DIARY FOR MAY.

1. Sat... *St. Philip & St. James.* Gram. & Com. Sch.
2. SUN. *Rogation.* [Fund app. Co. Tr. to make up books and enter arrears. Articles &c., to be left with Sec. Law S.
6. Thur. *Ascension.*
9. SUN. *1st Sunday after Ascension.*
12. Wed. Last day for service for County Court.
14. Fri... Exam. of Law Students for call to the Bar.
15. Sat... Exam. of Art. Clerks for certificates of fitness.
16. SUN. *Whit Sunday.*
17. Mon. Easter Term begins.
19. Wed. Interm. Exam. of Law Stud. & Art. Clerks.
22. Fri... Paper Day, Q.B; New Trial Day, C.P.
22. Sat.. Paper Day, C.P.; N. T. Day, Q.B. Declare for County Court.
23. SUN. *Trinity Sunday.*
24. SUN. Queen's Birthday. P. Day, Q.B.; N.T.Day. C.P.
25. Tue.. Paper Day, C.P.; New Trial Day, Q.B.
26. Wed. Paper Day, Q.B., New Trial Day, C.P.
27. Thur. Paper Day, C.P.
28. Fri... New Trial Day, Q.B.
30. SUN. *1st Sun. af. Trin.* [Last d. not. of trial Co. Ct.
31. Mon. P. Day, Q.B.; N.T. Day, C. P. Last d. for Ct. of Revision finally to revise Assm. Roll.

THE

Canada Law Journal.

MAY, 1869.

We are very glad to learn that Judge John Wilson, is gradually recovering from his alarming illness. He is out of immediate danger, and hopes are entertained of his ultimate recovery.

LAW REFORM ACT.

Of the many cases that have been tried at the Spring Assizes throughout the country, many very important ones have been tried without the intervention of jurymen, and, so far we have heard no complaints have been made of the findings of the judges on questions of fact; and there seems to be no reason why they should not be (at least in those classes of cases which are ever likely under the present law to be left to judges as sole arbiters,) as satisfactorily determined by one of the judges of a Superior Court of common law, as questions of fact in a suit have hitherto been by an Equity judge. There may be some minor difficulties in Term, in ascertaining and deciding the exact position of cases tried under the new practice, but anything of this kind will soon be put right. We notice, however, an inconvenience, which, though only felt probably in a slight degree at an Assize with a small docket, becomes serious where, as in Toronto and occasionally elsewhere, several weeks are occupied in the disposal of the business, and the inconvenience is this, that jurors are needlessly kept in Court, and away from their homes or business, whilst cases in which their services are not required are being tried. A simple remedy would be to provide that all jury cases should be tried first. A separate list might be made for them, to come on next in order after the disposal of assessments and undefended issues.

Much greater evils were found during the last assizes as the result of this Act—firstly, the length of time prisoners are kept lying in gaol awaiting trial, very often for offences of the most trifling nature; and secondly, the great waste of time to all parties attending the Assizes, by the trial of all sorts of paltry offences, which could be as well at the sessions, or perhaps by a magistrate. It is all very well that individual convenience should give way to the public advantage, but the advantages to the public must be of a very tangible nature before some of the leading features of British justice—that every person accused of crime shall have a speedy trial, and shall be held to be innocent until found guilty—are overlooked. At one assize, at least, the presiding Judge remarked upon the hardship of keeping prisoners charged with some paltry offence in gaol for months without trial,—accused as one was for stealing a rail off a fence; another for stealing a hammer, &c. In one of these cases the learned Judge sentenced the prisoner after conviction, to one hour in gaol. Here the punishment came first, and the conviction afterwards;—rather hard it would have been if the accused were innocent after all.

Another practical result of the Act is, that County Court cases are tried by Superior Court Judges; and the cases which there is no time for the Judge of Assise to try, are either left for a County Court Judge to finish, or have to lie over for six months. Every day brings up some new difficulty, the result of this hasty attempt to reform what had much better have been left alone than badly done. The remedy is worse than was the disease.

Some one will doubtless try his hand at an amendment of the Law Reform Act next session, and he might take a note of these suggestions, amongst others, by the way. Perhaps, however, the most effectual remedy that could be devised for the many defects, known and unknown in this Act, would be to re-

peal it *in toto*, and replace it with a more carefully prepared measure, dealing only with admitted defects.

NOTICE OF APPEARANCE.

A word as to notice of appearance after time for appearance has elapsed:—

In the case of *Lanark and Drummond Plank Road Co.* v. *Bothwell*, 2 U. C. L. J. 229, Burns, J., intimated an opinion that when an appearance is entered after the proper time, the knowledge of the plaintiff that such an appearance was in fact entered was sufficient to dispense with a written notice by the defendant that he had appeared. This was coupled with a statement, that the plaintiff did not in that case give time for notice to be given before he entered judgment, though it did not appear that any attempt to give a written notice had been made. This decision, though it may have been reasonable enough under the circumstances of the case, and equitable and proper no doubt, so far as the adjustment of the rights of the parties between themselves was concerned, has unfortunately been made an excuse for indulging in a looseness of practice in the premises which, for many reasons, it is always desirable to avoid.

In a recent case in Chambers, the decision of Mr. Justice Burns was cited as an authority to the full extent of the note we have given of it above. But the Chief Justice of the Common Pleas, though he did not expressly dissent from it, objected to the state of things that would result from its being followed as a general rule of practice. And he further said, that if it should be necessary for him to decide (which it was not in the case before him,) whether the notice spoken of in the Act meant a written notice, and not a verbal notice or mere knowledge, his impression was that he should have to decide that such notice must be in writing.

LAW SOCIETY—EASTER TERM, 1869.

CALLS TO THE BAR.

Twenty-five gentlemen presented petitions for call to the Bar, of which the following passed the Examinations:— Messrs. S. S. Smith and Morrison (both without oral), Chisholm, Jameson, Smart, Norris, N. M. Clarke, Gibson, Metcalf, Elliott, Hick, Dudley, Rutledge, King, Capreol.

ADMISSIONS AS ATTORNEYS.

Twenty-two gentlemen presented themselves for examination for admission to practice as Attorneys. The following were successful—Messrs. Robertson, Livingston, Ferguson, (these three without any oral examination). Meredith, Cartwright, Biscoe, Corbould, Rutledge, Oliver.

Messrs. McIntosh, Kimber and Lewis, of the Quebec Bar, were, during the present Term, called to the Bar of Ontario, and admitted to practice as Attorneys in this Province.

We publish in this number an article taken from the *American Law Register*, criticising the discussion in a recent case on the question of the validity of legal tender notes in the United States; also, the report of a case in one of the courts of that country, wherein it was decided that in contracts for the payment of a sum certain in gold or silver coin, made prior to the passing of the Act making certain notes a legal tender, damages for non-payment must be paid in coin according to the contract. These will have some interest at the present time when the tendency of legislation seems to shew that we are approaching a somewhat similar state of things in respect to our currency.

In a recent number of the *Solicitors' Journal* (vol. 13, p. 294), are given the general orders under the County Courts Admiralty Jurisdiction Act, 1868. This Act, we believe, gives to certain County Courts in England, jurisdiction under some circumstances in Admiralty cases. When are we to have something of this kind in this country—either by means of a Court with exclusive jurisdiction in such matters, or by giving the necessary powers in urgent cases to County Judges in certain localities? All the arguments in favour of legislation on this subject *before* confederation, are trebly strong now. We believe it was intended to introduce a measure at the present session at Ottawa, to afford partial relief in the premises, but we have seen nothing of it as yet.

SELECTIONS.

LEGAL TENDER NOTES BEFORE THE SUPREME COURT.

(From "The American Law Register.")

The recent discussion of the question of the validity of the Act of Congress creating the legal tender notes, before the Supreme Court of the United States, and the manner in which the question is viewed by the public in general, are certainly calculated to create, or perhaps we might more properly say to confirm, distrust in general public opinion, as an index or guide to truth. When the law was first passed it was regarded as evidence of disloyalty for any one to impugn the validity of that Act. The class of men, considerably numerous, indeed, and highly respectable in point of character, learning, and ability, who did openly denounce the act as an unworthy debasement, or attempted debasement of the public money of the nation, was encountered and assailed from every portion of the country as disloyal and unpatriotic; and certain epithets which were regarded as derogatory, and specially efficient in producing opprobrium and discredit, were freely heaped upon them, without measure or stint. At the present time, however, all this seems to be changed. Every one seems to feel at liberty to discuss the question of the validity of the law with the utmost freedom. But what is most remarkable in the discussion is, that while the best lawyers and the most cautious and conservative men in the country now approach the question with obvious diffidence and distrust in their own power to comprehend all its bearings, or to give it a satisfactory determination, the politicians, and letter writers, and others of the class who spend much of their time, as the Athenians did in the days of St. Paul, in hearing or telling some new thing, and who are supposed to reflect pretty accurately the general, superficial political public sentiment of the country, for the day, or the hour, exhibit a most amazing amount of flippancy and readiness to relieve all the doubts and difficulties of their hearers and readers by their own single and simple *ipse dixit*. And so common is it, in and about the Capitol, and in the leading city journals, at the great commercial centres of the nation, to hear and read the unqualified opinion and declaration, that the court will declare the law invalid with all but unanimity, that one is led to seek the explanation of this surprising garrulity against the law in the very quarters where but lately was found such inquisitorial intolerance of all such opinion, in some source of light and intelligence quite beyond any developments disclosed in the argument. It almost seems as if the authors of the act would now be glad to escape responsibility by invoking the aid of the court in declaring it void. But the court will do no such thing, for any such reason.

We had the agreeable opportunity of listening to the arguments before the court through most of the sessions for three successive days, and it was certainly such an intellectual banquet as is rarely exhibited in any forensic encounter. We do not care to venture upon any specific estimate of the particular excellencies of the successive advocates, where all were confessedly so able and so eloquent. We had listened to all the advocates, on other occasions with the exception of Mr. Potter, of New York. The opening argument in favor of the validity of the law was made by Judge Curtis, in his clearest, purest, happiest vein, as nearly perfect, both in matter and manner, as it is possible for us to conceive a law argument to be. Mr. Townsend, of New York, and Mr. Potter occupied parts of two days in reply, placing the main force of the argument on the ground of the impolicy and injustice of the law, and upon the early history of the Government and the Constitution, as showing both the improbability that the Constitution was intended to receive any such construction, and, as far as practicable, the fact that such was not the purpose of its framers, or of those who adopted it. These gentlemen commanded a good degree of attention, and made themselves, on the whole, very interesting.

The Attorney-General, Mr. Evarts, closed the argument with his usual copiousness of learning and fulness of illustration.

The only possible exception one can make to his manner of arguing causes in banc is, that he is, if possible, too deliberate, causing the attention of the court, after listening a considerable time, to rather flag, and lose something of that keen edge which it is always desirable to maintain throughout, if possible. A certain degree of deliberation and quiet self-possession adds very greatly to the force of a mere dry legal argument before a bench of judges, especially where, as in the present case, they are considerably numerous. And we know that Daniel Webster sometimes adopted this peculiar mode of argument with great effect in addressing courts; and juries possibly sometimes, but not by any means as a general rule. And he could do some things, sometimes, which it would be scarcely safe for any other man to attempt. As his favourite brother, Ezekiel, once said of him, "Brother Daniel could puzzle" [or even overwhelm] "a great many men that knew more than he did." No American, probably, and no Englishman, perhaps, ever possessed the power of manner which Daniel Webster seemed unconsciously to fall, or be driven, into. What seemed in him the inspiration of the moment, or the result of the secret and hidden springs of the cause, might not always appear so in others, at least on occasions of no special interest.

But bating this single and unimportant drawback in the Attorney-General's mode of speaking (which we are specially desirous of seeing improved to the extent of the Latin maxim, *festina lente*, on account of our great

admiration of the man), it must be admitted that he presents one of the best models of forensic eloquence at present to be found in this or perhaps any other country. Mr. Evarts' dry law arguments, while abounding in all the learning and logic which it is desirable to find there, abound also with the richest and choicest illustrations which it is possible to conceive, or which the purest and most chastened rhetorician could desire. And this alone makes it necessary to occupy more time than would otherwise be required, and thus imposes a somewhat greater strain upon the powers of the orator. The argument of Judge Curtis fell far within the limits of one hour, and it commanded the most undivided and unflagging attention to the last moment; and as a presentation of the legal argument, and it aspired to nothing else, it was certainly of a most uncommon and unrivalled character.

But the general style or argument in this court is losing much of that conversational air which gave it such a charm thirty years ago, and which still prevails, to a great extent, in Westminster Hall. The present style of forensic debate there is more like that of Pinkney, and Emmett, and Lowndes, than the school that followed these great masters of forensic eloquence, which was far less ornate and discursive. Each has its advantages and its followers. But the present style of forensic debate in America is rather French than English, and is based, perhaps, somewhat upon Rufus Choate's theory, that if you would move the court and jury, you must first electrify the bystanders, and the audience generally.

But we are very far from any assurance that the ablest, and purest, and most learned courts, and the judges of this court possess all these qualities in an eminent degree, are sure to be most effectually convinced, upon a great constitutional question, by merely dry legal views. There was something so stirring in the many eloquent illustrations and appeals of the Attorney-General, that we could not but feel that very likely they would effect a lodgment in the sternest legal minds, where no force of pure cold logic could reach. We believe the ablest, and most experienced, and learned judges are more frequently induced to reconsider an over-established opinion, upon the force of a pertinent illustration, or an argument *ab sinconvenienti*, or the *reductio ad absurdum*, than by any amount of mere deductive reasoning. But it is fair to say that taking the pure legal view of Mr. Curtis, and the mixed legal and practical view of the Attorney-General, there was nothing more to be desired on that side.

The argument upon the other side was considerably weakened in its force, upon the general question of the validity of the legal tender clause in the act, by the fact that the validity of gold contract, under the law, was also involved in the cases, and this of course caused considerable diversion and consequent loss of force upon the main issue. One of the speakers, too,—whose argument was in the main very able and happy,—we are bound to say fell into the common fault of diffuse and ready speakers generally, of loading his argument with an infinite number of illustrations, drawn from every source of supposed analogy, many of which were far more doubtful than the main proposition, thus dividing attention of the court and dissipating the intrinsic force of his argument. Mr. Townsend, whose case was that of a gold contract, in terms, made a very close and learned argument, which we should be surprised to have overruled by the court, even if they maintain the entire validity of the act. Having spoken so much at length upon the argument in these cases, we shall be able to say less in regard to the questions involved than we have desired, or intended. But we shall present a brief *resumè* of the points, not much relied upon in the argument before the court, but which appear to us worthy of consideration.

