DIARY FOR FEBRUARY.

1. Mon..Hilary term commences.
2. Tues..Purification of Virgin Mary.
3. Wed..New Trial Day, Q.B.
4. Thurs..New Trial Day, C.P.
5. Fri..Paper Day, Q. B., New Trial Day, C. P.
6. Sat..Paper Day, C. P., N. T. Day, Q. B.
7. SUN..*Quinquagesima.* Sir G. Wolseley entered Coomassie.
8. Mon..Paper Day, Q. B., New Trial Day, C. P.
9. Tues..Shrove Tuesday, New Trial Day, Q. B., Paper. Day, C. P.
10. Wed..Lent commences—Ash Wed.—Un. of U. & L Can., 1841.
11. Thurs..Paper Day C. P., Open Day, Q. B. Lord Sydenham, Gov. Gen., 1840.
12. Fri..New Trial Day, Q B., Open Day, C. P.
13. Sat..Hilary Term ends. Last d. to give notice for call. Last day to move against mun. elections. Mun. Act, s. 132.
14. SUN..*Quadragesima. Valentine's Day.*
16. Tues..Hon. E. R. Caron, Lieut.-Gov. Prov. Quebec, 1873.
18. Thurs..Disraeli accepts Premiership, 1874. Rehearing term in Chancery begins.
20. Sat..Tithes abolished in Upper Canada, 1823.
21. SUN..*2nd Sunday in Lent.*
28. SUN..*3rd Sunday in Lent.* Tich. claim. sen. 14 yrs. penal serv., 1874.

CONTENTS.

EDITORIALS:

PAGE

Hilary Term, 1875 33-41
Profits of Peace 33
Recent Law Appointments in Ireland 33
Re-arrangement of Counties for Judicial Purposes 33
Lawyers and their Clients 34
Professional Advertising 34
First Annual Dinner of Chicago Bar Association. 34
Acts of Last Session reviewed 35
Relative Importance of Case Law (*contd.*) 37
Enlargement of the Law of Set-off 39
Registry of Deeds 41

SELECTIONS:

Special Agency 42

CANADA REPORTS:

ONTARIO:

ELECTION CASES:

South Renfrew Election Case 47
Defective Nomination Paper.

ENGLISH REPORTS:

ELECTION CASE:

County of Durham (Northern Division) 51
Withdrawing Petition.

IRISH REPORTS:

ELECTION CASE:

Drogheda Election Petition 52
Inspection of ballot papers.

CHANCERY:

Kelly v. Kelly 54
Fiduciary Relationship—Administratrix of yearly tenant—Graft in equity.

UNITED STATES REPORTS:

PENNSYLVANIA:

Dollar Savings Bank v. Bennet 55
Nudum pactum—Trust.

REVIEWS.

Suggestions to Municipal Officers 55
Epitome of Leading Conveyancing & Equity Cases 55
Law Dictionary and Institute of the Whole Law 56
The English Quarterlies 57

BOOKS RECEIVED. 57

FLOTSAM AND JETSAM.

THE

Canada Law Journal.

Toronto, February, 1875.

The Courts of Queen's Bench and Common Pleas opened this Hilary Term with a fair show of business. On Monday morning the Queen's Bench list showed no less than fifty-seven cases of the old business, on the new trial paper, to be disposed of. The Common Pleas have twenty-four rules for new trials lying over from last Term.

The *Forum* gives currency to a paragraph that the Commandant of the artillery battalion of Boston has just recovered, after a long lawsuit, from the "World's Peace Jubilee Committee" the sum of $8,889.95, for artillery services during the jubilee. Peace hath her profits no less substantial than war. Commend us to "the piping times of peace."

The appointment of Dr. Ball as Lord Chancellor of Ireland seems to give general satisfaction. He is a sound lawyer, and was a powerful advocate, and in the House of Commons gained a high reputation. He was sworn in on the 1st day of January last. Solicitor General Ormsby succeeds him as Attorney General, and the Solicitor Generalship is filled by the appointment of the Hon. D. R. Plunket, Q. C. This last gentleman is a grandson of Lord Chancellor Plunket on the father's side, and of Chief Justice Bushe on the mother's side.

It was recently announced, in a semi-official manner, that it is intended at the next Session of the Ontario Legislature to group certain Counties together for judicial purposes, and that, therefore, no appointments would be made at present to fill

vacancies. It is impossible to discuss a measure which is, for the public at least, in so indefinite a shape, and we should suggest the advisability of taking the profession into confidence, by making public the proposed changes in good time. Every safeguard of this kind, in cases where it is proper to be done, is of advantage when we see the rapidity with which important measures are rushed through the House. We do not mean that this is done with any desire to prevent discussion, as it is, to a great extent, due to the fact that we have no second Chamber. It is easier to change to the new, than to come back to the old, if the new does not answer; and the maxim, "make haste slowly," is of especial application in matters affecting legal procedure.

At the first annual dinner of the Chicago Bar Association, recently celebrated, and whereof an elaborate account is given in the *Chicago Legal News*, one of the toasts propounded was "Our Clients," coupled with the following sentiment:

"The Scriptures assure us much may be forgiven
To flesh and to blood by the mercy of Heaven;
But we've searched all the books, and texts we find none,
That pardon the man whom his attorney must dun."

This sentiment is expressed with more force than fluency, and we object to it on the ground taken in the old warning—"*ne lude cum sacris.*" Upon the whole, we prefer the neat way (the antithesis of the above) in which Mr. Justice Maule put it, in a case before him in which an attorney's bill was sued upon. Counsel for the defence stigmatized the bill as "*a diabolical one.*" "That may be," said the Judge; "but the devil must have his due. Gentlemen of the jury, you will find for the plaintiff."

The following advertisement appears in an English periodical having a large circulation amongst country gentlemen in England, and a copy has been sent to us by a friend. Several professional men have also called our attention to it as highly objectionable:

"Canada.—Farms for sale. Investments made and examined. Persons thinking of settling in Canada can hear of good farms by applying to ——, Barristers, Toronto. Investments returning 8 per cent. per annum, on first-class security, can be made through them. Investments already made can be examined and reported on."

If this firm had called themselves *solicitors*, as they are in fact as well as barristers, the advertisement would not be open to the same criticism as it now is. The advertisers must surely be aware that *barristers* have nothing to do with a land agency business, though solicitors may properly sell lands for clients when so required, and advertise any lands that may be placed in their hands for that purpose. It is not usual, however, and most solicitors would be averse to putting their names to an advertisement couched in these general terms, and which one would expect to see signed by a land agent pure and simple. In the same way it was very properly thought objectionable for a barrister (as was done here some years ago), to advertise coals for sale, though circumstances *might* have arisen that would have made it competent for a solicitor to advertise the fact that he had to sell even coals on behalf of a client. We are not to *presume* that the word "Barristers" was used to convey an impression to the readers of the periodical in which the advertisement appeared (in a country where Barristers are never Solicitors, and where the former are in a higher grade than the latter,) that there was more reliance to be placed in them because they are Barristers; thus as it were, using the word to convey a wrong impression. At the same time the use of the word in that connection has properly been objected to by members of the Bar, and cer-

tainly might lead our brethren in England to entertain curious ideas as to the state of the profession here. Again, the last part of the advertisement unfortunately admits of two interpretations, but neither in this case are we to presume that it is intended as a "touting" advertisement for a class of business which is sufficiently disagreeable when it comes to us as a necessity, namely, to examine into the, possible, mistakes or omissions of other professional men. The advertisement may be read in a sense entirely free from such objectionable suspicion. Probably, as a matter of strict logic, it is competent for a Solicitor to advertise his readiness to do that which he properly may do when brought to him. But the question of good taste is another matter, and "for choice," we should be glad to see this advertisement discontinued, and in any case it should be altered to show the character in which the advertisers solicit the confidence of the English public. It is rather curious to note that one of the advertisers is a member of the English Bar. We offer this information to our brethren in England "in mitigation of damages."

ACTS OF LAST SESSION.

We called attention last month to two important acts affecting proceedings by magistrates and appeals from their decisions. We do not propose again to enlarge upon these, but to refer briefly to the other legislation of the session of special interest to the profession.

One of the acts already referred to (an Act respecting the operation of Statutes of Ontario) also provides that the repeal of any act or part of an act, shall not revive any act repealed by such act, or prevent the effect of any saving clause therein; thus disposing of a rule which, though in a way strictly logical, was productive of inconvenient and curious results.

The Act to amend section 13 of the Administration of Justice Act, 1874, makes provision for the disposal of cases heard before any judge who was a member of the Court of Error and Appeal, as formerly constituted, at the time of the hearing of the case.

By the Act to amend the Act respecting Division Courts, no change can be made in the number, limit, or extent of courts in a county, except after public notice given at the next previous sittings of the General Sessions of the Peace. We have always urged the undesirability of making frequent changes in the limits of these courts, and the cutting up of a county into such small divisions that the clerks and bailiffs cannot make a respectable living out of the legitimate business of their respective offices. This provision will at least prevent a change being made without the opportunity of full discussion. Another important change is made by which every County Judge shall have jurisdiction to hold Division Courts in any county in the Province, and may be required so to act by an order in council, or may do so at the request of a brother judge. This is a desirable provision, and we can imagine many cases where it will work both to the advantage of the public and to the convenience of the judges.

The preamble to the Act respecting personal estates of small value recites that "many poor persons die possessed of property of small amount, and it is desirable to increase the facilities for taking out letters of administration to their estate and effects, and to reduce the expenses attending the same." The latter part of the preamble we willingly accept, and it would be rash to contradict the assertion that many poor persons have a small amount of property; many have none at all; but, letting this pass, we are pleased to see a reduction in the outrageous tax

which small estates are subject to in the Surrogate offices. It was simply monstrous that from six to ten per cent. of these small estates should be retained to pay for a few simple forms that in most cases any schoolboy could fill up in half an hour. By this act the fees where the estate does not exceed the value of two hundred dollars, shall be two dollars and no more. It is to be hoped that the judges will, when they make any rules under this act, take the subject of the present surrogate tariff into consideration. Surrogate Registrars charge pretty much what they please and (like other Registrars) they please to charge quite enough; and as their fees are so large and those to attorneys so ludicrously small, and as they claim the right to be paid for everything whether done by them or not, the preparation of all papers falls into their hands, and the business is not done, as it ought to be, through the medium of the profession. This act also provides a simple process by which funds invested or deposited in a building society to the extent of two hundred dollars, can be handed over to the person properly entitled, without taking out administration; and there is a similar provision as to any surplus remaining with such society after the sale of mortgages. These clauses follow an Imperial statute to the same effect.

The Mechanics' Lien Act of 1873 of course required to be amended to be of any use at all, and it is therefore amended or at least altered by an act containing twenty clauses—the Act of 1873 was contained in fourteen. This act will certainly injure those who wish to borrow money for building purposes; and we have already suggested that there was a good deal of clap-trap about this legislative excresence in favor of the "workingman" who is trotted out for every purpose except that of doing him any real good; but we cannot at present discuss whether sufficient protection has been given to the "down-trodden masses." We see nothing in it, however, to secure any greater privileges of "working-women," to wit, female domestic servants. This is a grave omission which will probably be supplied next Session.

An amendment is made to the Registry Act by giving power to Sheriffs, Division Court Bailiffs, etc., who have seized mortgages under execution, to discharge the same in whole or in part, on payment being made to them. And the same Act compels Registrars on demand made to give detailed statements of fees charged by them. This is of course as it should be. We hope some day to see several other amendments made to this Act, and also to see the time when Registrars will be compelled by some efficient means to do properly that which they are well paid for. Solicitors occasionally come across mistakes and omissions which might make their hair stand on end with fright, but Providence fortunately is as kind to conveyancers as to children and inebriates. We should also like to live in those days when Registry offices are not made a refuge, as they have hitherto been, to a great extent, for retired, destitute, or troublesome politicians, that have to be provided for by the party in power, whichever that may be. A Registrar *ought* to be a lawyer in good standing, who would attend to his office work, and his deputy *ought* to be a Provincial Land Surveyor. Practising solicitors know the almost necessity for this, and as example of the advantages to be derived from such appointments we might refer to the Registrar at Guelph, who is a lawyer and to the Deputy Registrar at Toronto, who is a surveyor. Without the assistance and guidance of the latter, the brick building on Richmond street would be, to the uninitiated, a howling wilderness of doubt and despair.

