DIARY FOR JULY.

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

The Local Courts'

AND

MUNICIPAL GAZETTE.

JULY, 1867.

THE DOMINION OF CANADA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE QUESTION OF DIVISION COURT COSTS.

The attention of the writer has been strongly drawn to the practice of charging costs in Division Court suits.

As the business begins to fall off in these courts very perceptibly everywhere, many officers appear to exert every possible ingenuity to charge what they legally can, and some it is feared go beyond the law.

It may not be generally known to these officers, and the profession, that a case was tried at Barrie in 1866, at the Assizes, before Mr. Justice Adam Wilson, of the Court of Common Pleas, in which a bailiff was indicted for exacting and charging fees for enforcing an execution which were illegal. The bailiff was indicted under the 186th section of the Statute, and his offence was apparently charging fees and disbursements for keeping certain

property seized on execution. The presiding Judge there held that Division Court officers must regulate their charges strictly by the tariff of fees laid down by the statute. That they could not take *imaginary fees*, or fees which they might think justly or equitably due them; in other words, that costs or fees cannot be charged by *implication*.

No superior court will allow any officer to charge any other fees than those definitely pointed out by the tariff, much less should this be allowed in the Division Courts in back counties, where it may lead to great abuses.

It has been mentioned to the writer than an out-county clerk lately insisted upon a suitor paying nearly $4 for fees of various kinds to him and the fee fund, in an application for a new trial, made on behalf of this suitor. The same fees are charged by him for orders, judgments, and hearing, as if the case was actually being tried in court.

It should be remembered that at common law no costs were chargeable at all. The King's courts administered justice freely, and the parties, if they had lawyers, paid them themselves. The King's judges were paid by the public. This is the case now (or was a few years ago) in many of the Western American States, where the old common law is carried out. Costs are therefore the creation of statutes passed at various times.

In the superior courts statutes authorize the judges to fix the tariff of costs to be taken by officers acting under them. In inferior courts, such as division and magistrates courts, particular statutes lay down definitely what fees shall be charged, and none other should be charged. Out of the many hundred applications for new trials made in Upper Canada under the Division Court Act, similar fees to those spoken of were never charged before.

The rule of practice relating to new trials (rule No. 52) speaks plainly enough of postage and transmitting fees, and charges by the clerks, which we can see is reasonable enough. For the clerks may have to transmit papers to the judge and to pay postage, which should be paid beforehand. But to charge a hearing fee,—a fee on order,—a fee on application,—a fee on entering order,—a fee on judgment, in addition to the postage and transmission fees, is going beyond the statute, and if so, would be punishable under the section already referred to.

Now, in addition to the principle of the common law alluded to, it must be borne in mind that the *Division Courts Act* was passed in Canada, at a time when there was a great outcry about lawyers costs, and was intended to increase the jurisdiction of the courts, and at the same time make them cheap courts; but at the same time the writer does not wish to be understood as arguing against some proper and reasonable increase of Division Court fees in certain cases, such for example as remuneration for keeping possession of property under seizure; nor is it argued that cheap law is always the best.

This is a very debatable matter. But when we have a law, officers should not at their discretion, or by the permission even of their judges, exact new fees, not warranted by the statute. In some counties, and in Toronto, bailiffs exact a fee varying from thirty cents to seventy-five cents for a return of *Nulla Bona* on every execution in their hands. This is in the view of the writer simple extortion, as not warranted by the statute. Yet it would only be reasonable that some small fee should be allowed. In many counties clerks are in the habit of charging certain fees over and above postage, for transmitting and receiving, to enter in their books transcripts of judgments from out-counties. This is also wrong, as the tariff of fees has reference only to summonses sent for service. Other clerks are in the habit of charging an order fee to fee fund and themselves for every *certificate* put on an execution, where the judge *certifies* to avoid the *exemption laws;* a charge which the judges and clerks of the superior courts do not exact. A clerk some time since is said to have refused to issue an execution until he got a dollar in stamps for such charges.

Now it will be recollected that the law is very severe on Division Court officers for taking illegal fees (see section 186, Con. Stat. Division Court Act), and care should be exercised in this matter. If the law is wrong let it be altered by the Legislature. It is well known that in the Division Courts, even now, in proportion to the sums collected in them, they are dearer than the superior courts. A claim say for $20 sued has been exceeded in amount in a short period by the officers fees, apart from witness costs, where mileages, judgment summonses, and hearing fees have been charged.—*Communicated.*

SELECTIONS.

THE JUDICIARY OF LOWER CANADA.

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

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

"That such a state of things as have resulted in the *cause célèbre* of *Ramsay*, plaintiff in error, v. *The Queen*, defendant in error, exhibits, could not well occur in this part of Canada, we may well be thankful for. That such a boast may be as true of the future as it has been of the past, should be the constant aim and exertion of all those, who, on the bench at the bar, or in the study of the laws, desire the welfare of their country. The heritage left to us by those able, courteous and high-minded men who set the standard of the profession in Upper Canada cannot be too highly prized; and he who first, whether by his conduct on the bench or at the bar brings discredit upon their teaching, will, we doubt not, meet the universal contempt which such conduct would deserve.