The argument against the validity of the act seems to be placed largely upon the injustice and severity of its operation upon past transactions. This argument as it seems to us, is completely answered by the consideration that the validity of an act of legislation does not, in any sense, depend upon its innate wisdom or justice. Where the power of legislation exists, it is equally operative, whether its exercise be wise or unwise, just or unjust. And the same injustice is confessedly within the power of Congress, in regard to the currency, by debasement of the metallic coinage as by issuing bills of credit. The acts of Congress have more than once lowered the standard of the established coinage, and thus lessened the amount of standard gold or silver which subsisting contracts would require for their performance. And if this can be done in a small degree, it can equally be done to any extent which the government shall deem expedient, and thus effect the same depreciation complained of by making legal tender notes, so that this argument is thus effectually answered. It is a power which the National Legislature always possesses, and may exercise at will.

Again, much stress is often placed upon the historical fact that it was proposed in the convention framing the Constitution to give the express power to the National Government to issue bills of credit, and that this was not accepted, or, as it is called, was rejected. Now this is not by any means the same thing as if the power to make the Constitution had resided in the convention. It is not the same as if the proposition to emit bills of credit, had been submitted to the people and rejected. The most that can fairly be argued from this fact is, that the convention could not agree to submit to the people any express provision to enable the National Government to issue bills of credit. If this had been done, it must have been accepted in that form, or the whole

Constitution would have been rejected. This might have been the prevailing reason which induced the convention not to embrace that specific provision in the frame of government submitted. It merely shows then, that, for some reason, the convention could not agree to submit that express provision.

But it by no means leaves the Constitution, as adopted, subject to any implications against the provisions being virtually implied in what was submitted and adopted, because this express provision was not embraced in it. The people had no knowledge of the discussions of the convention, or of the propositions discussed by it and not embodied in the Constitution, but acted upon the document as presented to them; and it is therefore fairly entitled to receive its construction upon what appears in it, without reference to any discussions or propositions before the convention and which did not result in any affirmative action. It is much like the case of a contract, since the passing of the Legal Tender Act, in which the parties, in their preliminary action, had attempted to define the currency, either gold or greenback, in which it should be payable, but could not agree, and therefore left it to legal implication. There would surely be no ground of argument, in such a case, that the parties had virtually fixed the currency in which payment should be made, or that because the parties failed to agree either upon gold or currency, both must be excluded. No principal of legal construction is more familiar, than that none of the preliminary negotiations can be received or considered in fixing the construction of a contract. And the same is true in regard to any written instrument, whether a contract, a testament, or a constitution. Each must speak by its own words, construed with reference to its subject-matter and the purpose of its creation.

If then the United States Constitution, like ordinary written instruments, is entitled to be construed by its language, with reference to those allowable aids to which resort is always made in such cases, we shall find less embarrassment in reaching a satisfactory conclusion than if we were compelled to regard the views of the framers or of the people, then or now, or any other outside influences, in the matter. No doubt tradition, or contemporary history, may, in many instances, afford great aid in learning the import of terms, or the general purpose and intent of an act or instrument, or contract.

In that view the known and declared facts recited in the preamble of the Constitution, wherein the transaction is declared to be the work or act of the people of the whole United States, is a very significant intimation that the purpose was to create a national sovereignty, and not a mere confederation among the states. The other portions of the preamble look in the same direction. "To form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity," are all objects not to be expected from anything less than the establishment of a national and consolidated sovereignty.

Then the general frame of the instrument shows that the government was expected to embrace all the important, certainly all the indispensable powers and functions of national sovereignity, and that it was to be automatic, possessing all the functions and resources of sovereign states, viz., executive, legislative, and judicial.

As showing too the paramount and supreme power of the newly-created national government, the national judiciary is given the supreme function of defining and measuring all the national powers, and at the same time of defining and measuring the powers reserved to the several states under the National Constitution, be allowing writs of error to the highest judicial tribunal in the state from the Supreme Court of the nation in all matters affecting any power or function derived from or under any Act of Congress or the National Constitution, or where it was claimed that any conflict had arisen in regard to the validity of any state law by reason of its conflict with the powers and functions of the national government under its Constitution, and the decisions of the state court had been adverse to the national claim of authority.

Under such a distribution of the powers of sovereignty, it would be natural to find that the power of making money and declaring the value of the same should be reposed in the national government, as a clearly national function. This we do find to be the fact, either fully or subject to limitations. There can be no doubt that before creating the national sovereignty the general and unlimited power of making money, in all modes known to the law of free states, did exist in the fullest possible form in each of the states. And although the history of free states shows, that for commercial purposes a circulating medium of the precious metals is regarded as the most desirable, and the only desirable one, yet it is certain this has never been regarded as the exclusive currency of even commercial states. Almost all the European states have, in emergencies of great pressure, during war or in other great commercial crises, resorted to the issue of national bills of credit, by declaring them part of the money or circulating medium of the country. This question was incidentally involved in a recent case in the English courts of equity, where the Emperor of Austria sought to enjoin Louis Kossuth and one Day, the manufacturers, from preparing and issuing bills of credit in the name of the kingdom, or the king of Hungary. No question seems there seriously to have been made by counsel or entertained by the court but that such bills, when lawfully issued, would constitute a portion of the lawful money of the empire

Emperor of Austria v. *Kossuth et al.*, 7 Jur. N. S. 483, before V. C. Stuart; s. c. before Court of Ch. Appeal, Id. 639; 2 Story Eq. Ju. § 951 *e*.

It is declared in *Craig* v. *State of Missouri*, 4 Pet. 410, and is a fact in history familiarly known, that the states, before the adoption of the Constitution, had repeatedly exercised the power of issuing bills of credit and declaring them lawful tender for private debts, that is, making them lawful money. The confederacy before the adoption of the Constitution, possessed no power over the subject of lawful tender, and were compelled to, as they repeatedly did, appeal to the states to declare the national bills of credit lawful tender.

This was one of the defects in the national authority, which it was the purpose of the Constitution to remedy. This was done by prohibiting the states from coining money or issuing bills of credit, or making anything but gold and silver a tender for private debts. This in effect took from the states all power over the subjects, both of making money and declaring legal tender. This seems to be so regarded by Ch. J. Marshall, in *Craig* v. *Missouri*, *supra*, where he shows very clearly that both these functions are prohibited to the states. This must be so if the states could neither coin money or issue bills of credit, since this covers the whole subject of tender laws. And accordingly we find that Congress has always controlled the subject of tender since the adoption of the Constitution, and the states have never attempted to interfere. This, of itself, is such a practical construction of the Constitution as must, on every sound principal, be regarded as settling the respective powers of the nation and the states over the subject of tender laws.

We think it fair too to say, that the entire power of making money is, by the Constitution, given to Congress. We have seen that it existed before the formation of the national government in all the states, and that it is now prohibited to them all. It must therefore exist in Congress, or not at all. If it had been the purpose of the Constitution to prohibit the power of issuing bills of credit and making them lawful tender, equally to the national government as to the states, it is impossible to conjecture why it should not have been done in the same or similar terms. The fact that both are distinctly and expressily prohibited to the states, and that not one word is said in regard to their being exercised by the nation, is certainly a very significant intimation that it was not deemed proper to extend the prohibition beyond the states, but to leave its exercise by the nation to the necessities and emergencies of after times, to be exercised or not according to future exigencies, the same as it exists in all free and sovereign states.

This is very obviously to be inferred from the consideration that the whole subject of issuing bills of credit and making them lawful money was familiar to the delegates, in the then recent experience of the times, and especially must it have been present to their minds in making such express provisions in regard to its exercise by the states. It could not, therefore, have been supposed the national government would never have occasion to exercise such a power, since that had very recently been done by a national government possessing far less automatic power than the one then about to be created, upon the basis of paramount national sovereignty. Nor is it fair to conclude that it was then supposed there could never arise an emergency where it might be necessary to declare these bills of credit lawful tender or lawful money; since the nation had just had experience of that same necessity and had appealed to the states for the exercise of that same power, which they were now in express terms prohibiting them from exercising in future. And if it had been the purpose to extinguish and utterly abolish this power everywhere, we can conjecture no good reason why that should not have been done in terms, either by prohibiting all bills of credit as lawful money, or else declaring, as in regard to the states, that Congress or the nation should never make anything but gold or silver a lawful tender for private debts. We must surely conclude either that it was intended to abolish this known and and important function of government or else leave its exercise to the nation.

Whether, therefore, we look for this power in the clause "To borrow money on the credit of the United States," or that "To raise and support armies," which is evidently but a subdivision of the former, or whether we find it embraced under the liberal and only sensible construction of the power to "coin money, regulate the value thereof, and of foreign coin," is not very material. It must be obvious to all that an instrument creating a paramount national sovereignity, and prohibiting the exercise of all sovereign national functions, such as making money, by the states, should not, except upon strict necessity, resulting from the terms used, be so construed as to destroy or essentially abridge so importaut and indispensable a national function as the creation of paper currency upon great and pressing emergencies; a function exercised by all commercial states in those trying exigencies which, as in all future time must be expected to occur.

We only desire further to say that it seems to us that the courts and the profession have manifested more refinement than wisdom in giving the clause in the Constitution, "to coin money," such a precise and literal interpretation as to exclude all paper money under all circumstances. In its most literal sense it will extend to all kinds of metal, to iron and tin, as well as gold and silver, and perhaps also to every substance capable of receiving and retaining an impression, for coining in its most literal import means nothing but stamping with a device. Any material, therefore, which can be stamped may be coined. And

in that sense any impressible material, even paper, is susceptible of literal coinage. But the true construction unquestionably is, that the more common mode of creating money is here, by a figure of speech, put for the whole, and that "coining" money means nothing more than *making* money. For unless we do adopt this construction, there is no power by which money of gold and silver can be made in any other mode except coinage. It could not be done by weight, in the form of bars or bullion, or by stamping pieces of gold or silver, short of coinage, or by any other known or newly-discovered device. Such a narrow and literal construction of language would never be adopted in regard to the interpretation of other written instruments. The *endorsement* of notes and bills, which literally imports an assignment upon the *back* of the instrument, may just as well be upon the face of the instrument, as has been often decided. So also a contract for the *manufacture* of cloth, or machinery or any other thing, where it was susceptible of being done, either by hand, as the word literally imports, or by machinery, would never be received in a strict literal sense. All that is implied is, that it shall be so made as to answer the ordinary purposes and objects of such fabrics in the market. These illustrations might be carried to any extent. Any court which should assume to give language any such literal construction, in regard to an incidental and collateral matter, only implied from the etymology of the terms used upon any other subject, would shock the common instincts and common sense of mankind. And why that strict and extremely literal construction of this clause of the Constitution should be so strenuously insisted upon on this subject, any more than upon other portions of the instrument, is not easily explainable. If one of the most accurate of English writers could speak of "coining blood for drachmas," why may not a nation coin money in all the modes known at the time the power is created, and thus stamp its own paper with the quality of lawful money? Few men will argue that the government might not stamp the quality of money upon gold and silver without literaly coining it, and if so, why may it not effect the same thing with its own paper, as no limitation is found, surely, in regard to the material of which money shall be made by the national authority? It may be of any metal or other material susceptible of coinage. The same thing may be effected by stamping such material. Is paper, therefore, certainly excluded? Can that be fairly said when it was one of the known modes of making money at the time, and present to the minds of the farmers? If money may be coined out of paper, it is surely none the worse for containing the promise of the government.

It may undoubtedly be fairly argued that this power of emitting bills of credit and stamping them with the qualities of lawful money, was not intended to be given as the ordinary mode of making money. It was not expected the nation would attempt to do, under ordinary circumstances, what all nations regarded as destructive policy, except in times of war or extreme emergencies. The same is true of borrowing money, which is one of the express powers granted in terms most unquestionable. No nation can borrow money for its ordinary current expenses and not come to ruin and bankruptcy, any more than an individual could do the same and not lose credit. Current expenses must be met by current income or all credit and character is lost, both personal and national.

To argue that no power to emit bills of credit and stamp them as lawful money was intended to be given to the nation, but that still this may be done in all great emergencies, when it is impracticable to maintain the national life in any other way, seems to us very nearly equivalent to saying that the power is not given at all as an ordinary function of government: but it may be resorted to, by way of spasmodic convulsions, in the last throes of existence. This seems to be an admission that it is not given but may be assumed in *articulo mortis*, the same as the people may resort to the inherent right of revolution when the oppressions of the existing government become intolerable! This is a species of legal construction not judicial in its character as it seems to us. We would sooner presume it, as a necessary incident of national sovereignity.

Such an argument seems to us rather political than legal; a function of the legislative or executive authority, rather than of the judiciary. If the power to emit bills of credit and stamp them as money is not given in the function of borrowing money and coining money, it seems to me, with submission, that it is not given at all. But it seems very clear to us that these express powers of borrowing money and making money must be supposed to have been given to be exercised, not only in all the then known and usual modes of doing those things, which will cover the present issue of treasury notes, but also in all future modes and emergencies which might be desirable as they should arise. This is the only mode of construing the Constitution which will make it answer the purpose of its adoption. Upon any other mode of construction a written constitution must become an intolerant hamper and impediment to the just development and growth of the national life, which should surely be avoided if the courts possess the power of rising to the demands of the exigencies of advancing time, which is one of the indispensable functions of judicial construction, and which can alone render written laws endurable.

I. F. R.

LIABILITY OF GRATUITOUS BAILEES.

There are many advantages in the system, or want of system, by which English law is allowed to grow, now in one direction, now in another, as new questions arise for judicial decision. It gives great flexibility to the law, and allows, as the wants of the people change, a constant and even development without the aid of Legislative enactments. There are, however, on the other hand, great disadvantages in this method of law-making, not the least of which is the doubt and confusion that is often caused by carelessly-given judgments which, even although they may be correct in their conclusion, may yet cause much harm if they contain inaccurate statements of principles or ill-considered *dicta*. Succeeding judges are slow to overrule the decisions of their predecessors, or even to express dissent from the *dicta* ascribed to them in their reports. The consequence of this is, that an erroneous decision, or even a correct decision on erroneous grounds or inaccurate *dicta*, may cause much difficulty in the law, and may remain for years neither overruled nor altered, although the errors may be generally recognized. It is not until some state of facts requires a decision directly on the point that a judicial expression of disapproval can be obtained.