An Act respecting apprentices and minors, seems to be a consolidation of the statutory law of the Province on that subject with some new provisions.

The Real Property Limitation Amendment Act, 1874, is of great importance, it has already been touched upon, and further reference will be made to it, but it does not come into force until July 1, 1876. The principle involved would seem to commend itself to a young and vigorous people in the latter half of the nineteenth century.

The Act to amend the laws relating to fire insurance will be a hard nut for Insurance Companies to crack. Without entering into the vexed question as to whether they do or do not inequitably take advantage of the extraordinary and apparently unreasonable conditions in their policies, the Act will certainly have the effect of making them more cautious in taking risks by preventing their setting up conditions which a Court or Judge may think inequitable. The plan heretofore adopted by Companies has been to insure property with a reckless disregard of consequences, trusting to all sorts of conditions to evade payment, when in *their* opinion payment would be inequitable. The Court of Queen's Bench, in *Smith* v. *Commercial Union Ins. Co.*, 25 U. C. Q. B. 91, suggested the interference of the Legislature to prohibit and restrict the conditions; but matters seemed to culminate in the case of Elliot against several Insurance Companies, heard before Mr. Dalton, as arbitrator. By this Act, a commission is authorised to settle reasonable conditions for such policies. And we are informed that the Chiefs of the three Superior Courts of Law and Equity, together with Mr. Justice Strong and Mr. Justice Patterson have been named as the Commisioners.

RELATIVE IMPORTANCE OF CASE LAW.

(*Continued from Vol. x., p.* 303.)

An exception obtains with regard to the decisions of courts of co-ordinate jurisdiction, where the prior decision is made merely on a motion, so that there is no opportunity of carrying it to a higher court by way of appeal. In such a case the judges do not feel themselves bound by the decision, if they disagree with the law or the reasoning therein. Lord Campbell says, in *Woodhouse* v. *Farebrother*, 5 E. & B. 289, referring to a prior decision on an equitable plea, "As the case was decided merely on motion, without the opportunity of carrying it to a Court of Error, we should not consider ourselves bound by it, had we disapproved of it, but we entirely concur in the reasoning on which it is founded." See also per Hagarty, C. J. C. P., in *Shier* v. *Shier*, 22 C. P., 162.

Another exception also occurs when the Superior Courts are sitting in Courts of Appeal from courts of subordinate jurisdiction. In this instance each court is governed by prior decisions of its own, and is not in the habit of reversing these and conforming to conflicting decisions of other courts exercising the like appellate jurisdiction. In *Boon* v. *Howard*, 22 W. R., 540, Brett, J., observed, "Where the court has a final and exclusive jurisdiction and its personality must be changed, the action of the court is injured, unless all the judges determine to follow loyally, as has been said, the previous decisions of the court." A remarkable example of the point under consideration is to be found in the course of decision in this Province upon the provisions of the first and fourth sections of the Act respecting mortgages and sales of personal property (C. S. U. C., cap. 45) The question came up in several appeals from the County Court as to the effect of non-registration within five days from the

execution of the instrument. The Court of Common Pleas uniformly held that until registry the instrument was void as against creditors, and that registration would not make it valid unless it took place within the five days. See *Feehan* v. *Bank of Toronto*, 10 C. P., 32; *Shaw* v. *Gault*, *Ib.* 240; *Haight* v. *McInnes*, 11 C. P., 518. On the other hand, the Court of Queen's Bench, as uniformly held that the filing related back to the execution, and if the instrument was filed within the five days, the assignee or mortgagee was entitled as against a writ against goods placed in the sheriff's hands after the execution of the instrument, but before its registration. See *Feehan* v. *Bank of Toronto*, 19 U.C.Q.B., 474; *Balkwell* v. *Beddeme*, 16 U.C.Q.B., 206. This conflict was so pronounced and irreconcileable that the Legislature had at last to interfere, and then declared that the law as expounded by the Queen's Bench ought to prevail, by enacting in 26 Vic., c. 46, s. 1, that every such instrument shall operate and take effect upon, from and after the day and time of the execution thereof.

Again: in cases where the liberty of the subject is directly involved (*e. g.*, applications for *habeas corpus*) each court is accustomed, and, indeed, considers itself bound to exercise its jurisdiction according to its own view of the law. See *Re Timson*, L. R. 5 Exch. 261. This was also exemplified in one of the *causes célèbres* of Canada, *Re John Anderson*, 11 C. P. 9, and 20 U.C.Q.B. 124.

An interlocutory order in a suit in equity is usually deemed of less authority than the final judgment given at the hearing of the cause. As remarked by *Richards*, C. B., in *Drew* v. *Harman*, 5 Price 322, "An injunction is but an interlocutory order made for the sake of security, and very often the court ultimately decides exactly the other way." So in *Ball v. Storie*, 1 Sim. & Stu. 214, it was said by the Court, "An interlocutory order of the Court of Chancery in Ireland can only be regarded here as an authority, and not as binding upon the Court; although a final judgment of that Court, in a case in which it has concurrent jurisdiction, might be entitled to different consideration." But there are motions, interlocutory in form, which in truth go to the whole merits of the case. When, for instance, on an injunction motion, the rights of the parties depend not upon a conflict of evidence but upon a question squarely arising upon the pleadings, as touching the construction of a document, or the like,—in these cases the decision, though interlocutory in form, is in effect of as much weight as a judgment given at the hearing. This distinction was brought out by Lord Manners in *Revell* v. *Henry*, 2 B. & B., 286. His language is as follows: "But it has been said that this was an opinion on a motion for an injunction, and not a deliberate judgment, on a hearing on pleadings and proofs. * * * Where all the facts appear upon the bill and answer, and there is nothing in dispute between the parties but the law of the court, it is very common, both in this country and in England, to decide the question upon motion. There are many instances in the reports in Lord Redesdale's time and in the contemporary reports. It is a great saving of expense to the parties, and the judgment of the Court is equally entitled to weight and authority." The present Master of the Rolls in England (Sir George Jessel) has expressed his intention of always following this practice: and so, where a question is fairly raised on demurrer, he does not hesitate to decide it, though many judges before his time were in the habit of reserving it for a hearing.

Where the question before the Court is one not involving principle, but is a mere matter of practice, the Courts

will follow the practice as expounded in the last decision. In such cases certainty is of the greatest importance, and the Court will not inquire into the foundation of the practice, or investigate the reason of its adoption. See *Bancroft* v. *Greenwood*, 1 H. & C. 778.

To conclude this part of our subject, we may advert to the decisions where the Court consists of a single Judge only, as in England in the Bail Court, and in Ontario in the Practice Court. As might be expected these cases do not force the right which attaches to the adjudicating of a bench of Judges. In *Edwards* v. *Bennett*, 5 Prac. R., 164, Gwynne, J., says: "The case decided by the full Court appears to me to settle the point, and greater weight must be attributed to the decision being that of the full court, than to any of the cases decided by a single judge in the Bail Court."

ENLARGEMENT OF THE LAW OF SET-OFF.

The right of set-off obtains to but a limited degree in English jurisprudence. Originally unknown to the common law, it was recognized to a considerable extent in equity and was afterwards in the statutes of set-off, incorporated, subject to many well-known restrictions, into the general law of England. But many cases occur almost yearly, in which the natural equity to off-set claims arising out of the circumstances of the litigation is most persuasive. The courts, however, have felt hampered by the law as it exists, and have been obliged to refuse relief, which should have been granted, if for no other reason, in furtherance of the maxim *Interest reipublicæ ut sit finis litium.* Courts of Equity have exercised a larger jurisdiction in matters of set-off than has been entrusted to Courts of Law, for the reason, no doubt, that the former have always had more adaptable machinery for dealing with and working out conflicting equities and the enquiries consequent thereon, and they have not, as have Common Law Courts, regarded with abhorence a multiplicity of issues. The comparison has been quaintly, yet appositely made, that a verdict at law is like a fixed pipe which can only inject water in one course, whereas a decree in Chancery possesses the power of the *hose*, or flexible pipe, which is directed by turns from side to side, till every kindling spark of litigation is extinguished.

By recent legislation in Ontario much of this flexibility has been communicated to the Common Law Courts, and the present seems a fitting time to consider some of deficiencies of the law on the subject of set-off, in order to effect the extension of this principle to such cases as have been above indicated.

In the New York code it is provided that the defendant may answer any complaint by setting up any new matter constituting a defence or counter-claim. This counter-claim is defined to be one existing in favour of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract of transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) In an action arising on contract, any other cause of action, arising also on contract, and existing at the commencement of the action. A good deal of discussion has arisen as to the scope of the first sub-division. In the narrower construction, the latter clause "connected with the subject of the action," is treated as merely a qualification of the preceding clause; in the more liberal and reasonable sense, it is contended that the latter clause is meant to apply to the *property* in respect of which the plaintiff has be-

gun to litigate, although it may not be connected with the particular contract or transaction set forth in the complaint. We think that the doctrine of set-off may well be enlarged so as to embrace all cases falling within the the latter intrepretation of this clause of the New York code. Jurists of no mean repute have asserted that all cases should be dealt with and disposed of as in matters of arbitration where the reference is of the cause and all matters in dispute between the parties Then the totality of all causes of action and cross-causes on both sides is to be investigated and finally adjusted. Others have contended, and in our view with greater reason, that all quarrels and disputes touching the subject matter of the controversy--the property, in respect of which the litigation has arisen, should be heard and determined in one and the same suit.

The short-comings of English law, as found in the decisions of the mother-country and of this Province, will be seen in the cases which we now proceed to cite as specimens of the state of the law in this branch. In *Clarke* v. *Dickson*, Ell. Bl. & Ell. 150, the Courts treat the rule as well-established, that where a person is induced by fraud to enter into a contract under which he pays money, he can at his option on discovering the fraud, rescind the contract and sue for money had and received, if he can return what he has received under the contract. But when the parties cannot be replaced *in statu quo*, the right to rescind does not exist and the remedy of the party injured is by cross-action for deceit, when he will recover the real damages sustained. So in *Sully* v. *Freeman*, 10 Exch. 535, a plea was held bad which set up in an action on a bill of exchange that it was part purchase money of a ship (which the defendant had retained) which the defendant was induced to buy on certain false and fraudulent representations and that there was no value or consideration for the bill. Such a defence, even on equitable grounds, is not tenable. This point was considered by the Court of Common Pleas in *Best* v. *Hill*, L. R. 8 C. P. 10, where Bovill, C.J., says "When the cross-claim for unliquidated damages arises out of the subject-matter of the action, the Court of Chancery could at most but impose terms, as that the damages should be ascertained in the cross-action, and the execution stayed in the original action till that was done." In *Rawson* v. *Samuel*, Cr. & Ph. 177, the Court of Chancery laid down the rule more strictly, as follows:—Matters arising out of one contract in this way,—the one for an account of transactions under the contract, and the other for damages for the breach of it,—cannot form the subject of equitable set-off, nor will equity restrain an action for these damages till those accounts are taken. In *Hamilton* v. *Banting*, 13 Gr. 484, the late Chancellor (Vankoughnet) refused in a suit for the foreclosure of a mortgage given by the purchaser for a part of the price, to direct an inquiry and set-off as to the loss sustained by the partial failure of title and by incumbrances and charges on the land sold. These claims, he held, did not form a proper subject of set-off to the amount secured by the mortgage. But he goes on to observe: "I regret to find that such is the state of the law. The tendency of all modern decisions is to avoid, as far as possible, circuity of action, and I do not see why, when the cross-claims spring out of the one transaction, they should not be disposed of in the one suit. This Court has as difficult matters of calculation as those raised here to dispose of every day, and it seems hard that the defendant should be forced to go to law to ascertain the amount of the set-off, which, it seems to me, he must have the right to claim eventually in reduction of the plaintiff's mortgage."