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

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

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

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

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

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

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

of great attainments, eminently worthy of the judicial seat, and enjoying the esteem and confidence of the bar and the public generally.

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

WHAT IS A TEAM?

Not long ago a court of justice in England was engaged in defining what "a team" meant. The case was as follows:

A duke made an agreement with one of his tenants in Oxfordshire concerning the occupancy of a farm, and a portion of the agreement was expressed in the following terms: "The tenant to perform each year for the Duke of ——— at the rate of one day's team work with two horses and one proper person, for every £50 of rent, when required (except at hay and corn harvest), without being paid for the same." In other words, the rent of the farm was made up of two portions, the larger being a money payment, and the former, a certain amount of farm service. All went on smoothly until one day, when the Duke's bailiff desired the farmer to send a cart to fetch coals from a railway station to the ducal mansion.

"Certainly not," said the farmer, "I'll send the horse and a man, but you must find the cart."

"Pooh, pooh! what do you meen? Does not your agreement bind yon to do team work occasionally for his Grace?"

"Yes, and here's the team; two horses and a careful man to drive them."

"But there can't be a team without a cart or wagon."

"O yes there can, the horses are the team."

'No, the horses and cart together are the team."

The question which a whole row of learned judges were called upon to decide was—what is a team? The form in which the inquiry came on was that of ejectment; the duke seeking to eject the farmer on the ground of alleged forfeiture, because the latter had refused to interpret "team work" as including the supply of a cart as well as horses and a driver. In all probability both obstinate, each believed himself to be right, and so believing, determined not to yield an inch to the other. The case was at first tried at Oxford before a common jury, who gave a verdict substantially for the duke. A rule was afterwards obtained with a view to bring the question of definition before the judges at the Court of Queen's Bench. The counsel for the duke contended that as team work cannot be done by horses without a cart or wagon, it is obvious that a team must include a vehicle as well as the horses by which it is to be drawn.

One judge said, that "in the course of his reading he had met with some lines which tend to show that the team is separate from the cart:

"Giles Jelt was sleeping, in his cart he lay;
Some waggish pilf'rers stole his team away.
Giles wakes and cries, 'Ods bodikins, what's here?
Why, how now; am I Giles or not?
If he, I've lost six geldings, to my smart;
If not, Ods bodikins. I've found a cart."

Another justice quoted a line from Wordsworth:

"My jolly team will work alone for me,"

as proving the farmer's interpretation, seeing that though horses might possibly be jolly, a cart cannot. The counsel for his grace urged that the dictionaries of Johnson and Walker both speak of a team as a number of horses drawing the same "carriage." "True," said Justice A——, "do not those citations prove that the team and the carriage are distinct things?" "No," replied the counsel on the duke's side, "because a team without a cart would be of no use." He cited the description given by Cæsar of the mode of fighting in chariots adopted by the ancient Romans, and of the particular use and meaning of the word *temanem*. From Cæsar he came down to Gray, the English poet, and cited the lines:

"Oft did the harvest to their sickle yield,
Their furrow oft their stubborn glebe hath broke,
How jocund did they drive their team afield,
How bowed the wood beneath their sturdy stroke."

and from Gray he came down to the far famed "Bull's Run" affair in the recent American civil war, a graphic account of which told that the teamsters cut the traces of the horses.

The counsel for the farmer, on the other hand, referred to Richardson's English dictionary, and to Bosworth's Anglo-Saxon dictionary, for support to the assertion that a team implies only the horses, not the vehicle also; and he then gave the following citations from Spenser:

"Thee a ploughman all unmeeting found,
As he his toilsome team that way did guide,
And brought thee up a ploughman's state to bide."

From Shakespeare.

"We faries that do run,
By the triple Hecate's team,
From the presence of the sun,
Following darkness like a dream."

Again from Shakespeare:

"——I am in love but a team of horse shall
Not pluck that from me, nor who 'tis I love."

From Roscommon.

"After the declining sun
Had changed the shadows, and their task was done,
Home with their weary team they took their way."

From Dryden.

"He heaved, with more than human force, to move,
A weighty straw the labour of a team."

Again from Dryden.

"Any number, and passing in a line:
Like a long team of snowy swans on high,
Which clap their wings, and cleave the liquid sky."

From Spenser's "Virgil."

"By this the night, forth from the darksome bower
Of Erebus, her teamed steed you call."

From Martineau.

"In stiff days they may plough an acre of wheat with a team of horse."

The "glorious uncertainty of law" brought the duke and farmer into further litigation before they could settle the question. The jury of Oxford decided for the duke; the judges of Westminster decided (two against one) for the farmer; but then it was determined more to the advantage of the lawyers than of the parties concerned), that the case should be held over again, on some other plea, or under some other legal aspect.—*Exchange paper.*

"KISSING THE BOOK."