The law respecting the liability of gratuitous bailees is a curious instance of the way in which confused and incorrect legal notions may arise, and be continued for a long series of years with but the merest shadow of authority in their support. The case of *Coggs* v. *Barnard* (1 Sm. Lead. Cas.) is the leading case on bailments, and the judgment of Holt, C.J., has received a great deal of praise, and is often spoken of in very exaggerated terms. Its real merit is that it endeavoured to treat the whole subject of bailments in a more complete and scientific manner than had before then been attempted, and it was, no doubt, useful at the time it was delivered (A.D. 1704) when there were but few law-books of any kind. If the judgment is to be considered with reference to the present state of the law, it is open to much criticism. It is unnecessarily elaborate, and, for the sake of an apparent symmetry, useless distinctions are made between different kinds of bailments. The point actually decided was, that "if a man undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage." Holt, C.J., examines generally the law of bailments, and says that, "where a man takes goods into his custody for the use of the bailor, he is not answerable if they are stolen without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect." He then goes on to say that, in the case of a loan, the borrower is bound "to the strictest care and diligence to keep the goods," and if the bailee is paid for the bailment he is "bound to take the utmost care," but that if, notwithstanding such care, the goods are lost or destroyed, in either of these cases the bailee is not liable. Holt, C.J., therefore thought that there was a clear distinction between the liability of an unpaid bailee and of a paid bailee or borrower. It has been usual, since this decision, to say that a paid bailee or borrower is liable for simple "negligence," but that an unpaid bailee is liable only for "gross negligence."

As the liability of a paid bailee and of a borrower is the same in common sense, as well as by the judgment of Holt, C.J., and all other authorities, what is an authority in the one case is an authority in the other, and the two classes of cases may be dealt with together.

If the mere fact of payment affects the liability of a bailee, it is convenient to distinguish between the negligence which will charge a paid and that which will charge an unpaid bailee, and the terms "negligence" and "gross negligence" answer very well for this purpose. If, however, the mere fact of payment does not alter the liability, the negligence necessary to charge the bailee in either case is the same, and the term used to denote that negligence ought also to be the same.

After the decision of *Coggs* v. *Barnard* it was discovered, as might have been expected, that the difference made by Holt, C. J., between "gross neglect" and neglect of the "utmost care" was extremely vague and unsatisfactory. It was difficult for a judge to direct a jury accurately on this principle, and the difference itself was rather a subtle creation of the law than a substantial difference which could be practically recognised in dealing with the two classes of bailments. Every bailment gives rise to a contract the terms of which may or may not be regulated by express agreement. If there is no express agreement, the idea that is present to the mind of both parties on the delivery of the goods whether the bailee is or is not paid, would almost without exception, be that the bailee was to use that ordinary diligence and care in preserving the goods which, under the circumstances, any man of ordinary prudence would adopt, and the contract implied by the law in such a case ought to be to that effect. Although this is opposed to *Coggs* v. *Barnard*, there is ample authority for the proposition that such are the terms of the contract now implied by the law on a paid or unpaid bailment without any express agreement. *Coggs* v. *Barnard* has never been formally overruled, and the correctness of the actual decision has never been questioned; but cases have been decided which are inconsistent with some of the *dicta* of Holt, C.J.

The case that most clearly shows the liability of a gratuitous bailee is *Wilson* v. *Brett* (11 M. & W. 113). The defendant rode a horse of the plaintiff's gratuitously, at the plaintiff's request. The horse fell on a piece

of marshy ground, and was hurt. In an action against the defendant, charging him with having negligently injured the plaintiff's horse, it was proved that the defendant was skilled in the management of horses. The jury were directed to say "whether the nature of the ground were such as to render it a matter of culpable negligence to ride the horse there, and that, as the defendant was skilled in the management of horses, he was bound to take as much care of the horse as if he had borrowed it." It was held that this direction was right, and that "in the case of a gratuitous bailee, when his profession or skill is such as to imply the possession of competent skill, he is liable for the neglect to use it," "in the same way as if he had been a borrower." Rolfe, B., also says, "I see no difference between 'negligence' and 'gross negligence;' it is the same thing with the addition of a vituperative epithet." This judgment, in effect, decides that payment *per se* does not necessarily affect the liability of a bailee, as it places the liability of a borrower, which is the same as that of a paid bailee, and of a gratuitous bailee upon the same footing. This view of the law has been approved in *Grill* v. *The General Iron &c. Company* (14 W. R. 893), and in *Beale* v. *The South Devon Railway Company* (12 W. R. 1115). These three cases, besides other authorities, show that all bailees, whether paid or not, are liable for the want of reasonable care and for nothing else. That, however, which would be reasonable care by one man is not necessarily so by another. All the surrounding circumstances must be looked at. If a watch is given to a watchmaker to be repaired, he is bound to use such skill and care as an ordinary watchmaker might be expected to possess. If a watch is given to be repaired to a person who knows nothing of watches, he will be bound to use such care as may reasonably be expected from an unskilled person. In each of these cases the bailee will be liable if he is negligent, but that which would be negligent in the skilled workman would not necessarily be so in the unskilled man.

This liability would not be necessarily affected by payment. In each case ordinary care must be used, whether the bailee is paid or not. Payment may, however, sometimes indirectly affect a bailee's liability. If a person offers to do any act, as, for instance, to repair a watch for reward, he may, and in many cases certainly would, be understood to hold himself out as having competent skill to repair watches. If he either has such skill, or has represented that he has it, he is liable for any neglect of the ordinary care of a skilled workman. If, however, the payment was made under circumstances which did not amount to a representation of skill, the bailee will only be liable for neglect to use such knowledge as he in fact possesses. This is the only real distinction between paid and unpaid bailees. The payment may be evidence of a representation of skill. If it does not amount to this, it does not affect the liability.

As a matter of fact, paid bailees are usually skilled persons, or have represented themselves as such, while unpaid bailees are generally unskilled. Hence there is, perhaps, in the majority of cases, a difference between the liability of paid and unpaid bailees, but this difference does not depend on the payment, but on all the surrounding circumstances under which the bailment was made. An unskilled workman is not often paid for work which requires skill, unless he represents that he has skill, and a skilled workman seldom will work without payment. The question in each case is what were the circumstances from which the contract is to be implied, and payment may be a circumstance which should be considered, but it cannot itself *directly* affect the contract. Although this is clear, both as a matter of law and of common sense, text writers have not yet consented to consider the dicta of Holt, C.J., in *Coggs* v. *Barnard* as overruled. Almost all text-books, which treat of bailments, and even many judgments, still recognise, by their language, the distinction between paid and unpaid bailees, and between negligence and gross negligence. *Giblin* v. *M'Mullen* (17 W. R. P. C. 445), lately decided by the Judicial Committee of the Privy Council, affords an example of the vitality of a legal error when once enshrined in a judgment; and the case is also a specimen of the careless and slovenly judgments which unfortunately are not uncommon in our courts. The point for decision was as to the liability of a banker for the loss of securities deposited by a customer. The question was a very simple one, and the only wonder is, that it should have come before the Privy Council at all. It was admitted (although it is surprising that the point was given up) that the banker was a gratuitous bailee. The evidence showed that all reasonable and ordinary care had been employed to preserve the securities which had been lost. It was held that the banker was not liable. The authorities were clear in the defendant's favour, and the whole decision might have been comprised within the limits of a very short judgment. The Court, however, unfortunately took the opportunity of considering the liability of gratuitous bailees generally, and also discussed the meaning of "gross negligence."

The question for decision, as stated in the judgment, is, was there "that degree of negligence which renders a *gratuitous* bailee liable for a loss? . . . The negligence which must be established against a *gratuitous* bailee has been called 'gross negligence.' Of course, if intended as a definition, the expression 'gross negligence' wholly fails of its object. But, as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the terms may be usefully retained as descriptive of that

difference." This undoubtedly implies that gratuitous bailees are, as such, under a liability different from that of paid bailees. The meaning of "gross negligence" is then discussed, and the conclusion arrived at is that "the epithet 'gross' is certainly not without its significance;" but that significance is nowhere explained, and, indeed, as far as we can gather any meaning from this part of the judgment, it seems that the duty of a bailee (whether paid or not) cannot be defined; but he must wait until an action for negligence is brought against him, and he will then find out from the direction of the judge and the verdict of the jury what amount of care he ought to have exercised. Having arrived at this conclusion as to the state of the English law, the judgment comes to the point of the case, and decides "that the bank were not bound to more than ordinary care of the deposit entrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs."

No fault can be found with the law thus stated, as it is well supported by authority: but this decision, that "the banker was not bound to use more than ordinary care," would have been equally applicable if the banker had been paid for the deposit. There is ample authority to show that this would have been the correct and indeed the only proper direction of a jury in the case of a paid bailee. It follows, therefore, that, by the decision of *Giblin* v. *M'Mullen*, the liability of an unpaid bailee is the same as that of a paid bailee.

This decision, taken with the remarks which precede it, creates this curious contradiction on the face of the judgment. First, it is stated that there is, as a matter of law, a distinction between the liability of paid and unpaid bailees; secondly, that the bank were unpaid bailees; and, thirdly, that the liability of the bank is precisely the same as if they had been paid for the deposit. This is no exaggeration of the result of this judgment. The whole course of reasoning in the judgment, and the principles there recognized, lead logically to a decision the very reverse of that which was arrived at.

Giblin v. *M'Mullen* is therefore right in its result, but that result is arrived at in a most extraordinary manner. The whole framework of the judgment, the *dicta* that are scattered through it, and the grounds of the decision, resemble the hasty remarks that sometimes fall from a wearied judge at a Nisi Prius trial when there is no time for argument rather than the deliberate decision of an ultimate Court of appeal whose decision is final and binding upon inferior courts. The case can hardly fail to cause confusion in the law, as the principles recognized in the judgment revive an old and mischievous legal error, the authority for which has for some time been considered as overruled, and those who disapprove of case law are furnished with an excellent illustration of the careless way in which that law is sometimes made.—*Solicitors' Journal.*

SPECIAL PLEADERS.

We must confess that the decay and possible extinction of the noble race of special pleaders has always been to us a subject of peculiar interest. In the time of special demurrers and replications *de injuriâ*, and when it was rather more important to understand the distinction between trespass and case than it is at present, no one can wonder that pleaders were plentiful. But it is not perhaps so well known that nearly every one who in those days hoped to make his mark as a sound lawyer began practice as a pleader, and put off joining circuit until he had secured a fair number of clients. It is hardly necessary to remind any one that the Bench whose decisions were reported by Barnewall and Alderson consisted entirely of pleaders of renown, and that at a later period Patteson, Wightman, Crompton, and Hill sat in the same Court, after spending a great part of their professional lives below the bar. Moreover, two illustrious advocates, Lord Ellenborough and Lord Lyndhurst, thought a few years of a pleader's life a good introduction to the profession. No one need be reminded that all this is now changed. The Law List tells us that there are not more than sixteen or seventeen gentlemen who have certificates to practise as special pleaders 'not at the Bar,' and with the exception of the present Chief Justice of the Common Pleas and Baron Bramwell, we believe that all our present judges made their way to the bar in the ordinary course.

Of those who remain below the Bar a large proportion are in very good practice. Any one who attends a summons at Judges' Chambers is pretty sure to see some of the learned gentlemen pacing the flagstones surrounding Rolls Garden, and their chambers are crowded with pupils. If we ask why the number of pleaders has become less, we are told that it was the Common Law Procedure Act which did it. This statute introduced pleading for the million, and it was no longer worth anybody's while to cultivate the science. A pupil fresh in chambers will hardly be satisfied with this reason. He sees the table of his preceptor piled with papers, including not only instructions for pleadings but instructions to draw up all sorts of documents and cases for opinion of infinite variety. During the assize time the pressure is tremendous. Pleader, pupils, and clerk are at work upon draft and foolscap from morning till night. There are conferences, a stream of questions on points of practice, and constant rushes to the Judges' Chambers. Who can describe the amount of experience which a pleader must acquire? His fees may be small, but the questions submitted to him are most carefully considered, and require a thorough insight into every

branch of common law with a tendency to encroach upon equity. Half-a-dozen difficult cases in the same province of tort or contract may be brought up his staircase in as many days. With the exception of some vexatious delays at Rolls Garden, the learned gentleman has no need to waste any time. He is not obliged to wait for hours on the back benches till their Lordships have been through the Bar, or at Nisi Prius to read the newspaper *ad nauseam* till he hears that 'no other case will be taken to-day.' Most of his time is spent within reach of his book-shelves, and if he has any moments to spare from his work he feels that it his duty to bestow them on the young gentlemen in the next room. His holidays are few, and he sometimes contents himself in the long vacation with coming to Chambers an hour later, and leaving an hour earlier. We have dwelt upon the advantages which are afforded to clients by his learning and experience, but another remains to be mentioned. It often happens that the counsel retained to hold the brief upon the trial of a case is an excellent advocate but an indifferent lawyer. By engaging a pleader in the earlier stages of the cause it is possible to effect a division of labour without exciting the ill-will or jealousy which would ensue if one barrister were replaced by another. Looking at these advantages, we should be disposed to think that whatever changes in the practice of pleading have been or may yet be effected, there will always be room for a body of practitioners so eminently useful as the one which we have described. And so long as there is a reasonable demand for the services of a pleader, we cannot see why any one should object, for a time at least, to practise below the Bar. There are, it is true, a few disadvantages in postponing one's call. No matter how ancient may be the standing of a pleader, he is not eligible for several valuable appointments, including that of County Court judge. But the chance of getting practice and experience a long time earlier than is usual is a good set-off against such disabilities.—*Law Journal.*

In an interior county of Ohio, in a criminal court presided over by a judge of considerable humor, a notorious thief was on trial for larceny. The principal question of fact in the case was whether the property stolen was worth thirty-five dollars, or less than that amount. According to the statutes of that State, if the value amounted to this sum, the offence was grand larceny, and the penalty would be imprisoment in the penitentiary, where the rogue rightfully belonged. After the jury had been out for several hours, they returned into court, and said to the judge that they could not agree unless he charged them whether they should estimate the goods at the wholesale or retail price. Thereupon the judge enlightened them thus:

"Well, gentlemen, considering the way the rascal came by the goods, I don't think the court can afford to wholesale them to him.