These observations of one of our most brilliant judges strongly support the views which we urge, and indicate the advisability of ameliorating the law by enlarging the application of the doctrine of set-off in all the provincial courts.

LAW SOCIETY.

Hilary Term—1873.

The examinations of this term resulted as follows:

FOR CALL.

George B. Gordon, John Bruce, Colin G. Snider, G. M. Roger, Warren Burton. Charles Gamon and W. D. Pollard were called to the Bar under special acts, having also passed the required examinations.

FOR ATTORNEY.

Haughton Lennox, J. D. Matheson, J. T. Lennox, W. H. Ferguson, Francis Rye, John G. Robinson, F. E. P. Pepler, T. Caswell, Alexander Ferguson, Warren Burton, David Ormiston, J. C. Judd. Francis Elkington was also admitted under special act. Mr. Cootley, of the Quebec Bar, was also called and sworn in.

FIRST INTERMEDIATE.

T. G. Meredith, W. M. Sutherland, T. E. Lawson. L. M. Macpherson, F. S. Nugent, M. G. Cameron, E. Fraver, Charles Keats, John McLean, D. S. McMillan, J. W. Gibson, A. D. Patterson, W. J. Hales, W. J. Franks.

SECOND INTERMEDIATE.

F. W. Patterson, John Crerar, J. M. Kilborne, R. Pearson, D. W. Clendenan, W. C. Moscrip.

Of six students who went up for call five passed, and five out of seventeen articled clerks failed to reach the standard. In fact in no case were the papers more than ordinarily good, none obtaining the number necessary to pass without an oral, and this was remarked upon as singular, as several of the gentlemen have distinguished themselves at previous examinations.

REGISTRY OF DEEDS.

An exchange describes a new application of the processes of printing and photographing in connection with the registration of deeds:

"The Dublin correspondent of the London *Times* describes an ingenious invention of Mr. Dillon, an official in the registry of deeds office, by which, through the aid of a mechanical index and the use of printing and photography, searches in that office are to be facilitated. The invention comprises the substitution of a simple mechanical index for the numerous books now in use, and the application of printing and photography in producing the transcripts or copies which are required. The index is placed in a wooden case about the height of an ordinary office-desk, and consists of a roll of suitable paper, which is coiled around the cylinders, which in the model are turned by handles at the side. There are two sets of rollers in the desk, the top of which is of glass, the one at the left hand being for the common searches, and the one at the right hand for negative searches. If any one wants to know whether there is a charge affecting the lands of a certain person, he turns the handle at the left hand side, and in a minute brings up the particular letter under which is the name he wants. He then waits to see that there are no other charges than the one indicated, and he turns to the index to the lands and turning the handle to the right, brings up the name of the county or city; and turning on in a few seconds, finds the particular place, and there sees set out in print full information, such as under the present system he could only obtain after perhaps months of searching; and if he desires a copy of it, or any number of copies, he can have them printed for him in a few minutes. It is proposed to use steam or some other motive power applicable to a number of the index cases contained in record office. The names and all other particulars in each index are printed in legible characters, and it is calculated that with the aid of ten printers an amount of work will be gone through which now costs nearly £4,000 a year. The total annual cost of the registry of deeds office is £16,000. The rapidity of the registration will be understood when it is explained that instead of having the memorials

compared and copied by writers, the deeds are photographed, the printer gets the plates as his copy, and the originals, instead of being left to be thumbed and mauled and torn by persons who have to refer to them, are deposited at once in fire-proof safes. It appears that legislation will be necessary to make this wonderful invention available in the office, but surely this will not be long delayed."

SELECTIONS.

SPECIAL AGENCY.

Though the principles of law applicable to cases of general agency are well settled, and are laid down with great perspicuity by Story, Parsons and other text writers, the distinctions between general and special agencies, and the different rules governing the liabilities of principals, seem to be still involved in much uncertainty and confusion. How a special agent is to be distinguished from a general agent, becomes frequently a subject of much importance and great nicety, and there is often no certain criterion. Moreover, it is easier to lay down a rule than to determine its application in a particular instance, and there may be great subtlety and refinement in discussing the principles, without reaching a solution satisfactory to a candid mind in the case at bar.

A special agent is defined generally by Story as "a person appointed to act concerning some particular object;" by Parsons, as "one authorized to do one or two special things;" by Chitty, as "one appointed only for a particular purpose, and invested with limited powers;" by Kent, as "one constituted for a particular purpose and under a limited power;" though all these writers recognize these definitions as incomplete, and admit that the question whether the agent falls within them by no means always determines the rule of liability of the principal to third parties.

A most reasonable and proper rule, founded upon the soundest reason and clearest justice, is stated by Chitty in his excellent work on Contracts, though it seems to have been overlooked by most of the elementary writers. · "If the agent being himself engaged in a particular trade or business, be employed by the principal to do certain acts for him in that trade or business, he will in each case be held to be, with reference to his employment, a *general* agent, and the public having no means of knowing what are in any particular case within the general scope of the agent's powers—the wishes and directions of the principal—the latter will be liable even though his orders be violated. In such a case the principal having for his own convenience induced the public to consider that his agent was possessed of general powers, is bound by the exercise, on the agent's part, of the authority which he thus allowed him to assume," p. 284. This principle, so wise and salutory as to commend itself at once to every clear-thinking mind, is supplemented on p. 289 by the further rule: "Factors and brokers are both, it would appear, general agents, and hence it follows that—except in cases where it is known to be usual to limit their authority, although the actual limit be not known—all contracts made by them in the ordinary course of their employment, without notice by third parties of their private instructions, and without fraud or collusion, are binding on their principals."

These rules as thus laid down contain all the restrictions necessary to the safe conduct of business, and the protection of principals so far as they should be protected as against innocent third parties; for in cases of agency the universally recognized principle is to be applied that he who, even without intentional fraud, has enabled any person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the injury rather than the innocent party who has placed confidence in him. The principal who has appointed the agent, has clothed him with the *indicia* of agency and authority, and has thus in the furtherance of his own business, given him the power and position to do injury, should be the one to suffer for any abuses or misapplication of that power or authority. And the reason and justice of this is precisely the same in cases of general and of special agency. The principal of course should not be bound by any act of the special agent beyond what it was reasonable and proper or usual for the agent to do in the course of his agency.

If the owner sends another with a horse for sale, it is well established that

he has the implied power to warrant his soundness; that is reasonable and proper. He may also sell him for a fair price. But if the agent were to offer a valuable horse for twenty-five dollars, the purchaser should be at once put upon inquiry as to his agency, and whether he had the right to sell him at such a sacrifice; or, if he warrants him to trot in 2.30, the principal would not be bound, unless he had given proper authority for such a warranty, as that would be an extraordinary warranty, and the purchaser should be at once put upon inquiry.

In both cases of general and special agency, the authority of the agent, whether conferred in writing or by parol, includes all the necessary and usual means of executing it with effect: Story on Agency, § 58; 1 Parsons on Contracts, 57; Paley on Agency, 189; 2 Kent, 618; 1 Chitty on Contracts, note to page 286.

If, then, the agent be prohibited by his principal from using certain of these means, which would ordinarily be necessary and usual, what will be the effect upon third parties dealing with the agent in ignorance of this prohibition? In the case of a general agent the principal would certainly be bound, and in the case of a special agent, although this precise point is by no means settled in the books, it would seem that he should also be bound; otherwise innocent third parties would only know the existence of the limitation after the injury had been done. When too late they would discover that the liability of the professedly contracting party was but a myth and a hallucination. Suppose, for example, that a merchant should intrust a note to a broker for negotiation, with the direction "not to go to a National Bank with it," but the broker should sell it to a National Bank, who hold it till maturity. If the merchant has received the proceeds, he would of course be liable on that ground, but if the broker had converted them, could the merchant successfully defend against the note in the hands of the bank on the ground of his prohibition? It would certainly seem that in reason and justice, and by analogy, he could not, whether the broker be considered as a general or a special agent; otherwise there can be no safety in dealing with an agent.

In *Anderson* v. *Coonley*, 21 Wendell 280, it is distinctly stated, "The authority of the agent being limited to a particular business, does not make it *special;* it may be *general* in regard to that, as if the range of it was unlimited."

Nor can the distinction between a general and special agency be established by inquiring whether this was the first time that the agent had acted as such, for an agency is established either by the authority actually conferred upon the agent, or by the manner in which he is held out to the world as possessing authority, and either of these may be the same in a first as in a subsequent employment or act. If a man appoints another to do all his business in a particular line, he becomes forthwith general agent within that line, and his first act in that capacity binds his principal precisely as though he had acted during a term of years.

In *Barber* v. *Brittan & Hall*, 26 Vermont 112, which was a case of first employment, Bennett, J., in delivering the opinion of the court, states the case and the law briefly and clearly: "The defendants sent their own agent for the plaintiff (a physician), and clothed him with authority to employ plaintiff to visit the boy, and though the agent was told to inform the plaintiff that the defendants would pay him for the first visit, yet this the agent for some cause neglected to do, and employed the plaintiff generally to attend the boy so long as he might need medical aid. The law is well settled that if an injury is to result to one man from the omissions or neglect of an agent of another, the principal must be held liable. In this cause the defendants, through the neglect of their agent, caused the services to be rendered upon their credit, and the case is within the above principle." And Judge Story tells us in § 131 of his work on Agency, it makes no difference in the case of a factor who from the nature of his business possesses a general authority to sell, whether he has been ordinarily employed by the principal to sell or whether it is the first and only instance of his being so employed by the principal; for still being a known factor, he is held out by the principal as possessing in effect all the ordinary general authority of a factor in relation to the particular sale. And again, § 133, "So far as the agent, whether he is a general or special

agent, is in any case held out to the public at large, or to third persons dealing with him, as competent to contract for and to bind the principal, the latter will be bound by the acts of the agent, notwithstanding he may have deviated from his secret instructions and orders; for otherwise such secret instructions and orders would operate as a fraud upon the unsuspecting confidence and conduct of the other party." And these rules thus stated by Mr. Justice Story, are approved by the Supreme Court of Massachusetts in *Soldell* v. *Baker*, 1 Metcalf 202, 203.

And even in case of an agent constituted for a special purpose, the rule is laid down by Kent, 2 Com. 621, that though the person dealing with him does so at his peril, when the agent passes the precise limits of his power, yet, if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power. In the case of *Hatch* v. *Taylor*, 10 New Hampshire 538, Parker, C. J., in delivering the opinion of the court, elaborately discusses the doctrine of special agency, and lays down the distinctions between authority and instructions, more satisfactorily and clearly than we have elsewhere found them. He says: "It is contended, however, that the distinction between authority and instructions does not apply in cases of special agents," etc. "But it is, we think, apparent enough that all which may be said to a special agent about the mode in which his agency is to be executed, even if said at the time that the authority is conferred, or the agency constituted, cannot be regarded as part of the authority itself or as a qualification or limitation upon it. There may be at times upon the constitution of a special agency, and there often is, not only an authority given to the agent, in virtue of which he is to do the act proposed, but also certain communications addressed to the private ear of the agent, although they relate to the manner in which the authority is to be executed, and are intended as a guide to direct its execution. These communications may, to a certain extent, be intended to limit the action of the agent: that is, the principal intends and expects that they shall be regarded and adhered to in the execution of the agency; and should the agent depart from them, he would violate the instructions given him by the principal, at the time when he was constituted agent, and executed the act he was intended to perform in a case in which the principal did not expect that it should be done. And yet in such case he may have acted entirely within the scope of the authority given him and the principal be bound by his acts. This could not be so if those communications were limitations upon the authority of the agent. It is only because they are not to be regarded as part of the authority given, or a limitation upon that authority, that the act of the agent is valid, although done in violation of them; and the matter depends upon the character of the communications thus made by the principal and disregarded by the agent."