Among the not uncommon superstitions which are entertained by schoolboys and uneducated persons, the notion that a person can avoid committing perjury by pretending to "kiss the book," while not really doing so, is apparently still prevalent. A woman who was last week charged at the Central Criminal Court with perjury in having sworn, at a previous Surrey Session, that her nephew who was then convicted had never been convicted on a former occasion, whereas there was distinct evidence to show that he had been an old and convicted offender, sought to excuse herself by saying that when she was sworn she had kissed her *thumb*, and not the book.

Seriously to entertain the idea that such an evasion, or such an excuse, would avail to relieve the perpetrator from the penalties of perjury, stamps the character of anyone who would set it up as an act morally permissible. Supposing, indeed, that any species of sophism is available to ease the conscience of such a person, it must be admitted that, if the act do not amount to perjury, the offence of deceiving the ministers of justice under the false pretence of taking an oath, and thereby obtaining the end which truthful evidence would obtain, is as deserving of the penalties of perjury as perjury itself. In the case we have referred to, the learned Recorder took, and we think rightly, the view that actual perjury had been committed, and utterly ignored the plea of kissing the thumb. It would be but playing with justice if such an excuse were to be admitted as available to discharge a witness from the duty of speaking the truth, however meritorious it might be thought to try and save a relative from the penalties due to his crimes, in the hope that he might yet reform. Such considerations must be left to the judge, who will always be found willing to listen to anything that can be urged in a prisoner's favour. The more distinctly it is laid down that the offence of perjury consists in wilfully misleading a court of justice by false evidence as to matters of fact, irrespective of the form in which such evidence is tendered, the better for the interests of public morality and the due administration of justice.—*Solicitors' Journal.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Malicious Prosecution—Conviction outstanding—No power of appeal.—An action is not maintainable for malicious prosecution where the plaintiff has been convicted, and the conviction is outstanding, although there is no power of appeal from the court where the conviction took place.—*Basebe* v. *Matthews*, C. P. 15 W. R. 839.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Landlord and Tenant—Lease—Reservation of Right of Passage.—The plaintiffs are underlessees of one Hall Ashworth, who is a lessee of the Earl of Derby. The lease and underlease are of certain premises with their appurtenances, "except and reserved out of this demise the free running of water and soil coming from any other buildings and lands contiguous to the premises hereby demised in and through the sewers and watercourses made or to be made within, through or under the said premises." The defendant was the occupier, under Lord Derby, of some contiguous tan-pits, and he claimed the right to send water and refuse from those pits down a watercourse on to the premises demised to the plaintiffs. The watercourse had been arched over with brickwork for so much of it as passed through the land leased to the plaintiffs. A stoppage at the plaintiffs' end of the watercourse was proved, but the defendant contended that the stoppage was the plaintiffs' own fault. The jury found that the pipe was stopped in the plaintiff's land; but the judge being of opinion that the defendant had no

right to use the watercourse for refuse, a verdict was entered for the plaintiffs, with leave to move to enter it for the defendant, on the ground that on the finding of the jury and on the construction of the leases he was entitled to it.

The court held that the reservation did not include such matter as the defendant had thrown down the watercourse, but only matter incident to the convenient habitation of the contiguous land.—*Chadwick and Another* v. *Marsden*, 25 W. N. 194.

MANSLAUGHTER—AUTREFOIS ACQUIT—24 & 25 VIC. C. 100, S. 45.—The prisoner was convicted of the manslaughter of Timothy Liner. He had previously been convicted in Petty Sessions, at the instance of Timothy Liner, of the assault from which Timothy Liner's death afterwards ensued, and had undergone the punishment awarded for that offence.

G. Browne, for the prisoner, contended that the conviction for the assault was a bar to the indictment for the manslaughter; and he cited 24 & 25 Vict. c. 100, s. 45, which provides that, if any person is convicted of an assault and suffers the imprisonment awarded, "he shall be released from all further or other proceedings, civil or criminal, for the same cause."

No counsel appeared for the Crown.

The Court (KELLY, C. B., *dissentiente*) held that the conviction and punishment for the assault were no bar to the indictment for manslaughter. *The Queen* v. *Morris*, 15 W. N. 176.

CONVICTION—SALE OF BREAD BY WEIGHT—WHAT IS—6 & 7 WILL. 4, C. 37, S. 4.—The appellant, a baker beyond the limits of the metropolitan district, whose practice it was to weigh the dough of each loaf previous to putting it into the oven, making allowance for loss in the process of baking, and not otherwise to weigh the loaves, sold a loaf to a cnstomer as being a quartern loaf, the customary weight of which is four pounds. The customer did not ask that the loaf should be weighed, nor except as aforesaid was it weighed. The loaf was subsequently found to be less than four pounds in weight. Upon these facts the appellant was convicted of selling bread otherwise than by weight, contrary to the provisions of section 4 of 6 & 7 Will. 4, c. 37.—*Jones* v. *Huxtable*, 15 W. R. 900.