ONTARIO REPORTS.

ELECTION CASE.

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

Reg. ex rel. Corbett v. Jull.

Municipal election—Improper conduct of returning officer—Election by acclamation.

At a meeting called to receive nominations for municipal Councillors, one party, as they alleged, made their nominations at 12 o'clock, or a few moments after, in the presence of only two or three persons, and without any effort on the part of the returning officer to call in the people outside the place of meeting. The returning officer did not enter the names of the candidates in his book, and gave evasive answers to some of the other party who came in afterwards, as to whether any nominations had been made or not, and led some of the electors present to think that there was an hour or so to make nominations, when in fact there was less than half that time. At 1 o'clock the returning officer, without making any preliminary statement that certain persons had been nominated, and without asking whether there were any other candidates to be nominated, declared that the persons nominated at the opening of the meeting were duly elected by acclamation. The other side, who were waiting, as they alleged, to make their nominations after the other party, under the impression that no nominations had as yet been made, protested against this, and desired to nominate the opposition candidates, (of whom the relator was one,) which the returning officer, however, refused to receive as being too late.

Held, 1. That the election must be set aside, and a new election ordered.

2. That the relator was a candidate and voter within the meaning of sec. 103 of municipal act, and that the returning officer could not by his illegal acts divest him of his rights in that respect.

3. That the names of the candidates should have been submitted to the meeting *seriatim* after the hour had elapsed, and an opportunity given to the electors present to express their assent or dissent, without which there could not be said to have been an election by acclamation.

4. That the returning officer had acted improperly and contrary to the spirit of the law, and was therefore ordered to pay the costs.

[Chambers, Feb. 26th, March 8th, 1869.]

This was a *quo warranto* summons on the relation of John Corbett against Thomas Jull, as reeve of the village of Orangeville, and Thomas Jackson, Peter McNabb and Joseph Pattullo, councillors of the same village, to have their elections respectively declared invalid and void, for the following causes:

1. That the said election was not conducted according to law, in this, that the said Thomas Jull, John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, or any or either of them were not duly proposed and seconded according to law, nor were the said parties duly proposed and seconded at the place appointed for such by the returning officer, nor were the said parties proposed and seconded within the time required by law.

2. That the said Thomas Jull, John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, were not duly or legally elected or returned in this, that the said parties were not duly proposed within the proper time or at the proper place, nor were they proposed according to law.

3. That the returning officer did not wait for one hour after the last candidate had been duly proposed and seconded as is required by law so to do, but improperly and illegally declared the said parties duly elected councillors for the year 1869.

4. That the returning officer acted unjustly and illegally in conducting the said election, in this, that he told several intending candidates and electors that he had an hour to come and go on—meaning thereby, that it would be an hour before he closed the proceedings, and about fifteen minutes afterwards declared the defendants duly elected reeve and councillors respectively.

5. That the returning officer conducted the said election unjustly and illegally.

6. That the proceedings made necessary by law to the validity of said election were not observed by the returning officer at said election to the prejudice of the electors of the village of Orangeville.

The relator claimed an interest in the election as a candidate for the office of councillor, and who tendered his vote at said election for both reeve and councillors.

The defendant, Peter McNabb, disclaimed on the 28th January, 1869.

The returning officer was made a party to the cause and answered with the other defendants.

A number of affidavits were filed on both sides, but the further facts will be sufficiently understood from the judgment.

McMichael for the defendants shewed cause.

1. This is not a case within the Act. The relator is not a candidate as he was not nominated; and is not an elector as he did not vote or tender his vote: sec. 130, Municipal Act; *Reg. ex rel. White* v. *Roach*, 18 U. C. Q. B. 226; *In re Kelly* v. *Macarow*, 14 U. C. C. P. 457; *Reg. ex rel. Bugg* v. *Bell*, 4 U. C. L. J. N.S. 93. There may be a remedy at common law by full court, but not under these proceedings. It was the fault of the relator and his friends that they did not make any nominations they chose, and they cannot now complain that they did not do so.

Harrison, Q.C., for the relator. The new procedure is in place of the common law remedy: see *Roach's case ante*; and this proceeding is not touched by the cases cited, which speak of electors not taking the trouble to propose candidates, and evincing a carelessness as to their interests. But, here the relator's party were *waiting* and ready to make their nominations, but were deceived by the returning officer as to the position of affairs. If a returning officer can act thus, he can in effect abrogate the statute and destroy the rights of electors.

John Wilson, J.—The preliminary and first question is whether under the circumstances disclosed, the relator was entitled to his seat under our statute, and secondly, whether there was such an election in fact, as can be sustained.

The clerk of the municipality of Orangeville is Francis Grant Dunbar. He is the clerk of Joseph Pattullo, attorney-at-law, one of these defendants. On the 3rd December, 1869, Mr. Dunbar, as clerk of the corporation, published the usual notice, that a public meeting of the electors of the village of Orangeville, would be held at Bell's Hall, the place where the then last election had been held, on Monday the 21st of December, 1868, at the hour of 12 o'clock noon, for the purpose of nominating a reeve and councillors for the said village.

It is stated by a number of deponents, and not denied by any of the defendants, that a contested election was anticipated, and the village had been canvassed with a view to an election. There are, as is usual, contradictory statements as to what occurred during the hours between the opening and close of the proceedings, and as to when the proceedings were opened and closed, but I think there is no fair ground for saying, that the proceedings commenced after, but sharply after 12 o'clock noon. Without discussing every controverted point in these proceedings, I shall be able to dispose of both points chiefly from the statements of the returning officer, and one of the affidavits in reply. The returning officer on oath says, "before leaving the office of Mr. Pattullo (for the purpose of holding the nomination), I borrowed Mr. Pattullo's watch for the occasion. At a few minutes before 12 o'clock noon, I left the law office of Joseph Pattullo, Esquire, and went to the hall named in the proclamation, and shortly after entering said hall, I looked at my watch, and waited until 12 o'clock, when rising to my feet, I formally opened the nomination by announcing to those then present that it was now 12 o'clock, and that I was prepared to receive nominations for reeve and councillors for the ensuing year, and that if no more than the necessary number of candidates for the several offices were nominated within an hour after the last nomination, I would close the nomination and declare those nominated duly elected by acclamation."

I may here refer to a fact, on which the returning officer offers no explanation. He had a book, but I hear of no entries in it of nominations. He was sitting, according to the sworn statement of McCarthy, between 12 and 1 o'clock, with a book before him, open, but blank. Blank, the relator contends, that the electors might be mislead by the concealment, which he was practising upon them.

I now read the returning officer's further account of his own proceedings on oath. "I then took my seat at the table, and George Bell, a duly qualified elector ascended the witness box and nominated Thomas Jull for the office of reeve, which was seconded by Thomas Hunter. Bell then nominated Mr. John Anderson as councillor, and the said Hunter seconded the nomination. James Ferguson, another duly qualified elector, then nominated Thomas Jackson as councillor, seconded by Hunter; said Hunter then nominated Joseph Patrullo, seconded by Thomas Jackson; Thomas Jackson then nominated Peter McNabb, seconded by James Ferguson, all of which were made publicly, openly and audibly, and as required by law after and at the hour of 12 o'clock: that no other nomination or nominations for the offices of reeve and councillors was made within the hour, and I declared Thomas Jull, John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, duly elected reeve and councillors respectively for the village of Orangeville for the year 1869."

He says "I never spoke to any of said candidates or any other person or persons about the nominations before entering the hall," and he denies any conspiracy or arrangement to keep the nominations quiet and secret until the lapse

of an hour and that he received the nominations in good faith, and that the election was conducted strictly within the law so far as he was able to understand it. He says, "I neither omitted or exceeded any part of my duty as returning officer, and the said nominations and election were fairly and impartially conducted, and any person had ample time and opportunity, and the full allowance made by law to do so: that I was ready and willing to receive nominations from the time I opened the nomination until the declaration, and I did receive all that were offered, and if any intending candidate was not nominated he was himself to blame for not procuring his nomination within the time required by law."

The relator by his affidavits charges upon the defendants, that they conspired to carry the election by means of opening the proceedings before 12 o'clock, and making their nominations when none of the electors, excepting those necessary to make the nominations were present, and by concealing from the electors and other candidates that nominations had been made; and that this was done while the new candidates were waiting for the nomination of the old ones, as they supposed, that they might then make their nominations: that the returning officer by evasive and false answers to questions as to the state of proceedings, kept them off their guard for an hour, and then suddenly declared the defendants duly elected by acclamation without giving the electors an opportunity of nominating their candidates, and when they instantly rose to remonstrate and make them, he refused to hear them.

Maitland McCarthy says "I am a duly qualified elector of the village of Orangeville, and as such, went to Bell's Hall for the purpose of nominating candidates for reeve and councillors for the municipality of the said village; that I arrived there about twenty-five minutes after 12 noon, that on entering the hall I met the returning officer and Thomas Jull, who was afterwards declared reeve, in conversation close by the door of the hall. Jull soon after left the hall and the returning officer returned to his seat. I went to the returning officer's table and looked at the paper before him, and seeing it blank, asked him if he had received any nomination yet, to which he replied, 'I have not received any.' No nominations were made after I got to the hall. About fifteen minutes to one, Thomas Jackson came into the hall, and shortly after the returning officer left his seat and went to Jackson who was then close to me, and in my hearing asked Jackson, "are they not coming down?" remarking, "it is time," upon which Jackson left the hall, and about one or a little after, Jull, Anderson, Pattullo and some others entered, and almost immediately after the returning officer stood up and declared Jull duly elected reeve, and Anderson, Jackson, McNabb and Pattullo, councillors. I protested as strongly as possible against the extraordinary conduct of the returning officer, after being informed by him not half an hour before that he had received no nominations, and I then nominated a person as a candidate for councillor which was duly seconded, but the returning officer refused most positively to accept such nomination or any other, although several were made, stating he did not care for the electors or the council. That on leaving the hall, I met Jackson who had just been declared elected; I told him if he wished to wash his hands of such a corrupt work, he had better go back and repudiate all connexion with it and decline to accept office in such a way. Jackson replied, that he had nothing to do with it, and did not know anything of it, and had told them he would much sooner remain at home.

Various other affidavits were filed on both sides, but they did not materially alter the complexion of the case.

The conducting of an election is analogous to any public meeting where the object sought is a fair expression of opinion on any question proposed. A resolution is said to be carried by acclamation, when, after it has been proposed and heard, it receives no opposition, but is carried by the consent of the meeting, expressed or implied from its silence, but in no case can it be correctly said to pass by acclamation, where it has not been proposed or not understood.

The law in regard to elections, assumes, that when the election of any officer is carried by acclamation, the electors are fully and fairly informed of what they are assenting to by acclamation. They cannot assent to what is not submitted to their choice or present in their minds. A nomination is a resolution submitted to the electors, that the party named is a candidate for their suffrage, for an office named, but the legislature to present surprise requires that not less than one hour shall elapse between the submission of the last nomination and the putting of the question with a view to its being passed by acclamation. In the mean time the vote is in abeyance. The statute does not mean that, the returning officer, if no other nominations are made, shall simply declare those who had been proposed duly elected, it means that these nominations shall be put *seriatim* to the electors and then votes taken upon them. The law prescribes no form of words, but it requires that the proposition should be explained so as to be understood by men of ordinary understanding. Now this election is said to have been carried by acclamation. When was the acclamation? Was it when the movers and seconders were present, and perhaps one or two more when the nomination was first submitted? Certainly not. Was it when the declaration was made? Certainly not, for no one heard then who had been nominated, nor was it at any other time submitted to the electors as a question to vote upon—no opportunity was given to say or not to say, if it was carried or not carried. They had then no knowledge of *what* was carried by acclamation. Did the electors generally know that the simple declaration of the returning officer was to imply their consent and bind them to the election? Certainly not, for some of them indignantly protested against its injustice, and commenced to make other nominations. When the hour had expired, it would have been proper for the returning officer to have called the attention of the electors then present to the fact of the expiration of the time, and to have announced that Thomas Jull had been nominated at twelve o'clock, or soon after as the fact was, by George Bell as reeve, seconded by Thomas Hunter, and that if no other nomination was made, he should assume

him to be elected by acclamation, and declare him elected accordingly. If, after a reasonable pause no other nomination was made, the declaration of his election should have been announced. And so with the other nominations *seriatim*. They ought not to have been submitted together, for it would thus become a compound question and embarrass the electors.

By requiring an hour to elapse between the nomination and the proceeding to close the election, in case of no further nominations, the Legislature meant to protect the electors against haste and surprise, and in no case does the law require so strict an adherence to its letter as to defect its object and spirit.

It is the duty of a returning officer to stand indifferent between contending parties; to have no interests to serve for either or for himself; to approach his duty with the simple desire to do strict justice, to be ready and willing to give reasonable information as to the state of his proceedings, to conceal nothing, to evade no proper enquiry, to mislead no one by his silence, or exhibit any thing calculated to deceive, and he ought not to make a pretence of strictly following the letter of the law to defeat it.

Leaving out of the question all disputed facts, and taking the returning officer's own account of his proceedings, and acquiting him and defendants of any conspiracy or pre-arrangement to preclude the other party, and carry the election as it was carried, (and I think they are all entitled to their full acquittal on that score), did the returning officer honestly and fairly do his duty? Was it fair to have opened the proceedings till it was beyond question whether it was really twelve o'clock? Was it fair to open the proceedings in presence of two or at most three electors and make no effort to let it be known outside that he was about to open his proceedings? Why were not his proceedings entered in his book as a deliberate act and as his duty required? His attention was called to the impression which his apparent blank book created, by several of the deponents. He passes this unnoticed, and I may fairly assume there was no entry made at the time. He took the trouble to tell Mr Jull when he came in, that he, at least had been nominated. Why did he not tell some of the other party? Why speak to Mr. Jackson and say to him what he does not deny he did say? Why so much anxiety about his watch and the time? Why, when asked by Kelly if any nominations had been made, did he answer, "Yes, lots of them?" Why not say who had been nominated, and why did he give an answer that at least was evasive? He says he does not remember McCarthy asking him if any nominations had been made, nor does he believe he did so, but he remembers his asking, "Have proceedings commenced?" and his replying, proceedings had commeneed at twelve, and that he would close the nomination one hour from the last nomination. Why did he not deign to tell him what he told Mr. Jull, that he Jull had been nominated reeve at the opening of the proceedings?