Another principle is sometimes applicable even in cases of special agency, that a recognition by the principal of the agency in the particular instances is evidence of the authority; as where a person subscribes policies in another's name, and upon a loss happening the latter pays the amount. This would be evidence of a general authority to subscribe policies: 2 Starkie on Evidence 43.

This would seem to operate in the nature of an estoppel, and the principal cannot be permitted to be at the same time recognizing and denying the agency.

In a case recently tried at *nisi prius*, where a real estate agent had been employed to negotiate a loan, but the principal claimed that there was a specific limitation to his authority, it was strenuously contended on his behalf, that the burden of proof was upon the plaintiff to establish the agency, in all its terms; and that unless he could show by a preponderance of testimony that there was no such limitation as claimed by the defendant, he must fail in his case. This, however, cannot be the law: *first*, because under the well established rules of evidence, whenever certain facts are peculiarly within the knowledge of one party, upon him lies the burden of proof as to these facts: Taylor's Law of Evidence, § 347, p. 384; 1 Phillips on Evidence 821. *Secondly*, because such limitation is matter of defence and avoidance, set up by the defendant, the plaintiff having in the first instance made out a *prima facie* case. In constituting an agency, the principal and agent are ordinarily the only persons cog-

nizant of the facts, and of any special terms, conditions or limitations of that agency, while persons dealing with such agent have usually no means whatever of knowing anything of the particulars of the constitution of the agency. If, then, the burden of proof is upon the plaintiff, he must necessarily in every case where the principal and agent, either honestly or dishonestly, differ in their testimony as to the special conditions or limitations of the agency, fail in an action against either the principal or the agent, and however meritorious his cause of action may be, remain thus utterly and absolutely without remedy. With such a burden upon him he could of course never recover from either principal or agent. Such a result is not in accordance with nor contemplated by the law of agency. The innocent party must have his remedy, while the principal and agent must settle between themselves. The plaintiff must of course establish the agency by a clear preponderance of proof; but having once done that, and the agent having been, so far as the person dealing with him could know, competent to act and bind the principal, the burden is and ought to be upon the defendant to establish any condition or limitation. It will not do to say that where the agent has the *indicia* of full authority, though in fact it has been limited, a person dealing with the agent has the presumption of authority in the agent, but that such presumption is repelled as soon as the principal testifies that the authority was never actually conferred, even though there be counterbalancing testimony to establish the authority. Though unquestionably the plaintiff has the burden in establishing the agency, the condition or limitation is matter of defence, and as to that the defendant setting it up has the affirmative of the issue, and in this particular must bear the *onus probandi*.

If the evidence as to the condition or limitation is evenly balanced, that defence must fail. Of what possible value is a presumption, if one cannot act upon it, and if it confers no sort of protection upon one who in good faith has acted upon it? No doctrine of agency could be more fruitful of deception and imposition than this.

In cases clearly of special agency, the rule is certainly established by the regular current of authorities, that the principal is only bound by the acts of the agent within the limits and scope of the authority conferred upon him; but the distinctions between limitations to his *authority* and private directions or instructions as to the *manner* of executing that authority, are vague and shadowy, and unsatisfactory in the extreme. Limitations enter into and become of the essence of the authority; whereas directions or instructions are merely guides to the agent, and cannot affect third parties acting in good faith and in ignorance of them.

In cases of general agency the universal tendency of the courts, both in England and in this country, has been to protect innocent third parties in preference to the principal, while in cases of special agency, they determine the liability by the terms of the authority, but in deciding the question whether the agency in a given case is general or special, some have looked at the transaction between the principal and agent, when the agency was in fact originally constituted, while others have, with what seems to me to be the better reason, considered rather the relations to those dealing with the agent and with whom the agent was expected to deal, and have inquired whether the agent was held out to the world as possessing general authority, and whether third parties dealing in good faith with him were justified in believing that he was a general agent, or possessed of general powers in the particular business. The reason of the rules established for the protection of persons dealing in good faith with an agent, apply with equal force to cases of general and special agency, provided only that in the latter case they had good reason to believe that the agent was in fact possessed of the powers which he claimed the right to exercise; and the principal, who has clothed even a special agent with every appearance of lawful authority, and allowed the world to believe that a certain authority existed, must have some liability in the matter. Special agency cannot be all advantage to the principal and no liability. There is no such an anomaly in this branch of jurisprudence. Such a rule of law, or such an application of existing rules, would be in the highest degree unjust. It would be simply preying upon

innocent men, and a special agent would be nothing more nor less than a man sent out, with a roving commission, to perpetrate continuous frauds upon the community.

It is also now well established, that a special agent, even acting without authority, may in certain cases bind his principal. This is true in case of a bank teller who certifies checks when the drawer has in fact no funds on deposit. This principle has been twice decided by the New York Court of Appeals, and each time elaborately argued and discussed. In the first case, *Farmers' and Mechanics' Bank of Kent Co.* v. *Butchers' and Drovers' Bank*, 14 New York 627, the court say that although the plaintiff was chargeable with knowledge that the power of the teller to certify checks was confined to such as should be drawn by parties having money on deposit, the teller having been appointed by the bank to create evidence on their behalf of that fact, and authorized to hold out to parties inquiring for the existence of such funds, the bank should be held liable. In the same case as reported in 16 New York, Judge Samuel L. Selden, in delivering the opinion of the court, and treating the case as one of an agency specially restricted, said, p. 133, that the principle assumed by the defence, that principals are bound only by the authorized acts of their agents, except where the agent has been apparently clothed with an authority beyond that actually conferred, is too broad to be sustained; that principals have repeatedly been held responsible for the false representations of their agents, not on the ground that the agents had any authority, either real or apparent, to make such representations, but for reasons entirely different; citing with approval Lord Holt's remark in *Hern* v. *Nichols*, 1 Salkeld 289: "Seeing somebody must be a loser by this deceit, it is more reasonable that he who employs and puts a confidence in the deceiver should be a loser, than a stranger." And on page 135 Judge Selden lays down the further rule, that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it. This case is expressly affirmed in *N. Y. & N. H. R. R. Co.* v. *Schuyler et al.*, 34 New York 30, where the question of the liability of the principal is elaborately discussed, and the special rules above stated are distinctly re-affirmed.

Elaborate as have been the discussions, both judicial and by the text writers, of the questions relating to special agents, it is much to be regretted that they have not been more definitely and authoritatively settled. But the general tendency seems to be in favor of protecting innocent third parties who have acted upon the confidence of an authority which in the ordinary course of business they were justified in believing that the agent possessed, leaving the principal to settle with the agent for any departure from the strict letter of his instructions.

Josiah H. Bissell.
Chicago.

The philanthropists who are exerting their influence toward the utter abolition of capital punishment may, if they cannot secure this, endeavor to mitigate the rigors of the death penalty. Hanging has some features which might be eliminated by a change in the method. Thus beheading would probably be less painful, as it is much quicker, although there is a great prejudice against mutilating the body of even a criminal. We shall not expect to see hanging displaced by decapitation. The same is true in respect to blowing the criminal to pieces at the mouth of a cannon. Poisoning, by certain quick and deadly poisons, would be much easier for the doomed man, and much less disgraceful, than hanging. If the condemned should choose a slow and yet painless poison, he might be allured, like Socrates, to discourse on immortality, and counsel with relatives and friends, pending dissolution. Of course, few modern criminals would be expected to illustrate the domain of philosophy by the production of the materials for a *Phaedon* at the point of death. But one cannot but wonder what philological revelations Ruloff might have made, had he been al-

lowed to take the hemlock instead of the halter. Then there is drowning, which is a very ancient mode of punishment. The Britons, according to Stowe, inflicted death by drowning in a quagmire as early as 450 B. C., In 370 A. D., eighty bishops are said to have been drowned near Nicodemia; and Louis XI is said to have adopted drowning as a punishment in France. We know of no more desirable death for a condemned man than drowning, unless it be some artificial form of euthanasia, such as a deadly shock from an electric battery.

The *Law Times* gives an abstract of the case of *Estcourt* v. *Estcourt Hop Essence Co.*, in which it appeared that the plaintiff who was a manufacturer of an article used as a substitute for hops, called "Estcourt's Hop Supplement," employed his son C., one of the defendants, as his agent, who thereupon undertook not to disclose the secret of the compound, or at any time be connected with the sale of any article which could be used as a substitute for hops. During the time of his agency C. discovered the secret of the manufacture. He shortly afterward terminated his agency and began to sell a practically similar compound, which he called "Hop Essence." A bill was filed against him by the plaintiff to restrain him from continuing the sale, when he submitted and signed an agreement binding himself to observe the former agreement, and do the plaintiffs no injury in their trade. After this C. associated himself with one Taylor, and circulars were issued advertising the sale of "Estcourt's Hop Essence, sole proprietor, James Taylor." The defendant company was formed for the purpose of selling the "Hop Essence" under the name of "Estcourt's Hop Essence." The court being of opinion that the company was not a *bona fide* company, but part of a scheme for injuring the plaintiffs in their business, restrained the company and C. from selling the "Hop Essence," and restrained the company from trading under the name of "The Estcourt Hop Essence Company," and also restrained C. from disclosing the secret of the "Hop Supplement."

CANADA REPORTS.

ONTARIO.

ELECTION CASE.

South Renfrew Election Case.

Bannerman v. McDougall.

Defective Nomination Paper—Returning Officer.

A nomination paper was signed by twenty-five persons. Twenty-four of the names were on the voters' lists but through some omission one was not. This person had sufficient property to be on the list, and had been on the roll for the previous year.

Held, That the nomination paper was nevertheless sufficient.

Semble, that a Returning Officer is both a ministerial and judicial officer.

[Ottawa, January, 1875—Wilson, J.]

The general facts of the case were that the nomination paper for the respondent was delivered to the Returning Officer for the South Riding of Renfrew soon after twelve o'clock on Saturday, the nomination day, the 24th of October last, at the village of Renfrew, and about one o'clock p. m. on the same day, at the same place, the nomination paper for Mr. Bannerman, the petitioner, was delivered to the Returning Officer. This last nomination paper had twenty-eight names upon it of electors or of persons professing to be electors for the South Riding. Three of these names were struck through or cancelled before, and at the time of presentation and delivery of the paper to the Returning Officer, the initials of Mr. Muir, the attesting witness to the due execution of the paper, were set opposite to each of the three names to show that he had cancelled them, and that they were cancelled before the delivery of the paper to the Returning Officer, and this was done at request of the latter.

The two last names upon the list were added after the other three names were removed. The name of William Tierney, is one of the two names so added to the paper. An examination was made by Mr. Bannerman's Committee of all the names on the nomination paper, with the exception of the two last upon it, to see if such names were also upon the voters' lists, and they were found to be correct. No such examination was made as to the last two names on the paper. It was taken for granted that both of these persons were upon the voters' list. It afterwards appeared that William Tierney, one of the two last, was not on the voters' list for 1873, upon which list the election was held.

William Tierney had been a resident of the village of Renfrew for about five years. He was on the list for 1872 and 1874, and as to his

personal property he was on the Assessor's roll for 1873, but not for any real property. He was burned out early in 1873, and he removed to other premises, and in that way by some means he was not assessed in respect of real property, although he was the tenant of a shop during that time, paying a rental of $200 per annum. Muir made the attestation to the nomination paper, believing it to be true.