RAILWAY COMPANY, LIABILITY OF—CHILD ABOVE THREE YEARS OLD—NO FARE PAID—ABSENCE OF FRAUD.—A., an infant above three years of age, and who ought, therefore, under 7 & 8 Vict., s. 6, to have been paid for as a passenger on the Great Western Railway, travelled in company with his mother on the said railway without any fare having been paid for him. The non-payment of fare did not arise from any fraud on the part of the mother. During the journey an accident occurred owing to the negligence of the servants of the company, whereby the infant was injured. For this injury the infant, by his next friend, brought an action against the railway company.

Held, that the railway company were liable for the injury done to the infant.—*Austin* v. *Great Western Railway Company*, 15 W. R. 863.

AGREEMENT BY PARTIES TO WAIVE STAMP OBJECTIONS.—This was a special case, in which the question for the opinion of the court was, whether the plaintiffs were entitled to recover, under the circumstances detailed in the case, a certain sum of money "upon the contract of insurance alleged by the plaintiffs to have been entered into by the defendants."

It appeared that no stamped policy of insurance was in existence; but the case stated that it was to be taken that the defendants had executed a valid policy to the plaintiffs in their ordinary form, in accordance with the "covering note," which had been given by the defendants to the plaintiffs. The covering note was also unstamped.

The court declined to hear the case, on the ground that the Stamp laws had not been complied with. The terms agreed on by the parties could not cure that omission. The court were bound, in spite of any agreement, to protect the revenue.—*Nixon and Others* v. *Marine Insurance Co.*, 25 W. N. 196.

MISDEMEANOR—SOLICITING TO COMMIT A FELONY, WHERE NO FELONY COMMITTED—COUNSELLING AND PROCURING—24 & 25 VIC. CAP. 94, SEC. 2.—To solicit and incite a servant to steal his master's goods, where no other act is done except the soliciting and inciting, is a misdemeanor.

The statute 24 & 25 Vic. cap. 94, sec. 2, by which it is enacted that whoever shall counsel or procure any other person to commit a felony shall be guilty of felony, applies only where a substantive felony is committed.—*Reg.* v. *Gregory*, C. C. R., May 11, 1867.—15 W. R. 831.

ANIMALS—NEGLIGENCE.—It is not necessary, in order to sustain an action against a person for negligently keeping a ferocious dog, to show that the animal had actually bitten another person before it bit the plaintiff: it is enough to show that it has, to the knowledge of its owner, evinced a savage disposition by attempting to bite.—*Worth* v. *Gilling and Another*, C. P. M. T. 1866.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

HAMMOND v. MCLAY.

Registrar—Tenure of office.

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

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

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

[E. T., 1866.]

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

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

Issue thereon.

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

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

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

That on the 14th July, 1859, the plaintiff entered into the necessary recognizance with two sureties (approved by two Justices of the Peace) conditioned for the due performance of the duties of his office, and took the necessary oath of allegiance, all of which were duly filed of record with the Clerk of the Crown in the Court of Queen's Bench, on the 21st September, 185 .

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

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

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

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

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

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

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

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

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

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

The statutes cited are referred to in the judgments.

DRAPER, C. J.—The office of Registrar was first created in Upper Canada by the Stat. 35 Geo. III., ch. 5, which authorised the Governor

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

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

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

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

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

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

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

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

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

The question seems to have arisen under the former Registry Act of Upper Canada more than fifty years ago. Before the year 1808, David McGregor Rogers held a commission as Registrar of the two counties of Northumberland and Durham. It is, I believe, also the fact that he was in that year, as well as before and perhaps after, a member of the house of Assembly; and it has been suggested that in some way he gave offence, in consequence of which an attempt was made to deprive him of his office as Registrar, the commission for which, both under the statute 35 Geo. III. and that of 9 Vic., has contained the words "during pleasure." And on the 15th March, 1808, a commission issued appointing Thomas Ward, Esq., Registrar for the counties of Northumberland and Durham. Rogers, however, held all the books and papers, and in Michaelmas term, 49 Geo. III. (November, 1808) the Attorney General, on the part of the King, obtained a rule for the issue of a mandamus (*Nisi* I presume) ordering Rogers to deliver over these books, &c., to Ward. In Trinity term following, on the return of the mandamus, the Attorney and Solicitor General were heard in support of the application for a peremptory writ, and Mr. Rogers appeared and argued against it;

and after taking time to consider, the Court of Queen's Bench, (Scott, C. J., and Powell, J.) during the same term refused the application. The entries of these proceedings are minuted in the term book of the Clerk of the Crown, but none of the affidavits or papers are forthcoming. But the preamble to the statute 10 Geo. IV., ch. 8, referred to by Mr. Harrison, recites that the appointment of Mr. Ward was adjudged by the Court of Queen's Bench to be invalid; and having ascertained that his commission was in the usual form, I infer that the ground of the judgment was that Rogers was not removable except for some one of the causes and in manner pointed out in the statute 35 Geo. III.—in other words, that he held an office of freehold.