He denies what Fead asserts, but he says among other things that Fead said, he had closed the nomination on his account. To this the returning officer says, "I observed that it would teach him a lesson, meaning that if ever he offered himself as a candidate, he would cause himself to be nominated within the proper time." How was it his duty to teach by his proceeding a candidate or the electors a lesson? Does not this answer imply the character in which Fead stood as an intended candidate whom the returning officer had taught a lesson by something he had done. Was it fair to make no announcement at any time as to how the proceedings stood until by his declaration he had precluded any further nominations? Can any one say that justice was done to the electors on this occasion? On reading all the affidavits and all the explanations, I confess I arrive at the conclusion, that the election was arrived at by conduct of the returning officer not in accordance with law and contrary to justice.

The defendants contention was, that this was not a case to which our statute applied, that it was one under the statute of Anne, because they say, the relator was not a candidate or voter, within the meaning of sec. 103 of the Municipal Act. I think he was. The relator was known to be a candidate, was there to be proposed, was in fact proposed, although after the declaration by which the returning officer assumed to preclude him. It cannot be permitted that a re-returning officer shall by his own illegal act divest a relator of his *status* as a candidate, nor can the defendants who adopt that act, strip him of the character which gives him right to maintain his *quo warranto* against them.*

But the other defendants with full knowledge of all he did, adopted his declaration as an election by acclamation, and, excepting McNabb, who disclaimed, they took their seats.

I feel compelled to declare the election void, and I award the relator costs against the returning officers, and the defendants who have maintained their right to the seats.

COMMON LAW CHAMBERS.

Donelly v. Reid.

Plea in abatement—Affidavit of verification—Inferior Court of record—Pleading and demurring to plea in abatement.

Quære, whether the pendency of a prior action in a County Court can be pleaded in abatement to an action in a Superior; but the question was left to be decided on demurrer.

Where the only affidavit of verification of a plea in abatement was made by the attorney for the defendant (in both actions), an application to set aside the plea was refused.

Application for leave to reply and demur to a plea in abatement refused.

[Chambers, March 6, 10, 1869.]

To an action for work and labour the defendant pleaded in abatement, that an action was pending in a County Court between the same parties for the same cause of action. This plea was verified by the affidavit of the attorney for the defendant in both actions, who swore "that the plea hereunto annexed is, I am informed, and do verily believe, true in substance and in fact."

The plaintiff obtained a summons calling on the defendant to shew cause why this plea should not be set aside and struck off the files upon the following grounds: 1st That the pendency of an action in an inferior Court for the same cause

of action cannot be pleaded in abatement 2nd. That it appeared from the particulars of claim in this action that an amount is claimed beyond the jurisdiction of the County Court, and therefore the County Court action cannot be for the same cause of action. 3rd. That the affidavit of verification of said plea was insufficient in substance. 4th. That the affidavit of verification should have beem made by the defendant and not by the attorney.

Cause was shewn, and it was contended for the defendant,

1. That the term "Inferior Court, so far as this objection is concerned, does not apply to our County Courts, which are Courts of Record: *Laughton* v. *Taylor*, 6 M. & W. 695; *Grant* v. *Hamilton*, 3 U. C. C. P. 422.

2. Affidavits were filed contradicting second ground.

3. That the affidavit of verification may be made by a third person: *Tinseley* v. *Foster*, Burr. 344; *Chitty's* Arch. 12th ed. 914.

At all events the plea had to be filed within four days, and there would not have been time to get affidavits from defendant, and it is not the practice to enlarge the time for pleading in abatement, such pleas not being favored: *Jennings* v. *Webb*, 1 T. R. 279.

Harrison, Q. C., *contra*, referred to 4 & 5 Anne, cap. 16, sec. 11; *Onslow* v. *Booth*, 2 Str. 705: *O'Loghlen* v. *McGarry*, 2 Leg. Rep 110: Brunker's Digest, 1614; *Coleman* v. *Grady*, Smythe, 155; *Chit. Arch.* 12th ed. 915; *Grant* v. *Hamilton*, 3 U. C. C. P. 426.

Gwynne, J.—Independently of *Grant* v. *Hamilton*, 3 U.C. C. P. 422, I would not, upon a motion to set aside a plea in abatement for irregularity, grant an order to set it aside upon the ground that the prior action is stated to be pending in a County Court, which, although an inferior court, is still a court of record. But in view of that case, although it is not the point decided, the opinion of Chief Justice Macaulay appears to be, that it would not be a good objection on demurrer. If plaintiff desires to raise that question he must do so on demurrer.

As to the 2nd point, that the plea is not supported by a sufficient affidavit. By the Stat. 4 & 5 Anne, c. 16, s. 11, it is enacted, that no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, *or show some probable matter to the court, to induce them to believe that the fact of such dilatory plea is true*; and in 2 Saun. 210, in note, it is said, it is not necessary that the affidavit should be made by the party himself, if it be made by his attorney it is sufficient.

Now the defendant's counsel in this case, who is also his attorney in the action brought in the court below, undertakes to swear, from the information furnished to him as an attorney in both suits, that he verily believes the plea to be true in substance and in fact. It was contended before me that no one but the defendant himself could make the necessary affidavit. There is authority against this contention. No case was cited to show that assuming the attorney could make the affidavit, the frame of the one made in this case was insufficient.

In *Pearce* v. *Davy*. 1 Lord Kenyon, 364, an action of trespass was brought for breaking and spoiling certain fishing nets of the plaintiff, by throwing a grapple against it. The defendant pleaded in abatement, because the nets were certain large nets fastened together, called a pilchard seine net, and the plaintiff had no property in them, but jointly with sixteen others, naming them, who are still living, to wit, in A., in the County of Cornwall, and not joined with the plaintiff in the action. This plea was supported by two affidavits, the first made by one of the defendants, sworn after process served, but before declaration filed; and he swore that from the first setting up of the old pilchard seine, he had been, and still was, a proprietor of a thirty-second share therein, and the plaintiff of an eighth, and several other persons (not naming them) of different shares therein, some an eighth, others a sixteenth, &c

The other was an affidavit of one Paslow, who swore he believed the above affidavit to be true, and that the nets therein mentioned were the same as were mentioned in the declaration, and that he believed the defendant was entitled to a thirty-second share therein.

A rule *nisi* was obtained to set aside the plea for defects in the affidavit: 1. That the first affidavit being before declaration could not be looked at, but if it could, it was defective in not identifying the nets to be the same; 2. In not mentioning by name who the other several part-owners were, which it was insisted must be done in order to give the plaintiff a better writ. 3. That the second affidavit was founded on belief only. The court set aside the plea, because it was not verified so as to give the plaintiff a better writ, by setting out the names of the part-owners, but it was agreed that there was enough to induce them to believe the truth of the plea.

This is the only case I have been able to find upon this point, whether or not a person, other than the defendant, making the affidavit must swear positively to the truth. A defendant making the affidavit might properly perhaps be held to greater strictness than his attorney. In the absence of any more express authority, I do not feel disposed to say, where the defendant's attorney in both actions declares upon oath that he verily believes that the causes of action are the same, and in the absence of any affidavit on the part of the plaintiff—that probable matter to induce me to believe that the fact of the plea is true is not shewn. If it is clear that the necessary affidavit may be made by the attorney, information and belief is all that he could well speak from. I do not think, therefore, I should set aside the plea on this ground. As to the other objections suggested to the plea, these are more proper to be considered on a demurrer, if the plaintiff thinks fit to demur, than upon a motion to set aside the plea.

As to the plaintiff's application, in case the plea should not be set aside, to be allowed to reply and demur, I shall not grant it; for if, which perhaps admits of doubt, I have authority to grant leave to demur and reply to a plea in abatement, I certainly shall not exercise it to cause a double trial of such a plea. The judgment in favour of a defendant on a demurrer to the plea would be that the writ should be quashed. To

what end then should the truth be enquired into, which if also established for defendant, would lead to the same judgment; whereas if the plaintiff succeeds on demurrer the judgment is *respondeat ouster*. With such results to be attained before the merits are approached, I would not, though I could, authorize the two modes of trial. The order will be to discharge the summons with costs.

Summons discharged with costs.

ENGLISH REPORTS.

EXCHEQUER CHAMBERS.

Morton and Others v. Woods and Others.

Mortgage—Landlord and tenant—Attornment by mortgagor—Estoppel—Distress—Statute of Frauds, 29 Car. 2, c. 3—Bills of Sale Act, 17 & 18 Vic. c. 36.

A mortgagor in possession executed a second mortgage to the defendants, in which the prior mortgage in fee was recited.

By the second mortgage he attorned, and became tenant to the mortgagees, their heirs and assigns, of the premises thereby conveyed, for the term of ten years, if the security should so long continue.

The mortgage contained a proviso that the mortgagees, their heirs, executors, administrators or assigns, *might* re-enter at any time without demand, and determine the term of ten years, it was executed by the mortgagor, but not by the mortgagees.

The mortgagor continued in possession, and the defendants subsequently distrained for a year's rent.

Held, that by the Statute of Frauds, 29 Car. 2, c. 3, the instrument, not having been executed by the defendants, created an estate at will only; and further, that the intention of the parties, as gathered from the deed, was to create that estate, and not a lease for ten years, and that it was therefore immaterial that the deed had not been executed by the defendants.

Held also, that although it was apparent upon the face of the instrument that the mortgagor had no legal reversion which he could assign to the defendants, he having agreed to become tenant to them, was estopped from denying that they had the reversion, and that the distress was therefore valid.

Semble, that a mortgage which includes personal property is not within the Bills of Sale Act, 17 & 18 Vic. c. 36.

[Ex. Ch., 17 W. R. 414.]

Appeal from a judgment of the Court of Queen's Bench for the defendants upon a special case.

Reported 16 W. R. 979, L. R. 3 Q. B. 658.

The question, which depended upon the construction of a mortgage-deed, was whether a distress made by the defendants, the mortgagees, upon certain chattels alleged by the plaintiffs to be their property as creditors' assignees of the mortgagor, was a valid distress.

The material portions of the deed will be found in 16 W. R. 979.

Feb. 2, 3.—*Joshua Williams, Q.C.* (*Manisty, Q.C.*, and *Hugh Shield* with him), for the plaintiffs, contended,—1. That the parties did not, on the true construction of the deed, intend to create an estate at will, but a term of ten years; that the deed not being executed the term was not created, and there was no rent incident to the term, and no right of distress. 2. That the defendants were estopped from denying the recital in the deed, from which it was apparent that the mortgagor possessed only an equity of redemption, and not a legal reversion, which he could convey to the defendants, and that the mortgagor was not estopped from denying that the defendants had a legal reversion, and that there was a tenancy—that being apparent upon the face of the deed. 3. That the transaction was an evasion of the Bills of Sale Act, 17 & 18 Vic. c. 36. In addition to the authorities cited in the Court below, he referred to Bacon's Ab. Leases, Co. Litt. 576; *Disdale* v. *Isles*, 2 Lev. 88; *Newport's Case*, Skin. 431; *Penhorn* v. *Souster*, 1 W. R. 436, 8 Ex. 138, 763; and *Saunders* v. *Merryweather*, 13 W. R. 814, 3 H. & C. 902.

Kemplay, for the defendants, was not called upon.

Kelly, C. B.—The question upon this special case is, whether the distress made by the defendants can be legally supported. It has been contended by the plaintiffs that it cannot, upon the ground that the defendants had no legal estate in the premises, as the mortgagor had only an equity of redemption when he mortgaged to them, and no legal reversion which he could convey to them; and that consequently there was no rent incident to that reversion for which a distress could be made. It has been contended further, that when the terms of the deed are examined, it will appear that the relation of landlord and tenant was not created between the parties. The contention is put upon two grounds: first, that if any tenancy was contemplated by the deed, it was a tenancy for ten years, and that the deed not having been executed by the defendants, was inoperative, and created no such tenancy; and secondly, that the power of re-entry does not convert the intended lease for ten years into a mere tenancy at will, and that there was therefore no tenancy at all, and no right to rent. This argument is highly technical, but notwithstanding it must, if it is the law, be supported. The objection that the defendants had no legal estate, is correct in point of fact: that may be said of all cases where a tenancy is created by estoppel; but it becomes of primary importance in the present case, because it is argued that this tenancy, if a tenancy at all, is so only by estoppel, and that there can be no estoppel when the truth appears upon the face of the instrument itself upon which the question arises. Now it doubtless does appear upon the face of this instrument that the defendants are not legally seised of the premises, but that the legal estate was, at the time of the conveyance to them, outstanding in the first mortgagee. In support of the proposition numerous cases have been cited, but looking at the facts of those cases, and the *rationes decidendi*, it appears that they are not in point. They are either actions of covenant, or, in one case, an action of ejectment on a clause of re-entry, where it is clear that the plaintiff must fail unless he has the legal interest, and accordingly the action was held not to be maintainable. But if the authorities referred to go the length of deciding that when the truth appears there is no estoppel, they must be taken to be overruled by *Jolly* v. *Arbuthnot*, 7 W. R. 532, 28 L. J. Ch. 547, decided on appeal by Chelmsford, L. C., and binding upon us as a court of co-ordinate jurisdiction. There it was manifest upon the deeds that the receiver had no legal estate and no interest in the premises. The decision of the Master of the Rolls (7 W.R. 127, 28 L. J. Ch. 274 (was in accordance with the proposition contended for by the plaintiffs,

but his judgment was reversed by the Lord Chancellor, who held that there had been a tenancy created by the attornment of the mortgagor to the receiver, and that although the receiver had no other interest in the property, that fact did not destroy the tenancy and the power of distress annexed to it. "It is contended," he says, "that the attornment of Aplin had no operation,—not by agreement, because he had no interest in the land to which it could apply, nor by estoppel, because the deed sets forth the rights and interests of all parties, and shows therefore that he had no reversion in the premises to which the power of distress would be incident. It appears to me, however, that the truth of the case appearing by the deed is a reason why the agreement between the parties should be carried into effect, either by giving effect to the intention of the parties in the manner they have prescribed, or by way of estoppel to prevent their denying the acts they have authorised to be done. If the attornment to the mortgage would be good to create a tenancy in the mortgagor, which seems to be provided for by the 11 Geo. 2, c. 19, why should not an attornment to a third person with the consent of the mortgagee operate to create a tenancy, or to estop all parties from denying that such a tenancy exists? The statement in the deed of the character in which Aplin was to be clothed in order to carry into effect the object of the parties, and the proof it affords of his having no previous title in the land, appears to me to furnish no sufficient objection to the validity of the distress in question." There is a distinction between that case and the present; for in it the mortgagor and mortgagee, as well as the receiver, were parties, and the attornment was with the consent of the mortgagee, while here the prior mortgagee is not a party. That distinction is relied upon by Mr. Williams, but it is manifest that the relation of landlord and tenant was created, and it is upon that relation, and not upon the consent of any third party, that the right of distress depends. The cases then may be said to be identical, and upon this point we are bound by authority to hold that although the facts appear upon the face of the instrument, the relation of landlord and tenant is not affected, and the right of distress exists.