Shortly before 2 p. m., the hour for closing the reception of nominations, the election clerk, Mr. Bromley, on looking over the voters' list for the village of Renfrew, which was lying on the table in the town hall, but which was not the Returning Officer's official list, did not see the name of Tierney upon it and mentioned the fact. The Returning Officer and the clerk then examined the names on Mr. Bannerman's paper with the voters' list on the table, and Tierney's name was not found on it. The Returning Officer sent for Mr. McDonald, the only legal gentleman in the village, to come to the hall, that he might advise with him as to what should be done. Mr. McDonald came, and upon hearing the facts and referring to the Statute he advised the Returning Officer that he could not accept of the nomination paper because Wm. Tierney was not an elector according to the voters' list. The Returning Officer then went for his own official lists, brought them to the hall, examined them, and William Tierney's name was not found on them. The Returning Officer then sent for Mr. Bannerman and told him that William Tierney's name was not on the voters' lists, and he asked Mr. Bannerman what he should do. Nothing definite was said by Bannerman at that time. The Returning Officer says he advised Mr. Bannerman to see Mr. McDougall and ask him to waive the objection. Mr. Bannerman did so. Mr. McDougall said he would do so if his friends consented, but they did not, and that was told to the Returning Officer. Mr. Kelly, one of Mr. Bannerman's friends, asked the Returning Officer to be allowed to add a name in the place of William Tierney's, but that was refused, because that, it was said, would be equivalent to a new nomination paper The Returning Officer then declared that Mr. Bannerman's nomination paper was bad, and that he must reject it. Mr. Bannerman objected to that decision. A good deal of stress was laid upon what Mr. Muir said to the Returning Officer on this subject. The Returning Officer and two others declared that before the Returning Officer gave his decision, Mr. Muir had acknowledged that the affidavit he had made was not correct, that he had made a mistake, and that the name of William Tierney was not on the voters' list Mr. Muir said he did not say so, because he did not know as a fact at that time it was not on the list; that what he said was that Tierney's was a good vote, but if he had made a mistake it was not intentionally made. I do not know that it is of much consequence one way or the other, except so far as the Returning Officer makes it of consequence in this way. He says he did not give his decision until after Mr. Muir admitted his affidavit was wrong, and it was upon that being done, and Tierney's name not being on the list, and Mr. Bannerman not showing any cause why his paper should not be rejected, that he pronounced his opinion adversely to Mr. Bannerman. The Returning Officer then declared Mr. McDougall to be the only person who had been duly nominated, and he returned him as duly elected accordingly.

Cockburn, Q. C., for petitioner. The duties of a Returning Officer are ministerial. He has no judicial power, and therefore has no right to enquire into the validity of the nomination paper. The Statute expressly excludes him from making any scrutiny. It has been doubted under the old law whether a Returning Officer is ministerial or judicial: *Middlesex Case*, 2 Peckwell 16. The Returning Officer there allowed certain votes. It was argued that the Returning Officer was ministerial only and was bound to receive the votes if the voters would take the necessary oaths. The Returning Officer here was bound by the attestation oath of Muir. In *Ashby* v. *White*, 1 Smith's L. C. 105, the House of Lords held that the Returning Officer was a ministerial officer only. Warren's Election Law (1857), states the same view, pp. 203, 208. The Returning Officer may know the person has no vote, but he cannot act on his own knowledge. If a candidate is plainly disqualified, the Returning Officer must decide. If the Legislature had intended to confer power on Returning Officers to decide on validity of nomination paper, it would have done so. See Election Act, secs. 18, 19, 21. The oath under sec. 21 precludes the Returning Officer from acting against the paper. Sec. 80 shews that the election would not be set aside if had it been entirely carried through but for this defect. The paper here was *bona fide*.

Bethune, contra. At Common law the Returning Officer's duties are not entirely ministerial, but are partly judicial. See *Cullen* v. *Morris*, 2 Starkie 587; Addison on Torts, p. 26; *Drewe* v. *Coulton*, 1 East 502. He is a judicial office when the matter is open and notorious: *Ashby*

v. *White*, 1 Smith's L. C. 105 ; *Pryce* v. *Belcher*, 3 C. B. 58, 4 C. B. 866 ; *Tozer* v. *Howard*, 1 E. & B. 377, as to Churchwarden at an election. No action lies against him for declining to receive a candidate or voter, unless he has acted maliciously : Mole on Elections, 31. If a Returning Officer be fully apprized of an incontestible objection to candidate or voter, he should give effect to it : *Mallow Case*, Perry & Knapp 266-9; Rogers on Elections 317; 37 Vict. cap. 9, sec. 106. Whatever the provisions of the Common Law may have been, the Legislature has here given some discretion to the Returning Officer. By sec. 19, he must not act on nomination papers unless the candidate's consent in writing has been given. If he kept paper and money and allowed a poll that might be cured by sec. 80. By sec. 23, the Returning Officer is to accompany his return with a report, and of any nomination proposed or rejected for non-compliance with the requirements of this Act. There must now be twenty-five nominators in writing, and all duly proved before the Returning Officer. That number must be shown to be on the paper. If there are not twenty-five, one name is as good as 25. The Returning Officer must also have twenty-five electors. By sec. 25 the candidate may withdraw, in writing. Again, the Returning Officer has here some discretion. Secs. 11 & 21 show also what discretion he has. The Returning Officer has the means of knowing who the electors are, for he has the list. None but those on the list are to vote : secs. 40 & 43. The Returning Officer here did what is right. There were not twenty-five electors to the paper. The weight of evidence is that Muir came to the Returning Officer and acknowledged his affidavit was wrong,—that he had made a mistake, in that Tierney's name was not on the voters' list. Muir denies that, but there are three witnesses against him. The return of the Returning Officer, made almost at the time, corresponds with his present testimony. All parties admitted at the time, and admit now, that Tierney's name was not properly there. Bannerman admitted that, even although he said he would not submit to the Returning Officer's decision—and he may do that and bind the electors, because he can withdraw against their consent altogether. The Returning Officer was not bound to point out to any candidate any defect in his paper. The nomination paper was examined if not before 2 o'clock P. M., shortly after it. The Returning Officer took advice then, asked petitioner what he had to say of the mistake, and advised him to see respondent if he would waive the objection. But waiver not being made, he decided the petitioner's paper bad, and returned the respondent.

As to costs, petitioner should not have them in any case. The Returning Officer clearly was not liable for costs. He did not unlawfully disregard his duty in any way. Even if the election is set aside respondent should not be ordered to pay costs. The charge of disqualification made by the petitioner is not maintained, and he has claimed the seat. He has shewn no ground for so doing, and that is a reason why he should not get costs. If petitioner failed he should pay all costs.

Cockburn, Q. C., in reply.—The Returning Officer is only a ministerial officer. The cases to the contrary are old cases, the later law is different. The statement in Warren's Election Law is conclusive on this point. The proof of this nomination paper is prescribed by the statute, and if that proof be made the Returning Officer must receive it and act upon it. The alleged mistake had not been fully discovered till after 2 P. M., and then the Returning Officer's powers to reject the paper or to hold a scrutiny over it, was gone, and he was bound to give a certificate to the other candidate of the petitioner being a candidate. The Returning Officer discovered this alleged mistake himself without any one raising it. That should not be allowed. A proper scrutiny in fact was not made of all the rolls or lists for the different polling places. Sec. 23 does not prove the contention of the respondent. The Returning Officer may reject a nomination paper if $50 is not paid and if consent of candidate be not given in writing. Muir says he never admitted he had made any mistake. But if he had, it was not to be in denial of his oath. If one of the twenty-five be on the list for a wrong lot so as to have no vote, could the Returning Officer reject that one of the twenty-five from the nomination paper. The election should be avoided so that the electors might be permitted to elect their own candidate.

Wilson, J. Mr. Bannerman complains of the rejection of his nomination paper. It is not said Tierney's name was then upon the list, nor is it contended so now, and it appears he was not on the assessment roll for 1873, in respect of real property ; but it is said there were the names of twenty-five persons on the nomination paper as, and purporting to be, the names of actual *bona fide* electors of the South Riding, and twenty-four of them are so in fact, and the twenty-fifth was honestly believed to be so too. That it was a genuine paper and not a sham docu-

ment, and being so, although as a fact William Tierney was not an elector, yet the paper being duly sworn to according to the statute, the Returning Officer was bound to accept it, and to act upon it as a genuine truthful document. It is said that he and the election clerk raised and took an objection which was not apparent on the face of the document, and that they discovered it by an examination of the voters' lists, and that such a proceeding was in effect a judicial investigation and inquisition held without authority, and determined contrary to law. For the respondent, it is said that the Returning Officer is not wholly and only a ministerial officer, that he is necessarily, and in fact has certain judicial functions to perform ; that he is by section 11 of the Act to decide on the number of polling places to be appointed ; that he has to grant a poll by section 24 if more candidates than can be returned are nominated in the manner required by the Act ; and he is by section 23 to report any nomination proposed or rejected for non-compliance with the requirements of the Act ; and that in all cases when the objection to the candidate or voter or to the nomination paper is patent or notorious, he may act judicially ; and that he cannot receive a nomination paper with only twenty-four names to it for that would be the same as if he received it with less than the number of twenty-five electors in fact upon it.

I am of opinion the Returning Officer is both a ministerial and a judicial officer. He has not now, as formerly, to hold an inquisition into the capacity or qualification of a candidate or voter ; but I feel assured if a person appeared and was nominated, and the candidate were a woman or a mere child, that the Returning Officer could decline to receive such a nomination, and in like manner he could decline to receive the nomination of a Chief Justice or the Speaker of the Senate. I think, also, he might refuse a nomination paper signed by less than twenty-five electors, because the Act requires that a nomination shall be by twenty-five. I am disposed to think, too, that he could reject a paper signed by twenty-five if it were declared by the candidate that the paper was a sham ; that the names were those of persons who were not electors at all, and never had been ; or that half the names were forgeries ; and if there were good reasons for the Returning Officer to believe that statement, and he did believe it.

It is not every paper in the form of a nomination paper, however formally it may be prepared, that is to govern a Returning Officer, for that would be to make a farce of the whole proceeding, and to put parties to an unnecessary and vexatious expense, when it was known before hand that it would be all to no purpose.

I feel a great difficulty in dealing with this case. The nomination paper was formally, on its face, correct. It was prepared and intended to be a correct document. It was honestly believed to be correct, and it was used fairly and truly for the purpose of an election, and it was a surprise to Mr. Bannerman and to Mr. Muir, the attestant, to discover that William Tierney, one of the twenty-five, was not entered on the voters' list. I have no doubt the Returning Officer acted honestly and with perfect propriety in all respects according to the best of his judgment, and he acted on the legal advice which he sought for and followed in rejecting the paper. He had the means, to some extent, by him to verify the correctness of the persons' names in the paper being electors or not—assumiug that *electors* mean those persons who were electors on the lists *to be used at that election.* I think, however, with much hesitation, that the defect in this case, which I have no doubt exists, was one to which the Returning Officer should not have yielded, and it certainly was not accepted or yielded to by Mr. Bannerman, but was resisted by him, and the fact that the affidavit was wrong at all was denied by Mr. Muir. By reason of this one defect—one rather of form than of substance, for Tierney was in fact a real property holder who should have been on the list, and a defect not appearing on the paper, but found by an examination of it with the voters' lists—the electors have been prevented from voting for and electing their own representative, when, in truth, if the election had gone on, this defect could not in any manner whatever, according to the 80th section, have affected the result of the election.

The policy certainly is to have no scrutiny, or as little as possible, in such cases, and to give the people a full voice in choosing their own representatives. That has not been done here, and I must hold the election, according to the best opinion I can form, to be void, and that John Lorn McDougall, who was returned as the member elect, was not duly elected. I acquit the Returning Officer in every respect from all blame, and I am of opinion he acted honestly and fairly to all parties ; and if he erred, which, with some doubt, I think he did, he did so where many might equally have erred. He was anxious to have no difficulty raised, and his judgment was fortified by competent legal advice. I must leave each party to bear his own costs.

Election set aside.

ENGLISH REPORTS.

ELECTION CASE.