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

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

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

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

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

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

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

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

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

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

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

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

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

Once it is conceded that the statute provides for a tenure during good behaviour, or at least till the happening of certain specified events, I think there is no power lower than that of the Legislature that can limit the officer to a tenure during pleasure, even where the appointment is specially accepted on such a condition. This point is established by a number of cases, and is

noticed in a recent judgment of our Court of Error and Appeal—*Weir* v. *Mathieson* (3 E. & A. Rep. 123); see also *Regina* v. *Governors of Darlington School* (6 Q. B. 682).

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

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

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

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

MORRISON, J. concurred.

Rule discharged

COMMON LAW CHAMBER.

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

CHICHESTER v. GORDON, LACOURSE AND GALLON.

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

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

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

[Chambers, March, 23, 1867.]

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

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

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

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

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

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

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

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

also sustains the doctrine contended for by the defendant Lacourse.

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

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

Order accordingly.

ENGLISH REPORTS.

ALLAWAY v. DUNCAN.

Principal and Surety—Guarantee.

The plaintiff, who held an overdue bill accepted by one W. received a letter from the defendant containing the following passage:—"I am now making arrangements for an advance to W. to enable him to pay this and other claims upon him, and if you will have the goodness to hold the bill for a few days I shall be prepared on his behalf to take it up."

Held, that this letter did not amount to an undertaking on the part of the defendant to be personally liable for the debt due from W. to the plaintiff.

[C. P., April 16. W. R. XV. 711.]

The declaration stated that the plaintiff was the holder of a certain overdue bill of exchange, drawn by the plaintiff upon, and accepted by John Wright, which had not been paid; and thereupon, in consideration that the plaintiff would give time to Wright for the payment of the same for a few days, the defendant guaranteed that he would, at the expiration of such time, be prepared to take up the said bill on behalf of Wright. Averment, that the plaintiff gave time to Wright—breach, that neither Wright nor the defendant had paid to the plaintiff the amount of the said bill

Plea (the first), a denial of the guarantee.

The cause was tried before Smith, J., at the sittings after last Hilary term, at Guildhall, when it appeared that the plaintiff carried on business as a brick merchant and agent in the city of London, and that the defendant was a solicitor in the city of London. In the years 1865 and 1866 the plaintiff sold certain bricks to Mr. John Wright, a builder at Erith, which were paid for by Wright's acceptances at three months. One of these acceptances, for £91 11s., became due on the 4th December, 1865; it was made payable at the London and County Bank, Woolwich, where it was presented and dishonoured. It was afterwards paid; but Wright subsequently requested the plaintiff not to present at the bank his next acceptance for £91, which was to fall due on the 4th February, 1866, but promised to call upon him and take it up when it became due. Wright failed to do this, whereupon the plaintiff wrote to Wright requesting him to fulfil his promise, and on the 5th February he received the following letter from the defendant:—

"Sir,—Mr. Wright has handed me your letter of the 3rd respecting the non-payment of a bill for £91, due on Saturday. I am now making arrangements for an advance to Mr. Wright to enable him to pay this and other claims upon him, and if you will have the goodness to hold the bill for a few days, I shall be prepared on his behalf to take it up."

This action was brought upon the guarantee which the plaintiff contended was contained in this letter.

A verdict was found for the defendant, with leave to the plaintiff to move.

Keane, Q. C., now moved for a rule nisi to set aside the verdict, and to enter a verdict for the plaintiff. He contended the letter of the 5th February contained a personal undertaking to be answerable for the debt due from Wright to the plaintiff, if Wright failed to pay it. He cited *Downman* v. *Williams*, 7 Q. B. 103; *Lewis* v. *Nicholson*, 18 Q. B. 503; *Norton* v. *Herron*, R. & M. 229.

BOVILL, C. J. — The important document in this case is very ambiguous, and is one on which it is difficult to place a construction; it is the duty of the court to arrive at a conclusion from the general nature of the document. The letter which was written by the defendant to the plaintiff refers to Wright in such terms as a solicitor would use in speaking of his client. The defendant speaks of Wright as of a person for whom he was acting; he then says—"I am now making arrangements for an advance to Mr. Wright, to enable him to pay this and other claims upon him." To whom was this advance to be made? undoubtedly to Wright; and for what purpose? No doubt it was to enable Wright to pay off a sum due from him. The letter proceeds to say —"If you will have the goodness to hold the bill for a few days, I shall be prepared on his behalf to take it up." The letter is almost similar to the second part of the letter in *Downman* v. *Williams*; the distinction is a very fine one. I base my judgment on the whole transaction, as disclosed by the letter, and I think it is evident that defendant was acting for Wright.

BYLES, J.—I am of the same opinion. I think that a contract by which an attorney is to become a surety for his client can only be created by express terms. The defendant here says in effect, I shall be in funds on Wright's behalf, and shall then be prepared to take up the bill. The Lord Chief Justice has referred to the case of *Downman* v. *Williams*, and that case is a very strong one against Mr. Keane.