The next question is, whether the deed creates any tenancy at all; and it is insisted upon the part of the plaintiffs that if there is any tenancy it is for ten years, and that that being the intention of the instrument it is void as a lease for that term, for want of execution. To that it is answered by the defendants that by the Statute of Frauds (29 Car. 2, c. 3, s. 1), a lease for ten years not in writing shall not be absolutely void, but shall have the effect of an estate at will. It is also contended that as the parties intended to grant a lease for ten years, it is contrary to that intention to hold that an estate at will was created. That might perhaps be so in an ordinary case of a mere lease for years between landlord and tenant, but this instrument is a mortgage, and these further provisions which relate to the tenancy are all meant as a further security for the repayment of the interest, and the intention of the parties must be gathered from the whole instrument. It is not repugnant to the relation of mortgagor and mortgagee that the tenancy should last for ten years, and so in the first instance that term is mentioned; but then follows the power of re-entry, and it is clear that whatever the nominal duration of the tenancy, if it is in the power of the landlord at any time to enter and put an end to the tenancy by taking possession of the premises, the estate is only an estate at will. It is said that an estate at will cannot last beyond the life of the lessor, and that it was contemplated by this instrument that the mortgagor might continue tenant to the heirs, executors and administrators of the defendants. The law upon this subject is beset with subtle distinctions, but it would rather seem to be the rule that such a tenancy may last after the death of the lessor, unless he shows an intention to determine it in his lifetime. However this may be, the mere circumstance that the power of re-entry is reserved to the heirs, executors and administrators, is not of itself necessarily of effect to prevent the estate from being an estate at will. But, in any view of the case, the Statute of Frauds puts an end to the question; for as the deed was not executed, and the term created by parol only, the tenancy becomes, by the express words of the statute, a tenancy at will. I think, moreover, that upon the true construction of the instrument a tenancy at will was created: although the mortgagee did not execute it, he assented to it, and advanced money upon its execution by the mortgagor.

A point has been made upon the Bills of Sale Act (17 & 18 Vic. c. 36), and it is objected that this instrument is a bill of sale within the meaning of that act, and is therefore void for want of registration. But the court has in this case no power of drawing inferences of fact, and, even if this amounts to an evasion of the act, has no power as a jury to come to that conclusion. I may, however, observe that if this instrument is a bill of sale, every mortgage deed which included personal property, and contained a clause of re-entry, would require registration, and it is evident that no such doctrine could be supported. For these reasons I am of opinion that the judgment of the Court of Queen's Bench is right, and should be affirmed.

Channell, B., Byles, J., Keating, J., and Cleasby, B., concurred.

Judgment affirmed.

QUEEN'S BENCH.

Reg. v. Russell.

Quo warranto—Clerk of the peace—1 W. & M. c. 21, s. 6—Misdemeanour in office—Decision of Court of competent jurisdiction—Weight of evidence.

The Court of Queen's Bench cannot review the decision of an inferior tribunal on a matter within its jurisdiction, and on which it has heard evidence and arrived at a conclusion.

Where a charge was preferred to a Court of Quarter Sessions under 1 W. & M. c. 21, s. 6, against a clerk of the peace for a misdemeanour in his office, and evidence was taken, and the Court decided that the charges were proved, and dismissed the clerk of the peace from his office and appointed another person in his place.

Held, on a *quo warranto* information against the person so appointed, that the sufficiency of the evidence was a question entirely for the Court of Quarter Sessions, and the decision of that Court could not be reviewed by the Court of Queen's Bench.

[Q. B. 17 W. R. 402.]

This was an information in the nature of a *quo warranto* on the relation of Mr. Henry Atkinson Wildes exhibited against Mr. Francis Russell, and calling on him to show by what authority he claimed to be clerk of the peace for the county of Kent.

The case now came before the Court on a special verdict found at the trial of the information.

The return to the information set out that H. J Wildes, was clerk of the peace for the county of Kent, and that a complaint and charge in writing were duly exhibited against him of having misdemeaned himself in the execution of his office, and at a Quarter Sessions of the Peace duly holden on the 23rd of May, 1865, upon examination and due proof of the said complaint and charges, and in his presence and hearing, and on hearing what was alleged and insisted upon by and on his behalf, an order was duly made by the last mentioned Court of Quarter Sessions, and entered on record, and still remained in full force and effect.

This order set out formally, the charges of misdemeanour in his office against Mr. Wildes, which consisted in his refusal to record an order which it was his duty to record made by the Court of Quarter Sessions for payment of a sum of £169 16s. 6d. to Frederick Scudamore for professional services rendered as an attorney-at-law, and also to draw up, sign and deliver to the county treasurer, an order for payment of such sum to Mr. Scudamore. The order then stated the exhibiting of these charges in writing, and their delivery to Mr. Wildes: the holding of courts to adjudicate on the charges and the various adjournments until such 23rd day of May, 1865: the due hearing and proof of such charges and examination of witnesses, and the hearing of the defence.

The order then set out the finding of the court that the charges were duly proved and true, and that Mr. Wildes had been duly proved to be and was guilty of the several misdemeanours in the execution of his office in the complaint and charges alleged, and his discharge by the Court of Quarter Sessions from his office of the clerk of the peace for the said county, pursuant to the statute in such case made and provided. The return then set out the fact of the discharge of H. A. Wildes, under this order, and the due appointment of F. Russell to the vacant office of clerk of the peace.

The replication alleged that there was not before or at the said Court of Quarter Sessions holden on the 23rd May, 1865, any proof or evidence of the complaint and charges as in the plea alleged.

The case came on for trial before the Lord Chief Justice, and a special jury, when it was agreed that a special verdict should be found, from which the following statement of facts is taken, it having been agreed that no other objection was to be raised on the information except that specified in the rule *nisi* for the information, which was to the effect that there was no evidence before the justices who made the order for the discharge or dismissal of the said H. A. Wildes, that he had absolutely and contumaciously refused as alleged in the complaint and charges.

At the Quarter Sessions held on the 23rd May, 1865, certain documents were put in evidence, among others, a report of the finance committee, in the year 1863, asking for power to take proceedings in respect of certain transport fees received by the clerk of the peace, and an order thereon by the Court of Quarter Sessions. Also a subsequent report by the finance committee relating to these fees retained by the clerk of the peace, and recommending that the amount of such fees should be demanded of the clerk of the peace.

Other documents were also put in, from which it appeared that further proceedings were then had, and at a court held on the 12th of April, 1864, the court of Quarter Sessions refused to make an order for the payment of a quarter's salary alleged to be due to H. A. Wildes, together with certain other payments made by him amounting in the whole to £228 9s. 4d., on the ground that they were entitled to set-off against that amount the sum £229 10s. retained by him on account of the transport fees. H. A. Wildes who claimed these fees as his own right thereupon applied to the Court of Queen's Bench for a *mandamus* to compel the payment of his salary. Frederick Scudamore, above named, was employed as county solicitor in resisting this application, which resulted in a decision of the Court of Queen's Bench that the transport fees were included in the salary of the clerk of the peace, but that only a portion was recoverable and could be set-off. The rule was thereupon discharged upon terms. The bill of charges of Mr. Scudamore incurred in respect of these proceedings was as follows:—

"The Justices of Kent to Frederick Scudamore.

"Professional services rendered, and money paid on account of the general business of the country from the 23rd November, 1863, to 2nd December, 1864, the particulars of which have been delivered to the finance committee and approved by them, £169 16s. 6d.

"Frederick Scudamore."

This document was marked on the back with the initials of two justices, members of the finance committee, and with the words "seen and allowed" in the handwriting of a clerk of the said H. A. Wildes, and with the signatures of three justices of the peace who were present at the Court of Quarter Sessions on the 10th day of January, 1865, on which day it was with other bills sent in by the finance committee to the sessions and included in the finance report of the committee recommending the payment of bills. The chairman of the Court in the usual manner gave a verbal order for the payment of the bills, which were thereupon paid by the county treasurer, without any formal order being drawn up, and then sent to H. A. Wildes for the purpose of having such order made out. On the 24th of January, 1865, H. A. Wildes wrote a letter to the chairman of the Court of Quarter Sessions stating that the bill had not been presented in the usual manner by the finance committee, but that only a short note had been presented, and that he considered it his duty "not to enter in the proceedings of the Court an order for the payment of this bill, but to report to the next Court of General Sessions on the subject."

This letter was answered on the 26th January by Mr. Scudamore, on behalf of the chairman, in a letter which stated that the bill having been specially brought under the notice of the Court, and signed by three justices present, in the usual manner, the order for payment had been regularly made, and that he had been directed by the chairman to require that it might be recorded. To this letter Mr. Wildes replied on the 28th January, stating that for the reason mentioned in this previous letter he must decline to record the order.

At a Court of General Sessions held on the 13th March, 1865, Mr. Wildes read a report in which he stated his reasons for having declined to record the order, and it was then ordered that it be "referred to the finance committee to take such measures as they shall think right in respect of the refusal by the clerk of the peace to enter on the proceedings of the court an order made by the last court for the payment of the said bill, and that the said report of the clerk of the peace be handed by him to the finance committee."

A demand in writing was made on Mr. Wildes by the county treasurer for a certificate of the order of court which was declined by Mr. Wildes on the ground that the order was not a valid one, but illegal.

The finance committee, after having taken the opinion of counsel on the question, gave instructions to Mr. Scudamore to prepare charges against Mr. Wildes for having committed a misdemeanour in his office, under 1 W. & M. c. 21, s. 6. These proceedings were instituted in the name of the county treasurer.

The charges were heard on the 23rd May, 1865, and evidence taken, and the case gone into on both sides. The evidence was set out in the special verdict, and consisted among other things of the examination of a shorthand writer, who deposed that on the 13th of March the clerk of the peace was asked by the chairman "I understand you still refuses to enter the order," and replied "yes." At the conclusion of the hearing, on the 23rd May, the order was made by the court, which is above set out, dismissing Mr. Wildes from the office of clerk of the peace.

M. Chambers, Q.C. (*Gates* with him), for the relator, contended that on the facts there had been no absolute refusal to comply with the order, that there had at least been no contumacious refusal, and that there was no evidence on which the finding of the Court of Quarter Sessions could be supported. He supported his argument by contending that as the complaint must, by the Act, be in writing, it is incumbent that the court, acting on that complaint, should have specific proof of the written allegation, and that when the Court of Queen's Bench found that there was not before the inferior tribunal any evidence directed to the specific charge, they would review the finding.

Mellish, Q.C. (*Pollock*, Q.C. and *Archibald* with him), for the defendant.—The questions are twofold, first whether the court can look into the evidence to see whether the finding of the court below was warranted, and next, if they can, whether it was in fact warranted. Now here the Court of Quarter Sessions were bound to hear the case. If they, in the course of it, did anything contrary to natural justice, their jurisdiction would cease just as jurisdiction may cease in the case of justices when title to land comes in question. But nothing has happened to take away their jurisdiction. They are to determine both the law and the fact: first, that there is in point of law some evidence, and next, as jurymen, the sufficiency of that evidence. [Cockburn, C. J.—You admit that the charge must be for a misdemeanour in his office; is it not within our jurisdiction to determine whether that has arisen?] Yes, but the moment the jurisdiction is found to exist they have full authority over the entire charge: *Flanigan* v. *The Overseers of Bishop Wearmouth*, 6 W. R. 38, 8 E. & B. 451; *Wildes* v. *Russell*, 14 W. R. 796, L. R. 1 C. P. 722, and *Kemp* v. *Neville*, 10 C. B. N. S. 523. A departure during the hearing from natural justice might be impeached by *certiorari* even if it did not at once oust the jurisdiction, for instance, not hearing the parties would be not hearing the case, and this court would interfere by *mandamus*: *Duchess of Kingston's case*, 2 Sm. Lead. Cases 679; but if the inferior tribunal has acted within their jurisdiction their decision cannot be impeached. They had jurisdiction here, there was evidence, and they heard the parties, and nothing having happened to oust their jurisdiction their decision is final. The replication has traversed the plea which alleges "due proof," that is, proof that the Court of Quarter Sessions considered due, and as on a special verdict the court gives judgment on the whole record, the defence is entitled to judgment.

The following cases were also referred to: *R.* v. *Bolton*, 1 Q. B. 66; *R.* v. *Grundon*, Cowp. 315; *R.* v. *JJ. Cheshire*, 8 Ad. & E. 398; *Ex parte Hopwood*, 19 L. J. M. C. 197; *Coster* v. *Wilson*, 3 M. & W. 411; *Aldridge* v. *Haines*, 2 B. & Ad. 395.

Chambers, in reply.