County of Durham (Northern Division).

Parliamentary Election — Withdrawing Petition — Functions of the Judge—Conditions of Withdrawal.

By the Parliamentary Elections Act 1868 (31 and 32 Vict. c. 125) an election petition can only be withdrawn with leave of the court or a judge.

But, *semble*, where the petitioner withdraws during the hearing of the petition it would be practically impossible for the judge to proceed with the inquiry.

The only power which the judge has in such a case is to recommend the court not to allow the return of the deposit except upon the most satisfactory explanation of the grounds of the withdrawal of the petition.

The learned judge having come to the conclusion that no case had been made out to justify the unseating of the respondent the withdrawal was allowed, costs following the event.

[August 12, 1874—Grove, J. 31 L.T., N.S., 321.]

This was a petition against the return of Sir George Elliot, and contained the usual allegations of corrupt practices.

Counsel for the plaintiffs were *Charles Russell*, Q.C., *Edwards*, Q.C., and *Anstie*.

Counsel for the respondent were *Hawkins*, Q.C., *H. Giffard*, Q.C., and *A. L. Smith*.

After some evidence had been given in support of the petition, counsel intimated the intention of the petitioner to withdraw the petition.

Grove, J.—The withdrawing of an election petition must be by leave of the judge, and if the judge saw that the withdrawal was the result of any compromise, of any giving and taking, so as to prevent evidence being brought forward, which ought to be brought forward, not in the interest of either of the parties, but in the interest of the constituency, and of purity of elections, the judge ought not to allow a petition to be withdrawn; he ought, as far as he would have power to do so, to insist upon the petition being proceeded with. But although the Act of Parliament in my mind rather expects that on the part of a judge, no doubt it is an extremely difficult task, because if parties do not call witnesses forward a judge himself cannot become as it were counsel for the petitioners and judge at the same time. He cannot examine a witness and force him, if he is reluctant or antagonistic, to answer questions, and if I may say so exercise his ingenuity to elicit the truth from a possibly adverse witness, while at the same time he has to keep the scales of Justice even and to hear what may be said on both sides; nor can he, on the other hand, know what answers might be given if he had those instructions which counsel have, and could find out what the real facts were as presented by the opposite side. Therefore, when, as appears to be supposed by some, the duty is thrown upon the judge to occupy that somewhat equivocal position of being counsel and judge, it is simply, at all events according to the practice of the law of England, an impossibility. All that the judge can do is to see the truth is, as far as he can possibly do it, fairly elicited; and to my mind it can never be so well elicited as when there are persons on either side representing opposite interests, the judge only exercising his power in furtherance of the truth, when he sees that there is an endeavour to keep it back. I mention that because the task is an unusual one, which the Act imposes upon the judge of his exercising a discretion as to the withdrawal of a petition.

I mention those circumstances for this reason, that I think there possibly might be cases in which a judge would not allow a petition to be withdrawn, but would, as far as he could, use his power to prevent it. He might for instance exercise the power which is given to him of recommending the court not to allow the deposit to be withdrawn without considerable explanation. The task no doubt would be an extremely difficult one. The mode in which a judge is to compel parties to go on with a petition which they have determined to withdraw remains to be proved. I am not aware of how it can be made compulsory, but at all events he has the power over the deposit in court, which may in some degree be indirectly used as a compulsion. I mention that, not as applying to the present case, because I am thoroughly and entirely convinced, not only from the character of the learned counsel who now withdraws the petition, but from the course that the case has taken, that this is a petition in which he would have had no reasonable hope of success. I have watched the evidence to the best of my ability, and I will not say that some suspicion has not been excited in my mind as regards the acts of some of those who might be proved to be agents, in the election-law sense of the word, but it seems to me that there has been something like an intimation of some small reward to some of the witnesses. I presume, as is usual in nearly all these cases, the strongest portion of the case is put forward in the first instance, so as to

impress the tribunal, the judge or jury, with the strength of the case, but this case is such that it would be idle to say that it has had the effect upon my mind of satisfying me that there has been upon the part of the agents of Sir George Elliot corrupt practices. No imputation at all has been made upon Sir George Elliot in this case, therefore I need not say a word more upon that subject. With regard to the acts of the agents, there has been some degree of suspicion, and I am not prepared to say that a good deal of doubt might not have been raised in my mind, not as to the finding that I should come to, but as to whether the case was open to an explanation or not, that is to say whether at the close of the case I should have required Mr. Hawkins to go into any answer to it. At present certainly upon the case as it stands, if I were asked to give judgment, I should say that no case had been proved to my satisfaction to unseat the member. The matters were some of them extremely trifling. There was the alleged gift of a shilling to a man who happened to be a voter, which he, the man, says, whether truly or untruly I do not stop to consider, was given for old acquaintance sake. To say that a member should be unseated because somebody, who was alleged to have been an agent, by what I might almost call a legal fiction, because he had been seen coming in after a candidate on one occasion, when he was canvassing a voter, or because he had on one occasion given a voter a shilling or a glass of beer, or something of that sort, would certainly be a very strong proceeding. It appears that upon two other occasions a man was paid, not in pursuance of any corrupt promise, or understanding or undertaking, but going with his master to vote on this occasion for Sir George Elliot, he told other persons, if I remember rightly, that he had voted upon the other side, there being apparently no compulsion exercised by the master, who did not deduct (for practically it amounts to that) his day's wages from him. There was another matter—the man who was examined to-day, who says that he changed his house; he positively swore that he did not do it with any reference to his vote. He was no doubt pressed and canvassed on both sides, and pulled about, if I may use that expression, by the Red and Blue parties, and he got at last into a cab, belonging to the Liberal side. Which way he voted we do not know, but he appears to intimate that having quitted his place he may have voted on the Red side. It does not appear to me that those are cases which are supported by such an amount of satisfactory evidence as a judge could reasonably act upon; and therefore I may say that as the case at present stands, if I were asked for my decision without a word by counsel upon either side, I should say that the case has not been made out to my satisfaction.

Therefore, upon all the points which have been brought before me, I see no sufficient ground for unseating Sir George Elliot; and as the learned counsel for the petitioners now says, that having found in fact that the case as presented to him was very different from the case as it came out in evidence, I have every reason to entirely rely upon the words of that learned counsel; and it seems to me that he has taken not only a course which is permissible upon my part, but a proper course, in withdrawing this petition. Of course as far as my decision is concerned, the petition must be withdrawn upon the usual terms, that is to say, the costs following the event.

IRISH REPORTS.

ELECTION CASE.

Drogheda Election Petition.

Parliamentary Elections Act (31 & 32 *Vict.*, c. 125)—*The Ballot Act*, 1872—*Inspection of ballot papers.*

Liberty given to the Clerk of the Crown and Hanaper to permit the agents of the petitioners and respondents, in a Parliamentary Election petition, to inspect ballot papers which had been received by the Returning-officer, though objected to, on the part of a candidate, as having been marked so that the voters could be identified.

[Irish Law Times, April 23, 1874—Lawson, J.]

Motion, on behalf of Robert Martin and others, the petitioners in the matter of the Parliamentary Election Petition for the county of the town of Drogheda, for an order to permit inspection of ballot papers.

The motion was grounded on an affidavit of Mr. Henry Clinton, who deposed that he was the Parliamentary agent of the petitioners, and had acted as the conducting agent of Mr. Whitworth, one of the two candidates at the late election in Drogheda; that the respondent, Dr. O'Leary, was the only other candidate, and that Dr. O'Leary was returned as the candidate elected, and elected by a majority of ten votes; that the deponent was advised by counsel that Mr. Whitworth should have been declared elected, and that the majority for Dr. O'Leary was a colourable one, and had been created by the reception of voting papers improperly filled up, and marked so as to lead to the identifi-

cation of the voters, for from 45 to 50 ballot papers had been received and counted by the returning officer, though objected to on behalf of Mr. Whitworth, which had a cross marked on them after and opposite the name of Dr. O'Leary, and in the same compartment, instead of being marked outside the vertical line at the right hand side of the name; that a petition had been duly presented against the return of the said respondent, and that deponent was advised that a scrutiny of the ballot papers was essential to justice and necessary in order to enable the petitioners to question the validity of said election.

Heron, Q. C. (with him *Nicholls*), for the petitioners, in support of the motion, cited *re Tyrone Election Petition*, Ir. R. 7 C. L. 190; *re Athlone Election Petition*, 8 Ir. L. T. Notanda, 88; 35 & 36 Vict., c. 33, sch. 1, p. 1, r. 40. They asked that the order should go for an inspection both of the rejected ballot papers, and the ballot papers objected to yet received, as, unless there was a scrutiny at the trial, it would be necessary to have a general inspection then, and time would be saved by having it now, while it would, also, enable them to be prepared if a scrutiny were entered upon at the trial.

Porter, Q. C. (with him *Killen*), for W. H. O'Leary, one of the respondents, *contra*.—The case of the *Athlone Election Petition* was the converse of the present, and the motion there made was not so extensive as this application, as now presented on the argument for the petitioners; and none so extensive has been granted here or in England. This is in effect an application for a preliminary scrutiny, but seeking to inquire into matters which would be outside a scrutiny. In the *Athlone case* the order was sought for the purpose of inspecting the *rejected* ballot papers.

[Lawso .—There is no doubt that there would be a right to an inspection of rejected ballot papers in the proper case for it; and in principle I think there is, also, a right to have an inspection of ballot papers which were received by the returning officer contrary to objection. That the returning officer's decision is final does not take away any right to inspection.]

This is a mere fishing application, to assist the petitioners in spelling out a case. We do not deny that the Court has jurisdiction to make the order, but, before such an exercise of its power, an overwhelming case of convenience must be made out. Here, however, the application is unnecessary, frivolous, and vexatious. Upon the showing of the affidavit of the petitioners' agent, they seem quite familiar with the papers for the scrutiny of which this motion is now made. There are charges in the petition of bribery, &c., and recriminating charges, and if these were proved the scrutiny would be wholly unnecessary. The decision of these matters of fact should be preliminary to a scrutiny. The secrecy of the ballot should be most jealously guarded. The scrutiny of the voters in the case of *Clare County Election*, 1853, 2 P. R. & D. 241, was not entered into until after allegations of treating, bribery, and intimidation were decided. So, in the *Lyme Regis case*, 1848, 1 P. R. & D. 26, and in the *District of Wigton Burghs' case*, 1853, 2 P. R. & D. 134, the more convenient course was held to be, that the consideration of the other matters alleged in the petition should be preliminary to the scrutiny of the votes. In Leigh and Le Marchant's Election Law, p. 76, the usual procedure is stated:—"The inquiry by way of scrutiny is sometimes entered into before the other charges in the petition are disposed of, but this is not an expedient course, since it is possible that those defending the seat will, by the above section, be able to disqualify the candidate for whom the seat is claimed. The general charges should, therefore, usually be gone into first. . . . If the petitioner is disqualified, a scrutiny of votes may still take place, for the purpose of showing that the respondent has not really a majority of legal votes, even though the respondent is declared not to have been guilty of corrupt practices." Not only is the order sought at a stage in the proceedings when to grant it would be a novelty, unnecessary, contrary to the principles of the Ballot Act and to the course pointed out in Leigh and Le Marchant as usual, but it is, moreover, a fishing scrutiny, which the Court will not encourage. We would still be entitled to go on with a scrutiny at the trial.

[Lawson, J.—I am not disposed to make an order so extensive as that contended for. I should be inclined to make an order following that made in the *Tyrone Election case*.]

If an order is to be made at all, we would prefer that there should be an inspection of the received ballot papers, as we also might be advantaged. [*Heron*, Q. C.—As regards the rejected papers, the Clerk of the Hanaper can attend at the trial with them in a separate packet, to be opened if necessary.]

J. B. Falconer, for the returning officer, R. B.

Daly, the other respondent, applied for costs of appearing, and referred to the *Athlone case*.

Nicholls, in reply.