KEATING, J.—In order to decide this case it is necessary to look at the whole of the document: it appears clear from it that the defendant was only acting for Wright. The letter says nothing more than that, if the plaintiff would hold over for a few days, the defendant would raise money to satisfy the bill on behalf of Wright.

SMITH, J.—I am of the same opinion. My impression at first was that the letter did not contain any personal undertaking to pay, and I have since been confirmed in that view.

Rule refused.

STUBBS v. THE HOLYWELL RAILWAY COMPANY.

Contract—Personal services—Death—Right of action vested—Rescission.

Where a contract is for personal services, the death of the person who is to render those services determines the contract for the future, but it does not rescind it *ab initio*, or take away any right of action already vested.

Where a person employed to do a job, to be finished in a certain time, at a quarterly salary, and after several quarterly payments had accrued due, but before the work was finished he died,

Held, that his administrators were entitled to recover the quarterly payments accrued before his death.

This was an action by the administrators of one Stubbs, for work done by the deceased, and salary payable before his death.

The defendants paid £100 into court, and denied their liability to any further extent.

The case was tried before Mellor, J., at the Manchester Spring Assizes, when the facts proved were as follows:—

In December, 1865, the deceased was employed by the defendants as their engineer to complete certain specified works upon their line. The work was intended to be completed within fifteen months, and the deceased was to be paid a sum of £500 by five equal quarterly payments.

The deceased entered upon the work and at the end of the first quarter, in March, 1866, he was paid £100. He proceeded with the work for a second and third quarter, and soon after the end of the third quarter he died. Less than three-fifths of the whole work was then finished, but it did not appear that there had been any default on the part of the deceased.

The plaintiffs songht to recover £200, the amount of the two quarterly payments accrued before the death of the deceased. For the defendants it was contended that as the whole contract was unperformed the plaintiffs were at any rate only entitled to recover the actual value of the work done upon a *quantum meriut*.

The jury found the value of the work to be $50 beyond the amount paid into court.

A verdict was entered for the plaintiff for the full amount, with leave to the defendants to move to reduce it to the amount found by the jury.

Holker, in Easter Term, obtained a rule *nisi* accordingly.

R. G. Williams now showed cause. This was an employment at so much per quarter. The death of the deceased no doubt dissolved the contract, for it could not be performed by any one but himself. But it cannot affect a right of action already vested, and the present claim was a vested right of action in him before he died.

Holker, in support of the rule.—If a special contract is put an end to, whether by death or otherwise, it is rescinded. That rescission relates back to the making of it, and it puts an end to all rights founded on the contract. The only right that any one can then have is to treat the contract as if it had never existed, and sue upon a *quantum meruit* for the value of the services actually rendered. The law is laid down in the notes to *Cutter* v. *Powell*, 2 Smith's Lead. Cas. 1; and it is there shown that all the cases in which any right of action exists, while a special contract remains unperformed, rest on the doctrine of rescission. [MARTIN, B.—This is a verbal ambiguity. In most of the cases in trat note the contract is broken, not rescinded.] It is broken by one party, and thereupon rescinded by the other. [CHANNELL, B.—The case of a contract for personal services, and the death of the party is rather the case of a condition unfulfilled. The contract is subject to the condition that he shall live to perform it.]

KELLY, C.B.—I am of opinion that the plaintiffs are entitled to retain their verdict. The deceased entered into a contract for work to be finished within a year and a quarter, his payment to be £100 a quarter. At the end of the first quarter he received £100. He then proceeded with the work for two more quarters, and thereupon became entitled to two more sums of £100. This right of action vested in him the moment after his third quarter was finished. Soon afterwards he died. His death put an end to the contract; but it did not divest the right of action already vested in him, and which survived to his administrators. It may be a case of hardship, for less than three-fifths of the work was completed; but that cannot take away the right of action vested in the deceased.

MARTIN, B.—I am of the same opinion; and really the law is very clear, though it has been much confused by talking of rescission and *quantum meruit*. If a man is employed to do a job, the price is not to be paid unless he does it, even though he die. But if he is to be paid so much a month, he earns his money each month. If he failed or refused to do his work in such a case, he could not recover, for he could not prove his readiness and willingness to fulfil his part of the contract. Where a man dies, in a case like this, the contract is at an end, for he must do his work in person; in other words his living to do it is a condition of the continuance of the contract. But no right of action once vested is taken away. It is in this sense that death puts an end to the contract. Rescission is a totally different thing, and must be by the consent of both parties. No one has a higher respect for Mr. Smith's opinion than I have; but I think some of his positions in the note cited cannot be upheld. The subject is before the Exchequer Chamber, and I think the view taken in a case in the Exchequer will be found to be the true one.*

CHANNELL, B.—I am of the same opinion. I think on the death of the deceased the contract was at an end as to things future, but not so as to affect things past. I entirely agree that this is not the case of a contract rescinded, but of a contract annulled for the future, by failure of that which was the condition of its continuance. If the evidence showed a want of readiness and willingness in the deceased to perform his contract, or any default on his part, the case might be different, but nothing of the kind appears. A right of action had vested in him; and his administrators may enforce it.