Cockburn, L J.—This is a proceeding by way of a *quo warranto* to try the defendant's title to the possession of the office of clerk of the peace for the county of Kent. The return to the writ makes the following statement of facts:—The relator was in possession of this office, and whilst so in possession, a charge was made against him of having been guilty of a misdemeanour in that office in refusing to record an order made by the Court of Quarter Sessions, which it was his duty as clerk of the peace to record, and that thereupon a written complaint having been preferred against him, the Court of Quarter Sessions having competent jurisdiction to inquire into the matter, found that he had misdemeaned himself in his office, and dismissed him from it, and therefore the office being vacant, the defendant was appointed to it, and was entitled to retain it. The case comes before us as a special verdict, by which we are bound, and on the argument two grounds are taken by the defendant in support of his right to the office. The first is, that the Court of Quarter Sessions having competent authority to entertain the charge against the relator—a charge which if established was a sufficient cause for turning him out of the office—and having received a written charge, and having heard evidence thereon, and heard the parties, and delivered their judgment, it is not competent

for this Court to review the judgment, and determine whether it was warranted by the evidence, and secondly, that if it were competent for this Court to enquire into the matter, then that on this special verdict, it appears that, in fact, there was evidence on which the Court of Quarter Sessions were justified in acting. On the first point, the argument of Mr. Mellish has quite satisfied my mind that the defendants contention is right. It seems to me to be impossible to question that the Court of Quarter Sessions had competent jurisdiction, the Act of Will. 3, expressly gives it to them, but we are entitled to look to see if the complaint made against the relator amounts to a misdemeanour in his office, and I am very clearly of opinion that it does. I agree with Mr. Justice Willes that "if the justices were to make an order, which they thought right, and which the clerk of the peace, after remonstrance had failed to satisfy them it was wrong, still refused to act on, that would clearly amount to a misdemeanour." I agree also with the counsel for the relator that, if Mr. Wildes *bona fide* thought that the Court of Quarter Sessions were doing something illegal and unjustifiable, and if he entertained a belief that when their attention was called to it, the Court would rectify the error, it would be his duty to point out to the Court the mistake into which he supposed them to have fallen, and a mere delay or strong remonstrance would not amount to a misdemeanour. But if from the outset he determines that whether the Court agree with him or not he will not comply with their order, or when he perseveres in disobedience to it after he has brought the matter before them, then I agree with Mr. Justice Willes that the proper course being to leave it to the Queen's Bench to say whether the order was right, the clerk of the peace would be setting himself up as superior to the justices and master, and would be guilty of a misdemeanour. There was, therefore, in my opinion before the Court of Quarter Sessions, an offence charged, which, if proved, gave them authority to dismiss the relator. That charge was brought before the Court, in writing, as required by the Act of Will. III., and from what happened at that and the subsequent Courts as appears by the special verdict, I cannot doubt that there was evidence brought before the Court, and inquired into, going to the question whether there had been a misdemeanour on the part of the relator in his office. On this state of fact, and without expressing as yet any opinion as to whether the evidence warranted the Court in coming to the decision at which they arrived, there arises this question—whether it is open to this Court to inquire whether the Court of Quarter Sessions were warranted in coming to the conclusion at which they arrived. I am of opinien that it is not so open to us. The rule is well established in cases of summary convictions. As to everything which relates to jurisdiction this Court will interfere to regulate, and set right inferior tribunals, but when once we find that there is jurisdiction, this Court will not take upon themselves to say whether the decision actually arrived at, is that which this Court would have come to. It may be that something may happen in the course of a case which is inconsistent with what has been called natural, but what I prefer to call rational justice—such as the refusal to hear a party—and then this Court will interfere; but, unless something of the sort appears, we should not enter into the merits of the case. Applying this to the still stronger case of a Court of Quarter Sessions, which is a court of record, when we find—as we do here—that the charge is one over which the Court have jurisdiction, that the provisions of the statute have been complied with, and a written charge exhibited, that there has been proof in open court and an opportunity to the person charged to defend himself, and thereupon a decision—we cannot interfere because we may be dissatisfied with that decision, and should ourselves have arrived at a different one. This case is somewhat different from the one that was before the Court of Common Pleas, for that was an action for the fees of the office received by the defendant, and in that case the answer was that the claim could not be entertained, because the claimant was not in the office, and the court could not enter into the question whether his removal from it was right or wrong: the court could not go behind the judgment. But so here; unless we find that the Court of Quarter Sessions has proceeded wrongfully and illegally, we cannot go behind the judgment. If this court has any jurisdiction over such a court of record other than that I have pointed out, it would be, I think, by *certiorari*, but on this enquiry we cannot go into the question whether the relator has been properly removed on the evidence adduced before the court below.

I feel, however, bound to add that, after the most careful consideration that I can give to this case, I am myself satisfied that Mr. Wildes—for some motive which I will not enter into, whether of discharging his duty, or from angry feeling, or otherwise—did in fact refuse, and absolutely refuse, to obey the order of the court. The evidence satisfies me on this point, and that on this the contention of the defendant is also right. I think the conclusion from the evidence is fair, that he had made up his mind that the order was illegal, and that he would not enter it; that, in pursuance of this resolution, he did refuse, and that in this he committed a misdemeanor in h office. The conclusion, then, is, that the pleas are sufficient, and that our judgment should be for the defendant.

Hannen, J.—I have nothing to add, except to express my concurrence on both points. It is not competent to us to inquire into the grounds on which the Court of Quarter Sessions arrived at their decision, and I may further say that I entirely agree, if it were competent for us to inquire into the evidence, I myself should come to the same conclusion, that there was a refusal by Mr. Wildes which amounted to a misdemeanor in his office.

Hayes, J., concurred.

COMMON LAW.

Reg. v. John Taylor.
Reg. v. Canwell and Dunn.

Misdemeanour—Common assault.

Upon a count for unlawfully and maliciously wounding, or on one for unlawfully and maliciously inflicting grievous bodily harm, a prisoner may be convicted of a common assault.

[C. C. R., W. R., 623.]

Case:—The prisoner, John Taylor, was indicted at the Easter General Quarter Sessions, 1869, of the North Riding of Yorkshire, for a misdemeanour upon an indictment, of which the following is a copy:—

North Riding of Yorkshire, to wit: The jurors for our lady the Queen, upon their oath present that John Taylor, on the third day of January, in the year of our Lord one thousand eight hundred and sixty-nine, unlawfully and maliciously did wound one Thomas Meek.

And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year aforesaid, the said John Taylor did unlawfully and maliciously inflict grievous bodily harm upon the said Thomas Meek.

Upon this indictment the jury returned a verdict of "guilty of an assault."

The counsel for the prisoner contended that the prisoner could not be convicted of a common assault on that indictment, and therefore that the verdict amounted to an acquittal.

The Court thereupon postponed judgment and reserved the question of law for the consideration of the justices of either bench and barons of the Exchequer, viz.:

Whether this conviction can be sustained?

In the meantime the prisoner was admitted to bail to appear at the next Court of Quarter Sessions of the North Riding of Yorkshire to receive judgment, if called upon.

John R. W. Hildyard, *Chairman.*

Shepherd for the prisoner. The question is, whether the prisoner can be convicted of a common assault upon this indictment, which neither expressly charges a common assault nor mentions the word "assault" in either count. The offence charged is a misdemeanour only, and whenever a count charges a misdemeanour of a high character, which in its nature includes a lower one, it is within the province of the jury to convict of the lower. In *R.* v. *Oliver*, Bell C. C. 287, 9 W. R. 60, it was held that upon a count for assaulting, beating, wounding, and occasioning actual bodily harm, there might be a conviction for a common assault; and in *R.* v. *Yeadon*, L. & C. 81, 10 W. R. 64, where an indictment contained a count for an assault occasioning actual bodily harm, under 14 & 15 Vict. c. 100, s. 29, and the jury returned a verdict of guilty of a common assault, which the judge declined to receive, as illegal, and the jury thereupon found a general verdict of guilty, this court awarded a *venire de novo*. It is true that in those cases the word "assault" is introduced in the counts; but that is not a technical word which it is imperative to use in a count in order to support a conviction for an assault. Every battery includes an assault: 1 Hawk. P. C. 110, *R.* v. *Ingram*, 1 Salk, 384. Here the charge of wounding includes that of assaulting. If this conviction is held to stand, a special verdict of guilty of a common assault would be entered upon the record.

No counsel appeared for the prosecution.

Kelly, C. B.—This conviction must be affirmed; although the word assault is not mentioned in either of the counts, the charge in each of them includes it, and both on principle as well as having regard to the language used, we think this conviction must be supported. In *R.* v. *Yeadon*, *supra*, it is observed by more than one learned judge that the first finding of the jury of a common assault was unobjectionable, and Wightman, J., says the chairman in that case substantially misdirected the jury. It is true that there the word assault occurs in the count; but the count charges a higher description of assault, and the principle is the same whether the word is used or not. In *R.* v. *Canwell*, the conviction must be affirmed for the same reasons.*

The rest of the Court concurred.

Conviction in both cases affirmed.

CHANCERY.

Page v. Ward.

Practice—Production of documents—Privileged communication—Architect.

The plaintiff had in her possession or power letters which had passed between her solicitor and an architect, having reference to the questions in the suit, but not written in contemplation of legal proceedings.

Held, that she was bound to produce them.

[V. C. M., 17 W. R. 435.]

Adjourned summons.

This suit related to a parol agreement, under which the defendant was alleged to be a lessee of a portion of Saville House, Leicester-square, the whole of which was destroyed by fire in February, 1865. The plaintiff, Mrs. Ward, was called upon to make the usual affidavit as to documents in her possession.

By her affidavit, she admitted she had in her possession or power certain letters which had passed between Mr. Marsh Nelson, her architect, and her solicitors, which had reference to the questions in this suit. The affidavit alleged that Mr. Marsh Nelson was the principal witness on the plaintiff's behalf, and all the letters which had passed between him and her solicitors were of a confidental character. Those written by Mr. Nelson to her solicitors were written to them as her professional advisers, and those written by her solicitors to Mr. Nelson were written to him as her professional adviser and architect, and all of them were private and confidential.

Some of the letters had been written before the date of the alleged agreement, others after that date, but before any dispute had arisen, the rest after the dispute had arisen.

* *R.* v. *Canwell and Dunn* was a case reserved at the same sessions upon precisely the same point, the jury having found the prisoners guilty of a common assault upon a count charging them with unlawfully and maliciously inflicting grievous bodily harm.

A summons had been taken out to consider the sufficiency of the privilege set up. The chief clerk was of opinion the documents were privileged, as they were communications with skilled witnesses.

The summons was adjourned into court, and now came on to be heard.

Davey, in support of the application.—The affidavit does not state that the letters were written in contemplation of the suit, or that Mr. Marsh Nelson was employed in getting up evidence. No distinct ground of privilege is set up in the affidavit, and if that be not done every document must be produced. He cited: *Simpson* v. *Brown*, 33 Beav. 482; *Steele* v. *Stewart*, 1 Ph. 471; *Holmes* v. *Baddeley*, 1 Ph. 476; *Curling* v. *Perring*, 2 M. & K. 380; *Walsham* v. *Stainton*, 12 W. R. 199; 2 H. & M. 1.

Wickens, *contra*.—On the fire taking place every sort of difficulty was likely to arise from the fact of the plaintiff's property being let out among many persons. She very properly employed a solicitor and an architect to settle the conflicting claims. The question as to what is the commencement of litigation does not arise in this case, for every letter written after the fire was clearly written with reference to the litigation which was now arisen.

Malins, V.C.—It is difficult to lay down any general rule in these cases as to privileged documents, but my impression is that the rule cannot be carried to the extent here contended for. I agree with Mr. Davey that all documents are *primâ facie* to be produced, and, as no ground of privilege is set up in this case, I think the documents in question must be produced.

Dixon v. Holden.

Injury to reputation—Injunction.

The court has jurisdiction to restrain by injunction the publication of advertisements injurious to a man's reputation or mercantile credit.

[17 W. R. V. C. M. 482.]

This suit now came on to be heard on motion for decree. An interlocutory injunction had been granted during the Long Vacation, restraining the defendants from printing and publishing the advertisements complained of. The facts were as follows;—

William Dixon, the plaintiff in this suit, up to the year 1851 (when the partnership expired), carried on business at San Francisco, in partnership with Alexander Forbes, and his brothers Hugh Dixon and Launcelot Dixon, under the style of Dixon, Forbes & Co. Hugh Dixon and Launcelot Dixon also carried on a distinct business at Liverpool, under the style of Dixon Brothers, but with this firm the plaintiff had no connection.

In December, 1850, the firm of Dixon Brothers stopped payment, and executed a deed of assignment for the benefit of their creditors; they subsequently incurred further losses, and in December, 1851, became bankrupt.

In the year 1852, the plaintiff returned to England, and in 1857, entered into partnership with Hugh Dixon and Launcelot Dixon, under the style of William Dixon & Co.

The defendants acted as solicitors to the assignees in bankruptcy of Dixon Brothers, up to the year 1854, when other solicitors were appointed.

In the year 1867, the defendant, J. Holden, wrote letters to Hugh Dixon threatening, *inter alia*, to advertise some acceptances given by him prior to his bankruptcy as old assets; the purpose of these letters being, as the bill alleged, to extort money.

In September, 1867, the defendants inclosed and forwarded to Hugh Dixon, at the offices of William Dixon & Co., a printed notice, requesting the creditors of Dixon Brothers to meet at a certain time and place, for the choice of a new assignee, and to be consulted as to the assets, "and also on there being two additional solvent partners, William Dixon and Alexander Forbes, both formerly of California." This notice was signed by the defendants.

The plaintiff, considering that this notice, if published, would damage his character and credit, as connecting his name with the insolvent firm of Dixon Brothers, instructed his solicitors to write to the defendants and protest against the issue of such notices. The defendants in reply, stated that they believed the plaintiff and A. Forbes were partners in the firm of Dixon Brothers, and that "the advertisement was intended for as many local papers as there were diverse residence of creditors."

It was to restrain the publication of these advertisements that this bill was filed.

Little, Q. C., and *Proctor*, for the plaintiff, contended that as this advertisement was injurious to the credit of the plaintiff, it was damage in effect to his property, and the court had jurisdiction to restrain its publication. They cited, *Routh* v. *Webster*, 10 Beav. 561; *Bullock* v. *Chapman*, 2 De G. & S. 211; *Springhead Spinning Company* v. *Riley*, 16 W. R. 1138, L. R. 6 Eq. 551. [The Vice-Chancellor referred to *Clark* v. *Freeman*, 11 Beav. 112.]