Ordered, that the Clerk of the Crown and Hanaper do, on Monday, the 27th inst, at the hour of 12 o'clock, allow an inspection of the ballot papers admitted and received by the returning officer at the election for the said borough, to Mr. Henry Clinton and Mr. Verdon on behalf of the petitioners, and Mr. J. G. Healy and Mr. John Downs on behalf of the respondents. Let every precaution be taken by the Clerk of the Crown and Hanaper not to permit of the inspection of any other document, or documents, than said papers. And let the costs of this motion, and of the said inspection, be costs for the successful party in this election petition matter.

CHANCERY.

Kelly v. Kelly.

Fiduciary Relationship — Administratrix of yearly tenant procuring a lease to herself—Ulster tenant-right—Landlord and Tenant (Ireland) Act, 1870 *—Graft in equity.*

Where the widow of a tenant from year to year entered into possession of the premises, as administratrix to her husband, and procured a lease to be granted to her in her personal capacity, the Court held that the benefit so obtained by her while occupying a fiduciary position as administratrix, should be held by her in trust for the next of kin of the intestate, and, that accordingly, the lease should be deemed a graft on the original tenancy for their benefit.

[Irish Law Times, Jan. 20, 1874.]

This was a suit to have a lease of a farm, which had been demised to the defendant, of which, prior to the lease, she had possession as administratrix, declared to be a graft, and to be held by her for the benefit of the next of kin. The bill set forth that Hugh Kelly, at the time of his decease, was possessed of a farm of land at Cloughcor, in the county of Tyrone, containing about fifty acres, under the Duke of Abercorn, as tenant from year to year, at a rent of £51 9s., of which the value at his death was estimated at £600. He died on the 23rd Jan., 1863, intestate, leaving his wife, Sarah Kelly, defendant, and the children of two sisters, him surviving, some of whom were the plaintiffs in the bill. On the 14th March the defendant obtained letters of administration, and thereby obtained possession of all the intestate's personal estate, including the farm. The plaintiffs, and other next of kin, not wishing to disturb the defendant during her lifetime, permitted her to occupy the farm, intending at her decease to make it available for the next of kin, being satisfied that the selling value of the tenant-right in the farm would, in the meantime, become more valuable. The defendant continued to reside there till May, 1872, when, without the knowledge of the plaintiffs, she sold, or agreed to sell the tenant-right in the farm, for the sum of £1,500. On the 30th April, 1872, the defendant was called upon, on behalf of the plaintiffs, to account for the assets, and a notice was served on the land agent, claiming the farm on the part of the plaintiffs, and it became necessary to apply to the Court to administer them. The affidavit of the defendant, upon the administration summons, alleged that she had administered the assets, and that they were insufficient to pay the debts, and referred to a schedule annexed thereto, but which contained no reference at all to the farm. The plaintiff not being satisfied obtained an order on the 22nd June, 1872, for an inquiry to be made as to who were the next of kin, and for an account of the intestate's personal estate come to the hands of the defendant. In the defendant's affidavit verifying her accounts, she stated that a civil bill ejectment had been brought on a notice to quit, and a decree obtained for the possession of the farm, in June, 1865, after which a new lease was granted to her by the Duke of Abercorn. That was the first intimation the plaintiffs had of this transaction, and on the 9th June, 1873, they filed a bill in this Court praying as above stated.

J. S. Byrne, Q. C. (with him *R. Donnell*), on behalf of the plaintiffs, contended, that if the defendant had really been ejected from the farm, it was at her own instance and request, either to assist her in getting rid of some cottier tenants, or with the intention of depriving the next of kin of the intestate of their rights; that, under the circumstances, the tenancy of the defendant after the said ejectment should be considered as a graft on the original tenancy, for the benefit of the next of kin; and that the defendant was bound to account for the value, and the rents and profits of the farm from the death of the intestate to the present time. That at the time of the ejectment the defendant knew she would be immediately reinstated; that she was never actually dispossessed, nor were her cattle driven off the land, nor her chattels disturbed; and in fact, that if it was not actually a collusive transaction, in order to obtain a greater interest for herself in the lands, nevertheless, from the fact of her being in possession as administratrix, she was

prevented on grounds of public policy from deriving thereby any benefit for herself.

R. Carson, Q. C. (with him *D. Colquhoun*), for the defendant, *contra*, maintained that the intestate was only a tenant from year to year, and that it has long been the custom on the Duke of Abercorn's estate, when a tenant dies intestate, to accept his widow as tenant, and not to subdivide the farm among his next of kin, and this whether the widow is or is not the intestate's personal representative. That the ejectment was put in force without the defendant's solicitation, but at the same time, she believed she would be immediately reinstated. That upon such reinstatement she held the same in her own right. That had any other person taken out administration, such person would have been compelled to put her in possession of the intestate's farm. And that even if the plaintiffs ever had any right they had lost it long since by *laches*.

The following cases were cited:—*Nesbitt* v. *Tredennick*, 1 Ball & Beatty 29; *Jones* v. *Kearney*, 1 Dr. & W. 134; *Griffin* v. *Griffin*, 1 Sch. & Lef. 352; *Randal* v. *Russell*, 3 Mer. 190; *Rawe* v. *Chichester*, Ambler 715; *Keech* v. *Sandford*, 1 Tudor's L. C. Eq. 44; *James* v. *Dean*, 11 Ves. 383; *Holt* v. *Holt*, 1 Chan. cas. 190; *Archbold* v. *Scully*, 9 H. L. 360.

Chatterton, V. C., granted the prayer of the bill, and stated that the question he had to decide bore no reference to the Land Act, or any tenant-right custom, but was the simple case of a tenancy from year to year, of which the defendant obtained possession as administratrix of the intestate, and while so in possession, obtained from the landlord a lease of the premises. That he grounded his decision on that principle of public policy which prevents any person in a fiduciary capacity obtaining any benefit by reason of that capacity, from holding such for his own use instead of for that of the person for whom he is trustee. That as he did not consider the defendant had been guilty of fraud, she should not be visited with costs.

UNITED STATES REPORTS.

PENNSYLVANIA.

Dollar Savings Bank v. Bennett.

Nudum pactum—Trust.

A mere verbal agreement by a purchaser at a sheriff s sale with his own money, that he will hold the premises in trust for the defendant, neither vests any equitable estate in the defendant, nor does it give any ground for an action, being a mere *nudum pactum*.

Error to the Court of Common Pleas of Allegheny County.

Opinion by Sharswood, J. November 9th, 1874.

This was an action of assumpsit. The declaration contained two special counts, and the common count for money had and received. It is essential, to maintain this action, that the promise or undertaking of the defendant should be founded upon a sufficient legal consideration, either some benefit to the promissor or some injury to the promissee. Nothing is clearer on principle or better settled by authority than that a mere naked verbal agreement by a purchaser at sheriff's sale with his own money, that he will hold the premises in trust for the defendant, neither vests any equitable estate in the defendant under the statute which prohibit parol declarations of trust so that no claim to the money could exist in him under the common count, nor does it give any ground for an action, being a mere *nodum pactum*. The mortgagees had a perfect right to proceed on their judgment bond, if they were the highest bidders. There may have been in the special count a sufficient allegation of consideration, and there may have evidence of it given upon the trial, which might have been left to the jury. Upon these questions we do not feel called upon to express any opinion. The learned judge below evidently did not advert to the vital points in the case, in affirming as he did, without qualification, the first two propositions submitted to him by the plaintiff below. No consideration for the alleged promise is adverted to in either of these propositions: Sweetzer's Appeal, 21 P. F. Smith, 264, is not opposed to this, for there Chief Justice Thompson states in his opinion—and it was evidently the turning point of the case: "At the time of the sale it was made known to creditors that the property was simply being put in a shape to bring money on mortgage to pay Sweetzer's debts. The master finds that at the sale the Jeffton's, Sherred and Sweetzer, all represented that the sale was merely an arrangement for the relief of Sweetzer." In Danzeiser's Appeal, 23, P. F. Smith, 65, the conveyance was without consideration, upon a parol promise by the grantee to raise money by a mortgage of the land to pay the grantor's debts, and the present Chief Justice says, in the opinion: "It is very evident that the deed was a mortgage or trust *ex maleficio* arise; for when the deed was delivered no consideration passed Miller procured the estate without payment of any purchase-money, and therefore stood in no better situation in point of fact than one in whose name a deed is taken by another who pays the purchase-money." And again: "It

would be different had the deed been intended to enable Miller (the grantee) to raise money by a sale, for then Danzeiser (the grantor) would intend to pass an absolute estate, and to trust the promise of Miller to apply the proceeds to his use; a breach of such promise would not convert Miller into a trustee, and the case in principle would resemble that of *Barnet* v. *Dougherty*, 8 Cas. 371. In *Boynton* v. *Housier*, 23 P. F. Smith, 458, the purchaser on the day preceding the sale said, that, "If they would not interfere or bid at the sale, and have it bid off as low as possible, she (the widow of the party whose estate was sold) should have the homestead."

The cases, then, upon which the defendant in error mainly relies to support the proposition which the learned Judge affirmed, do not sustain his contention. It is unnecessary to consider the other errors assigned. Judgment reversed, *venire facias de novo* awarded.—*Leg. Intel.*

REVIEWS.

Some suggestions to Municipal Officers having special reference to their duties in respect to Voters' Lists, by the Junior Judge of the County of Simcoe, Wesley & King, Barrie.

Judge Ardagh has done good service to Municipal Officers, and to all who desire to make themselves familiar with the working of municipal affairs in relation to the important matter of the franchise. The various duties of Assessors, Clerks, Reeves, and Councillors, are given in detail, in the clearest and most succinct manner and some useful forms are introduced. We could have wished that this brochure had been a little more imposing in its "get up." It is certainly worthy of much larger type and many more pages. We presume, however, that it was the desire of the author to give his labours to those for whom he was working at a nominal price, for we see that copies can be had of the publishers at $1.25 per dozen, post-paid. When this edition is exhausted he can follow our advice and charge five times the present price, which would be something nearer its real value.

We trust that this is not the last we shall hear of Judge Ardagh. If his industry is equal to the style and ability shown in the pamphlet before us, he will be able to be very useful in many ways similar to this effort.

An Epitome of Leading Conveyancing and Equity Cases, with some short Notes thereon, chiefly intended as a Guide to "Tudor's Leading Cases on Conveyancing" and "White and Tudor's Leading Cases in Equity." By John Indemaur, Solicitor (Clifford's Inn, Prizeman). Second edition. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1874, pp. 104.

The value of a collection of leading cases in Law, Equity or Conveyancing is now too well known to need argument of any kind to support it. The selection of leading cases on various branches of the law, by the late John William Smith, was a happy thought. The first, second, and third editions of it were rapidly exhausted. The third and fourth editions were enriched by the learning of the late eminent Judge Willes and the present ex-Justice Keating, when at the Bar. Subsequent editions have been still more enhanced in value by the additions of learned and able men in the profession; but one consequence has been the growth of "Smith's Leading Cases" far beyond the bulk originally contemplated. This in 1873 suggested to Mr. Indemaur the preparation of an Epitome of Smith's Leading Cases, which has already reached a second edition.

The success of "Smith's Leading Cases" encouraged Mr. Owen Dawes Tudor to issue a selection of leading cases on Conveyancing and Messrs. White and Tudor to issue their well known selection of leading cases in Equity. These have passed through several editions; and the reasons that made necessary an epitome of Smith's Leading Cases rendered necessary an epitome of the "Leading Conveyancing and Equity Cases." And no better man could be found for that task than the gentleman who prepared the Epitome of Smith's Leading Cases, Mr. Indemaur. His first edition was published in 1873, and now we have the second edition before us.