Rule discharged.

TURNER v. BURKINSHAW.

Principal and agent—Interest—Negligence of principal.

Where the plaintiff had entrusted the defendant with the entire management of his affairs, and years occasionally elapsed without any accounts being furnished by the defendant or demanded by the plaintiff, and the defendant retained in his own hands a large sum which should have been paid over to the plaintiff's account.

The court refused to charge the defendant with interest.

[L. C. Chancery, April 24.]

In 1842 the plaintiff, who was the vicar of Grasby, and the owner of much freehold property in the vicinity, entrusted the defendant, the son of a neighbouring farmer, with the entire management of this property. No express agreement was made between the parties, but the plaintiff reposing entire confidence in the defendant, the arrangement between them was, in

* The case in the Exchequer Chamber, referred to by his lordship, appears to be *Appleby* v. *Meyers*, reported in the Court below, 14 W. R. 835, 1 L. R. C. P. 616. The case in the Exchequer is apparently *Clay* v. *Yates*, 1 H. & N. 73.

effect, that the defendant should pay all moneys which he received on account of the plaintiff into the plaintiff's account at a certain bank. The defendant had unlimited authority to draw on this account, and the cheques were always drawn in his own name "for the Rev. Charles Turner." The plaintiff himself never drew upon this account, but applied to and obtained money from the defendant as he wanted it.

Between 1842 and 1852 accounts were rendered by the defendant. From 1852 to 1857 no accounts were rendered, and no complaint appears to have been made by the plaintiff. From 1858 to 1861 accounts were rendered. In 1861 the plaintiff's father-in-law discovered errors in the defendant's accounts, and an end was put to the relation between the plaintiff and the defendant.

In 1863 the plaintiff filed his bill for an account, which account was decreed by the Master of the Rolls, and the Chief Clerk's certificate showed that upwards of £4,000 was in the hands of the defendant, as the plaintiff's agent. Respecting a sum of £1,000, part of this amount, the defendant alleged that until the institution of the suit he had not been aware of its having been paid in to his private account; he admitted, however, having had his pass-book in his possession, with intervals of several months.

The case coming on for further consideration, the Master of the Rolls refused to charge the defendant with interest.

The plaintiff appealed.

Southgate, Q. C., and *Nalder*, for the appellant. *Lord Hardwicke* v. *Vernon*, 4 Ves. 411, 14 Ves. 504; *Beaumont* v. *Boultbee*, 5 Ves. 485, 7 Ves. 599, 11 Ves. 358; *Lord Chedworth* v. *Edwards*, 8 Ves. 46, are in point. In *Lord Salisbury* v. *Wilkinson*, cited in the last case, it is true that the defendant was not charged with interest, but only on the ground that he had informed his principal from time to time what moneys were in his hands, and arranged with him to retain constantly a large balance. They also cited *Pearse* v. *Green*, 1 J. & W. 135; *Crackelt* v. *Bethune*, *ib.* 586; *Mosley* v. *Ward*, 11 Ves. 581; *Mayor of Berwick* v. *Murray*, 5 W. R. 208, 7 D. M. & G. 497; *Attorney-General* v. *Alford*, 3 W. R. 200, 4 D. M & G. 843; and contended that *Blogg* v. *Johnson*, 15 W.R. 626, was not in point

Selwyn, Q. C., and *Fischer*, for the respondent. The case is merely this, that the plaintiff entrusted the defendant with the entire management of his affairs, which involved the outlay of large sums by the defendant on his behalf, and the defendant, in consequence of the very friendly relation between himself and the plaintiff, did not furnish regular accounts. The neglect of the plaintiff contributed to the confusion which arose, and under such circumstances this court does not, in favour of a plaintiff, charge a defendant with interest.

