pleasant to feel that a Judge who has the decision of your case in his hands, above suspicion of any ill feeling though he may be, may perhaps still be smarting under a severe criticism of his law, or remarks on his want of attention or industry.

So far as Upper Canada is concerned there has never been anything of this kind; but the Bench of the Lower Province has never, we think we may safely say, equalled ours either in industry, mental force, dignity, or general eminence. We have never felt any pressing need of sharp criticism on the conduct of our Judges. Some of them, of course, have been more dignified, learned or talented than others; but all, to the best of their ability with more or less laborious research, have, with most commendable diligence, endeavoured to discharge their duties faithfully to the public, and have done so with credit to themselves and to their profession, ever keeping in view the high honour and dignity of their office.

It is reported that all this cannot be said of their brethren to the east of us, though nothing is farther from our thoughts than to insinuate aught against them as being anything but honorable and upright Judges. It

is complained (at least we are so informed) that not only do they not write their judgments, but also very generally simply state the result of their deliberations, without giving the reasons on which their judgments are founded. The former practice, though not essential, is very useful and satisfactory, but without the latter the confidence of the Bar cannot be retained. The reckless conflict of decisions also sometimes leads counsel to suspect that a judgment has resulted, not from an anxious scrutiny and comparison of the authorities, but from thoughtlessly trusting to a crude notion of what might seem at first glance to be the proper adjustment of the disputed point.

The Review before us, conducted by some of the most fearless and best of the profession in the Province of Quebec, intends to try the effect of a little wholesome criticism in the hopes of remedying some of the defects of their Judges in the conduct of public business, so far, at least, as such conduct comes strictly within the bounds of proper public comment. But it is not alone in this respect that the Review will be useful, as will be seen by reference to its contents (which we shall now more particularly refer to), for the articles shew an intention to discuss fully and impartially the public questions which affect the Dominion.

La Revue Critique is published quarterly, each number containing about one hundred and twenty pages, much the same in shape and size as the English *Law Review*. The articles are written some in French and some in English, at the option of the contributor—and as to this we wish that they were all in English, as much is lost to many outside of the Province of Quebec which would be instructive and interesting to them, and we would submit to the editors the propriety of taking a hint in this matter, if it is contemplated increasing the circulation of the Review beyond the limits of that Province.

The articles in the first number are—A Discussion of the Alabama Question; The Fishery Question; The Provincial Arbitration, wherein the Quebec view of the matter is strongly urged; My First Jury Trial; A Review of Mr. Kerr's work on "The Magistrate Act of 1869;" a Summary of Decisions, &c.

The second number, just to hand, commences with an essay on the conflict of commercial jurisdictions, added to and altered from an article which appeared some time ago in this journal, headed "*Lex loci contractus—Lex fori*," from the pen of M. Girouard, a talented and rising member of the Quebec bar. The same gentleman also discusses in this number "Le droit constitutionel du Canada," and "The Joint High Commission." The Hon. E. T. Merrick, of New Orleans, contributes an article on the oft-quoted Laws of Louisiana; Mr. W. H. Kerr, who occupies a leading position at the bar in Montreal, writes about deeds of composition and discharge under the Insolvent Act; also about the Navigation of the River St. Lawrence, and has a few words to say—to be amplified, he says, hereafter—about the observations of the *American Law Review*, on the Fishery Question, to which we alluded last month. A few useful hints are given to legislators by M. Racicot. The secretary of the committee of management then, in a few pages, gives, without note or comment, what cannot but be looked upon as a most curious picture of the state of the decisions in the Court of Appeal. Side by side are placed extracts from different judgments, the most conflicting and contradictory; not merely conflicts between different Courts and different Judges, but contrary opinions expressed by the same Judges at different times. If there is nothing in these cases which could, on a careful examination, reconcile such apparently opposite opinions, we can well fancy that the task of giving an opinion on a case submitted to counsel must be a much more hopeless task in the Province of Quebec than in any other civilised country that we are aware of.

La Revue Critique has arisen mainly from the alleged necessities of the case, and whilst fully endorsing the view so well established and acted on in England, that judicial opinions on matters brought before the Judges of the land in their public capacity, are open to free, but fair and respectful comment, we trust the editors may carefully keep within the due limits they have prescribed to themselves, and not weaken the moral force of the judicial office, whose claim to respect and confidence is somewhat different in a new country like this from what it is in England, and in many ways somewhat weaker, but which *must*, on the other hand, both in England and every other country, in the long run, lie in its own inherent excellence and integrity.