We reviewed the first edition when it appeared, pointing out its uses especially for students, and are pleased to note that students have, as we anticipated, found

it a work deserving of their patronage. The second edition contains only one additional case, viz., *Earl of Beauchamp* v *Winn* (L. R. 6 H. L. C. 223), on the subject of mistake. But the notes to the remaining cases have been considerably enlarged. We also observe a new feature: blank spaces are left at the end of each case for the purpose of enabling students to make MS. notes of subsequent cases. The Epitome well deserves the continued patronage of the class—students—for whom it is especially intended. Mr. Indemaur will soon be known as the "Student's Friend."

A Law Dictionary and Institute of the Whole Law for the Use of Students, the Legal Profession and the Public. By Archibald Brown, of the Middle Temple, Barrister at Law. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1874.

This work takes us by surprise. We had no idea that there was room for a new Law Dictionary. But when we bear in mind that no new edition of "Termes de la Ley" has been issued for years, we might say almost for centuries, and that there has been no edition of Tomlin's Law Dictionary since 1835, we begin to think there is some need for such a publication.

The Dictionary before us is free from the many inaccuracies that are to be found in "Termes de la Ley." The last edition of "Termes de la Ley," that we have seen, has an apology for the many errors of the press that former editions contained. In it it is said, "And for errors of the press they were very numerous and strangely unhappy; as "dis-seised" for "die seized," "Common Law" for "Canon Law," "deep" for "deer," "necessary" for "accessary," "tiel" for "viel," "rather" for "either," etc. Printers of the eighteenth century are apparently more closely watched than were the printers of the seventeenth century. But the proneness, if not fondness of printers to have a joke at the expense of some hard working author, is not, we think, at all lessened. Their ability, not their disposition is abridged.

"Termes de la Ley" is now too antiquated to be of much current value. Reference to it in matters requiring antiquarian research are yet made. But for the ordinary purposes of a Dictionary the work is practically useless.

On the other hand the large tomes of Tomlin are so expensive and so exhaustive as to be often beyond the pocket and the comprehension of the law student. Besides, the changes of the law are so many since the last edition was issued that the Dictionary is likely to mislead.

Mr. Brown, influenced, no doubt, by some such considerations as the above, has been induced to provide his new Dictionary. His purpose, as he says in his preface, was to furnish "a Complete institute of the whole law of England, expressing briefly, but without inaccuracy or meagreness, the rules and principles of the Common Law, of Chancery Law, of Real Property, of Conveyancing Law, of Constitutional Law, and of Public or General, *i.e.*, International Law." In doing this he intended to "arrange rules and principles, whether as doctrine, evidence or procedure, in lexicographical order; and while giving prominence to what is modern, not ignoring what is ancient in the Law, wherever the ancient principles or phrases were either valuable in themselves or serviceable in explaining the modern principles or phases which are in numerous instances their equivalents."

This was a comprehensive task and in a measure, perhaps, he has accomplished his purpose. But we cannot say we are particularly struck by the manner of execution. The work is almost too brief to be of much real service. There are only 391 pages in it. It is more likely to be of service to students than to more advanced persons in the profession.

The English Quarterlies and Blackwood's Magazine. Leonard Scott Publishing Co.: New York.

In another place will be found the adtisement of the enterprising firm that reproduces these standard Reviews for the Western world. Even a simple list of the subjects treated of in *The London Quarterly, Edinburgh, Westminster and British Quarterly Reviews and Blackwood*, during the past quarter would take up

more space than we have at our disposal. Suffice it to say, that every department of study, and every branch of literature receives the attention in a greater or less degree of the best writers in the British Isles. If the public read these Reviews more and the trash of the period less, they would be immensely the better for it.—The articles in the last *Blackwood*, are: "Giannetto," the beginning of a new story; "Idas: an Extravaganza"; "Alice Lorraine." Part X. "The Abode of Snow"; "The Story of Valentine and his Brother." Part XIII. "The Life of the Prince Consort"; "The Great Problem: Can it be solved."

BOOKS RECEIVED.

The Criminal Law Consolidation and Amendment Acts of 1869 for the Dominion of Canada, with Notes, Precedents, &c. By Judge Taschereau. Vol. I. Lovell Bros.: Montreal.

The Science of Law. By Sheldon Amos. M. A. Henry S. King & Co.: London, Eng.

Woman before the Law. By John Proffat, LL. B., of the New York Bar. G. P. Putnam & Sons: New York.

These books will be noticed hereafter.

FLOTSAM AND JETSAM.

The German Criminal Law.—A German paper says that a singular instance of the working of the German criminal law was brought out by a case which was tried before a jury the other day at Hamburg. The case in itself was very simple. A house in Hamburg was broken into, and a quantity of silver plate stolen from it. Some time after a pedlar, who had already been imprisoned several times for theft, was apprehended at Ratzeburg, and the stolen property was found upon him. Being accused of the robbery, and put upon his trial, the pedlar denied that he was guilty of the burglary, and accounted for his possession of the property by saying that he had stolen it from the real burglar, whom he had met while travelling upon the high road between Eutin and Schwartau; which, if true, would have reduced his crime to simple theft. Two questions were, therefore, put to the jury—(1) whether the prisoner was guilty of burglary and theft, or (2) whether, according to his own statement, he had merely stolen the things from the real burglar. The jury pronounced him guilty of the burglary and theft, but only by seven votes against five; whereupon it seems, by the German law, the ultimate decision of the question devolved upon the Court. They acquitted the prisoner upon this count, and the jury were then required to give their verdict upon the charge of simple theft contained in the second question, which remained still unanswered. The result was that the prisoner was declared guilty by more than seven votes, and condemned by the Court to five years' imprisonment. But, of course, this last verdict could only have been obtained by the concurrence of several of the jurymen who had previously pronounced the prisoner guilty of the burglarious theft in Hamburg, but now found him guilty of stealing the property from the real burglar on the high road between Eutin and Schwartau. Obviously, however, only one of the two charges could have been true. The result would have been more singular still if the seven jurymen, who had pronounced the prisoner guilty on the first charge, had adhered to their verdict; for the decision of the majority which pronounced him guilty of the burglary having been set aside by the Court, he must have been acquitted on the minor charge, and thus, notwithstanding his confession, would have escaped scot-free.

"Devilling" at the English Bar.—According to the London *Law Times*, the English Bar is in great danger of falling into disrepute and degradation from the practice of what our contemporary calls—not altogether euphoniously—"devilling" at the Bar. The practice complained of is that of taking cases and fees and employing a clerk, or an unknown and briefless barrister, to do the work. This has a public and professional aspect. "The public have a distinct and absolute right to the services of a professional man who consents to act for them," and, "in common honesty, work ought to be done by him who is engaged and undertakes to do it." Our contemporary "ventures to predict that a system which recognizes constant breach of faith by barristers cannot last," and that "if the professional career is made one simply of a race for wealth, then the public must look to its own interests." In its professional aspects, our contemporary thinks that the practice of "devilling" is calculated to support a "monopoly" among the busier and more famous barristers, and it is asserted that, "without the assistance of the briefless barristers, the mo-

nopoly would come to an end, and the briefless would become practising barristers." We are told of numbers of lawyers who advise in cases, and at the last moment desert their clients. If this picture is correctly drawn, we sympathise sincerely with the English client and condemn severely the English barrister, although he may be the slave of a most pernicious system of professional ethics and etiquette.—*Albany Law Journal.*

The Supreme Court of Pennsylvania holds that though a municipality cannot prevent the general slipperiness of the streets caused by the ice and snow in the winter, but it can prevent such accumulations thereof in the shape of ridges and hills as render their passage dangerous. (*McLaughlin* v. *City of Corry* 7 Leg. Gaz., 13.)

In *Pittsburg, etc., R. R. Co.* v. *Pillow*, 7 Leg. Gazette, 13, the Supreme Court of Pennsylvania decided that where a passenger, on a railroad car, lost an eye through the quarrel of drunken men, the company was liable to the injured passenger. The decision proceeds on the ground that carriers of passengers are just as liable for the misconduct of fellow-passengers, as they are for the mismanagement of the train. It is the duty of the company to maintain order; and if they are negligent in this respect and injury results to a passenger, they are liable. In *Railway* v. *Hinds*, 53 Penn. St. 512, a passenger's arm was broken in a fight between drunken persons, and the company was held liable because the conductor did not stop the train and endeavor to expel the disorderly persons. In *Godderd* v. *Railroad Co.*, 57 Me. 202; S. C., 2 Am. Rep. 39, it was said that the carrier "must not only protect the passenger against the violence and insults of strangers and co-passengers; but, *a fortiori*, against the violence and insults of his own servants." In *Flint* v. *Norwich, etc. Transp. Co.*, 34 Conn. 554, it was held that it is the duty of passenger carriers to repress all disorderly and indecent conduct on their cars, and that persons guilty of rude or profane conduct should at once be expelled. In *Putnam* v. *Broadway, etc., R. R. Co.*, 55 N. Y. 108, the principle of the foregoing cases seems to have been sustained; but it was held that where there was nothing in the condition, conduct, appearance or manner of the passenger from which it could be reasonably inferred that he was about to make an attack on a fellow-passenger, the company was not liable for a sudden attack on a passenger. It is not the duty of the conductor to remove a drunken person who is not disorderly or offensive, or who remains quiet after admonition from the conductor.—*Albany Law Journal.*

In Ohio the rights of mortgagees have been recently adjudicated in the case of *Oberlin College* v. *Goodwin*. This was an action to a judgment on a note, and to foreclose a mortgage executed and delivered to the plaintiff. The defendants, F. W. Barnhart and wife, set up a second mortgage upon the premises, and asked its foreclosure. They also claim that the plaintiff 's note and mortgage were given in renewal of a former note and mortgage, which drew seven per cent. interest when the statute authorized only six per cent. The defendants, Wm. E. Goodwin and wife, makers of the note and mortgage, failed to answer. The court *held*, that a second mortgage had the right to insist that the land mortgaged should not only be held for, or charged with, the payment of the first mortgage debt and legal interest thereon, if the proceeds of the sale of the land were insufficient to pay both mortgages, including the usurious interest on the first mortgage. But if the land sold for an amount sufficient to pay the first and second mortgages, with interest on the first at seven per cent., and the mortgagor was willing to pay such illegal interest, it does not lie with the owner of the second mortgage to object to it.

To Correspondents.—We must remind "B" of our invariable rule that no communication can be published unless it is accompanied by the name of the writer, not necessarily for publication, but as a guarantee of good faith.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Michaelmas Term, 37th Victoria.

During this Term, the following gentlemen were called to the Degree of Barrister-at-Law, (the names are given in the order in which the Candidates entered the Society, and not in the order of merit):

Norman F. Paterson.
John McCosh.
Michael Edward O'Brien.
James H. Coyne.
W. H. McFadden.
G. H. Watson.

The following gentlemen received Certificates of Fitness:

James H. Coyne.
W. H. McFadden.
Michael E. O'Brien.
G. H. Watson.
A. D. Cameron.
James Pearson.
W. D. Foss.
H. E. Henderson.
A. R. Creelman.
H. W. Delaney.
B. Vallack Elliott.

And the following gentlemen were admitted into the Society as Students of the Laws:

Graduates.

Kenneth Dingwall.
J. Austin Worrell.
Peter C. McNee.
John Inkerman McCracken.
Arthur W. Ross.
Allen B. Aylsworth.
Thomas Talbot McBeth.
Edward George Ponton.

Junior Class

J. J. Scott.
W. R. Hickey.
W. E. Higgins.
G. Hopkins.
P. J. M. Anderson.
A. W. Brown.
G. M. Grievr.
James Parkes.
W. McDonald.
P. Mulkern.
G. T. Blackstock.
J. M. McDowell.
W. J. Porte.
J. A. P. Wood
H. Morrison.
G. A. Skinner.
E. Cahill.
C. E. Carbert.
H. Stotesbury.
Thomas Ede.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects namely, (Latin) Horace, Odes, Book 3; Virgil. Æneid, Book 6; Cæsar, Commentaries, Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3, Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students-at-law shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding,—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.