Lord Chelmsford, C. [after stating the facts.] On consideration of all the extraordinary circumstances of the case, I think the Master of the Rolls was right in the conclusion at which he arrived. During the argument, I was disposed to think that some distinction might be drawn between a sum of £1,000 which was paid in to the defendant's account, and the other sums with which the defendant was charged. The defendant says he was not aware of that sum being paid into his account, until the institution of the suit, but as he had his pass-book in his possession, as he admits, with intervals of several months, he ought to have discovered that that sum which belonged to the defendant, had been paid in to his account, and he ought to have transferred it to the plaintiff's account, according to the regular course of dealing between them. But upon reflection, I think it was merely like the other sums of money, amounts which have been retained by the defendant, and improperly no doubt retained in his hands. "It was the duty of the agent," Sir Thomas Plumer said in *Pearse* v. *Green* [*ubi. sup.*], quoting the words of the Lord Chancellor in *Lord Hardwicke* v. *Vernon* [*ubi. sup.*], "to be constantly ready in his accounts." But this must mean that the agent must be ready to render his accounts when they are demanded. If no demand is made upon him, it is the simple case of an agent retaining money which he ought to pay over, but which he has not been required to pay; and there is no case of which I am aware, where under such circumstances, without anything more, the agent has been made to pay interest. In this case, the agent was to a certain extent the banker of his principal—keeping his money and supplying his wants when demands were made upon him. If therefore there was no fraudulent dealing on the part of the defendant, it appears to me that he ought not to be made liable for interest. The defendant seems to have been a person of very little experience in matters of account, and to have been left very much to himself. If I could see any wilful withholding of the accounts, or any fraudulent falsification of them, I should of course consider that the defendant ought to be charged with interest; but I see nothing in the case but a loose mode of dealing between the parties—the plaintiff implicitly confiding in the defendant, and making him in a certain sense his banker—allowing him to operate at his own will and pleasure upon his account at the bank—certainly leaving him in the uncontrolled management of his affairs, and the defendant receiving and disbursing the plaintiff's money to the extent of upwards of £70,000, according to the extent of the authority entrusted to him. Such an agent is undoubtedly bound to account whenever his principal chooses to call upon him to do so; but he is not liable to the penalty of paying interest unless he has improperly withheld accounts and refused to pay over money in his hands when demanded, or has delivered fraudulent accounts. The decree of the Master of the Rolls must be affirmed.

CORRESPONDENCE.

A question under the Bankrupt Law.

To the Editors of the Law Journal.

Gentlemen,—In my letter to the *Local Courts' Gazette* for last month, I drew the attention of the learned Editors of that Journal, and the legal public to a question under the Bankrupt laws. I am hoping to see your comments on it, as well as other legal lights from the pens of legal contributors, in your

forthcoming July number. The question is, "*is a debt not included in the Schedule of debts attached to the assignment of an insolvent, under the law, discharged by his certificate of discharge or not?*"

I contend that it is not, and although I cannot at this time lay my hands upon any adjudged case it seems to me that every principle of law, and common sense, is against a contrary construction. The real object of the Bankrupt act, is to enable honest debtors to get a discharge, upon giving up all the property they have for the *benefit, and upon due notice to every creditor great and small.* Every creditor should have notice and by our insolvent act, as construed, every creditor has to be once notified at least. To bar a man of his debt without notice seems very unfair. Another object in having every creditor put in the list, is that no favouritism may be shown to one more than to another. If the insolvent can leave out of his list a creditor of say $50, with impunity, so he can leave out with equal legality one having a claim of $500. Supposing him to have an estate (a precious rare thing it is true) that will pay 5*s.* in the £, then certain preferred or included creditors are paid, and excluded ones get nothing. That your readers may know in what places in our insolvent law, reference is made to the necessity of giving a full list of creditors I mention the following, viz.; Section 2 of the act says "At such meetings he (the insolvent) "shall exhibit a statement showing the position of his affairs and particularly a schedule (form B) containing the names and residences of all his creditors." See also subsection 2 of section 2: subsection 16 of section 3: subsection 2 of section 5: subsection 6 of section 2: section 11."

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

SCARBORO.

Toronto, July 15, 1867.

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

CANADA.

A PROCLAMATION.

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

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

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

For the Province of Ontario.

John Hamilton.
Rodedrick Matheson.
John Ross.
Samuel Mills.
Benjamin Seymour.
Walter Hamilton Dickson.
James Shaw.
Adam Johnson Fergusson Blair.
Alexander Campbell.
David Christie.
James Cox Aikins.
David Reesor.
Elijah Leonard.
William MacMaster.
Asa Allworth Burnham.

John Simpson.
James Skead.
David Lewis Macpherson.
George Crawford.
Donald Macdonald.
Oliver Blake.
Billa Flint.
Walter McCrea.
George William Allan.

For the Province of Quebec.

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

For the Province of Nova Scotia.

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

For the Province of New Brunswick.

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

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

GOD SAVE THE QUEEN.

CANADA.

By His Excellency the Right Honorable CHARLES STANLEY VISCOUNT MONCK, Baron Monck, of Ballytrammon, in the County of Wexford, in the Peerage of Ireland, and Baron Monck, of Ballytrammon, in the County of Wexford, in the Peerage of the United Kingdom of Great Britain and Ireland, Governor General of Canada, &c., &c., &c.

To all whom these presents shall come—GREETING:

A PROCLAMATION.

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

GIVEN under my Hand and Seal at Arms, at OTTAWA, this FIRST day of JULY, in the year of Our Lord one thousand eight hundred and sixty-seven, nnd in the thirty-first year of Her Majesty's reign.

MONCK.

By Command,

JOHN A. MACDONALD.

Canada Gazette, July 1st, 1867.

APPOINTMENTS TO OFFICE.

CORONERS.

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

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

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

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

COMMISSIONERS.

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

NOTARIES.

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

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