Glasse, Q. C., and *Morris*, for the defendants. There is no jurisdiction in this court unless an injury to property results. This is a mere case of libel over which the common law courts have jurisdiction, and in which they can now, if necessary, grant an injunction. Here, however, there is no damage. They referred to *Clark* v. *Freeman*; *Fleming* v. *Newton*, 1 H. L. C. 363.

Little, Q. C., in reply.

Malins, V.C.—In this case there is no evidence that the plaintiff ever was a partner in the bankrupt firm; it was sworn that he was not; but being a merchant of repute at Liverpool, the advertisements stated not only that he was a member of the bankrupt firm, but in substance that being a solvent partner, he had concealed that fact from his creditors. The defendant instead of apologising for this very grave offence, repeats it in an aggravated form. It is admitted that this court has jurisdiction where property is to be affected. But in my opinion the credit and good name of a merchant is part of his property, and he is entitled to have such property protected by injunction. Here, however, there is a distinct allegation, not denied, that the publication of this advertisement will injure the plaintiff's business,

but had it only referred to his reputation, I am of opinion that this court would also have jurisdiction. It was contended, to my surprise, that in *Fleming* v. *Newton*, Lord Cottenham had decided that in such a case this court had no jurisdiction, but on referring to that case, I find that Lord Cottenham only expressed an opinion that such jurisdiction should be exercised cautiously. In the case of *Springhead Company* v. *Riley*, which has never been appealed, I had to consider all the authorities bearing on this question. I apprehend that the case of *Routh* v. *Webster*, goes the whole length of what is asked here. The next case is *Clark* v. *Freeman*. I refer to the observation of Lord Cairns upon that case in *Maxwell* v. *Hogg*, 16 W. R. 84, L. R. 2 Ch. 310, where he says,—"It always appeared to me that *Clark* v. *Freeman* might have been decided in favour of the plaintiff, on the ground that he had a property in his own name." With this observation I entirely agree. I am of opinion that the original injunction in this case was rightly granted. Has then the subsequent conduct of the defendants mitigated the offence? In their answer and evidence they appear rather to attempt to justify themselves than to apologise. The injunction must, therefore, be made perpetual, and they must pay the costs of the suit. Wherever the publication of advertisements or other documents tend to destroy or deteriorate property, whether tangible or intangible, this court has, in my opinion jurisdiction to interfere, and a man's reputation and mercantile credit is assuredly a most valuable part of his property.

Feilden v. Slater and Sefton.

Covenant—Practice—Affidavit—Lease—Notice—Construction of covenant—Damage—Parties.

An affidavit filed on the part of a defendant cannot, in a cause, be read as evidence against a co-defendant.

Lord v. *Colvin*, 3 Drew. 222, distinguished.

The rule that a purchaser is bound to inquire into the title of his vendor, and is affected with notice with what appears upon the title if he does not so inquire, applies in the case of a lessee who neglects to inquire into his lessor's title.

Wilson v. *Hart*, 14 W. R. 748, L. R. 1 Ch. App. 463, followed.

A covenant not to use a house "as an inn, public-house, or tap-room, or for the sale of spirituous liquors, ale or beer," is broken by the sale therein of spirits or beer in bottles, though the house is not used as a public-house, and the liquors are not sold by retail, or to be drunk on the premises.

A plaintiff suing for an injunction to restrain a breach of a covenant, is not bound to show any special damage sustained thereby.

A. conveys land to B., which B., by the same instrument, covenants that he will not use or suffer to be used for certain purposes. B. leases the land to C., who uses it for the purposes forbidden by the covenant. B. is not a proper party to a bill filed by A. for an injunction to restrain any further breach of the covenant.

[V. C. J. 17 W. R. 485.]

By indenture of the 25th of April, 1854, John Feilden and Joseph Feilden (the plaintiff) conveyed certain dwelling-houses and shops in the borough of Blackburn to the defendant Slater and three other persons, in equal shares, as tenants in common, reserving a perpetual rent charge of £40 a-year. By the same indenture the purchasers (including the defendant Slater) jointly and severally covenanted with John Feilden and the plaintiff, their heirs and assigns, among other things, that they would not use or occupy, or permit to be used or occupied, any of such buildings as an inn, public-house, or tap-room, or for the sale of spirituous liquors, or ale, or beer, nor set up or exercise, or cause or suffer to be set up or exercised thereon any business or manufactory which might be detrimental to the neighbourhood.

In the year 1859 the interest of John Feilden in the premises became absolutely vested in the plaintiff.

By a deed of partition, dated 25th February, 1858, the defendant Slater became solely entitled to *one* of the dwelling-houses and shops in question; and by an indenture, dated 1st November, 1862, the defendant Slater demised the same to the defendant Sefton for a term of twenty-one years; and the same indenture contained a covenant on the part of Sefton to the effect that no offensive business or occupation or nuisance should be carried on or committed on the same premises, and that the same should be used as a dwelling-house or shop only.

About the end of the year 1865, the defendant Sefton, having for several years previously, in the shop in question, carried on the business of a grocer only, was appointed agent in Blackburn of Messrs. W. & A. Gilbey, the wine-importers and distillers of Oxford-street, and in the month of March, 1866, and from that time, he proceeded to sell and expose for sale, in the shop in question, the wines and spirituous liquors of Messrs. Gilbey.

The defendant Sefton continuing to sell wines and spirituous liquors in spite of the remonstrances of the plaintiff and his agents, and of the defendant Slater, the plaintiff, in March, 1868, filed his bill against the defendants Slater and Sefton, praying that they might be restrained from using, or permitting to be used, the dwelling-house and shop in question as an inn, public-house, or tap-room, or for the sale of spirituous liquors, or ale or beer.

The defendant Slater, by his answer, insisted that, whatever might be the nature of the acts charged against Sefton, no case had been made out by the bill against himself.

The defendant Sefton, by his answer, stated that he never sold any wines or spirituous liquors except those of Messrs. Gilbey; that he never sold any for consumption on the premises, nor ever sold a less quantity than a single reputed quart bottle. He also denied that, when he took the lease of the 1st November, 1862, he had any notice of the covenants contained in the indenture of the 25th April, 1854.

The plaintiff filed a replication.

Renshaw (*Kay*, *Q.C.*, with him) for the plaintiff, argued that the defendant Sefton was, upon the facts of the case, affected with notice of the covenants in the indenture of the 25th April, 1854, and, in order to prove this, proceeded to read a portion of an affidavit filed on behalf of the defendant Slater.

James, V.C.—An affidavit filed on behalf of a defendant in a cause cannot be read against a co-defendant.

Renshaw, in reply to his Honor, referred to *Lord* v. *Colvin*, W. R. 342, 3 Drew. 222.

James, V. C.—That case applies to open public cross-examination. I want an authority applicable to the case of affidavit.

Renshaw referred to the observations of the Master of the Rolls, in *Sturgis* v. *Morse*, 26 Beav. 565, 566: "'I apprehend that evidence given for any defendant is evidence for the whole cause, and that the plaintiff may make use of it both in argument or comment. I have known it done repeatedly, and I think that any evidence in the cause may be made use of by the plaintiffs against the defendants, and by the defendants against the plaintiffs." But even if the defendant Sefton be not affected with notice upon the facts, he is so by construction of law. He ought to have inquired into his lessor's title: *Tulk* v. *Moxhay*, 2 Phillips, 774; *Parker* v. *Whyte*, 11 W. R. 683, 1 H. & M. 167; *Wilson* v. *Hart*, 13 W. R. 988, 2 H. & M. 551, affirmed on appeal, 14 W. R. 748, L. R. 1 Ch. App. 463; *Clements* v. *Welles*, 14 W. R. 187, L. R. 1 Eq. 200. It would completely paralyze the covenant if Slater were permitted to let the premises to a person who might set the covenant at defiance. Sefton avoids getting notice by not making inquiry, and is therefore guilty of gross negligence. As for the construction of the covenant, we do not desire to restrain the defendant Sefton from selling wines, but we submit that the scope of the covenant ought not to be restricted to the selling of beer and spirituous liquors by retail, but that it ought to receive a reasonably liberal construction: *Harms* v. *Parsons*, 11 W. R. 250, 32 Beav. 328.

Amphlett, *Q.C.*, and *Roweliffe*, for the defendant Slater, maintained that he was unable to prevent Sefton selling spirituous liquors and ales, and therefore was not a proper party to the suit. In *Clements* v. *Welles*, the bill against Welles, the intermediate party, was dismissed with costs: 14 W. R. 187, L. R. 1 Eq. 203.

Druce, *Q.C.*, and *Simmonds*, for the defendant Sefton, argued that the obvious intention of the covenant was to prevent the premises being used as a public house or tap-room, so as to be detrimental to the neighbourhood. The sale of liquors not to be consumed on the premises could not be within the scope of the covenant: *Pease* v. *Coates*, 14 W. R. 1021, L. R. 2 Eq. 688. There was no evidence that the plaintiff had sustained any damage from the acts of Sefton, nor did the plaintiff in his bill allege any special damage, as he ought to have done: *Nokes* v. *Fish*, 3 Drewry, 735. As for the evidence adduced to affect Sefton with notice upon the facts of the case, it could not be admitted. An affidavit, filed on the part of one defendant, could not be used in evidence against a co-defendant. It would be a most oppressive case against a defendant if he had to take into consideration the affidavits adduced by his co-defendants. The covenant entered into by Slater did not run with the land either at law or in equity: *Keppell* v. *Bailey*, 2 My. & K. 517; *Bristow* v. *Wood*, 1 Collyer, 480. In the case of *Tulk* v. *Moxhay*, a covenant was held not to bind an assignee without notice. In *Wilson* v. *Hart*, the under-lessee had notice of some restrictions; and in *Clements* v. *Welles*, the under-lessee had notice of the lease, and therefore was bound to inquire into its contents. In the present case, the defendant Sefton had no notice of the deed by which his lessor claimed.

Kay, *Q.C.*, in reply, referred to statute 11 Geo. 4 and 1 Will. 4, c. 64, s. 31, and the judgment of Vice-Chancellor Wood, in *Pease* v. *Coates*, 14 W. R. 1021, L. R. 2 Eq. 691, which was a direct authority in favour of the present plaintiff. If all that was intended to be restrained by the covenant was the keeping of the house as a public-house, why were the words "*or* for the sale of spirituous liquors or ale or beer" added? With regard to the question of notice, he had himself, as counsel in *Wilson* v. *Hart*, strongly contended that a tenant from year to year could not have been bound to inquire into the title; but his contention was overruled. But in the present case there was not a tenancy from year to year, but a lease for twenty-one years.

With regard to Slater, he covenanted, not only that he would not do these things, but that he would not suffer or permit them to be done. He was owner in fee, and therefore was properly a party to the suit: *Hodson* v. *Coppard*, 9 W. R. 29 Beav. 4.

James, V. C.—If it were a question whether the defendant Sefton had actual or constructive notice of the covenants in the indenture of the 25th April, 1854, except so far as he is fixed with constructive notice by not inquiring into his lessor's title, I should hold that he had not. The plaintiff could not have used against Sefton an affidavit filed on behalf of Slater. The case is different where, as in *Lord* v. *Colvin*, there is an open examination, and all parties are present; but I am not prepared to extend the doctrine in *Lord* v. *Colvin* to this case. It is not necessary, however, for the plaintiff to prove notice upon the facts of the case. I consider myself bound by the case of *Wilson* v. *Hart*. If a man will take a lease without inquiry into the lessor's title, he must be bound by the lessor's covenants. The question then further arises, what is the meaning of the covenants in this case? I have been much pressed to hold that they cannot apply to the sale of spirituous liquors in bottles. If I were to depart from the plain meaning of the words in this case, it would be impossible to say what particular mode of sale would or would not be permissible according to the covenant. But it is said that no damage has been proved to have been sustained by the plaintiff. But the plaintiff is not bound to prove that. He is the best judge why he wants specific performance of the covenant. The plaintiff is therefore entitled, as against Sefton, to an injunction against the use of the house for the sale of spirituous liquors.

As for Slater, there is no ground for making him a party to the suit. His position was known to the plaintiff at the time of filing the bill, and he seems to have done all he could to induce Sefton to refrain from what he was doing.

Bill as against Slater dismissed with costs; injunction granted against Sefton, with costs.

Peatfield v. Barlow.

Order for payment of costs—Interest of London agents and country solicitors and suitors.

A decree was made in the usual form ordering the payment of costs to F. & Co., the London agents of E. E.'s client had satisfied all claims of E. against him, and now prayed that the costs might be paid to him.

Held, that the order for payment to F. & Co. gave them no rights of lien or set-off in respect of the costs, or in any way altered the rights of the principals.

[V. C. M. 17 W. R. 516.]

This was a petition by Mr. and Mrs. Barlow, two of the defendants in the suit.

By a decree made in the suit on the 3rd of June, 1867, it was ordered that the costs of the petitioners should be taxed and paid to Messrs. Few & Co. Messrs. Few & Co. were the London agents of Mr. Esam, of East Retford, the solicitor for the petitioners.

At the date of the decree, Mr. Esam held in his hands a sum of £228 on Mr. Barlow's account, which exceeded all that was due to Mr. Esam for the costs of the suit. Mr. Esam subsequently became insolvent, and executed a deed under the Bankruptcy Act, 1861.

Schomberg, Q. C, for the petitioners, asked that the costs of the suit due from the petitioners to Mr. Esam might be set off against the sum in Mr. Esam's hands, and that the costs to be paid out of the fund in court might be paid to the petitioners. He contended that the order directing payment to Messrs. Few & Co. was merely made in that form for convenience, and in no way affected the rights of those entitled to the money. He cited *Ward* v. *Hepple*, 15 Ves. 297; *Waller* v. *Holmes*, 9 W. R. 32, 1 J. & H. 239, and the cases there referred to.

Pearson, Q C. and *Bardswell*, for Messrs. Few & Co —Messrs. Few & Co. had a lien upon this fund for the amount of costs incurred by them as the agents of Mr. Esam. The payment of costs to the London agents is the usual and ordinary course, and the agents are justified in relying upon it in dealings with their principals. The decree directs payment to our clients, and is therefore binding, independently of any question between Mr. Esam and his client.

Malins, V.C.—This is a case of great importance both to London agents and solicitors and suitors in the country. As to the money in Mr, Esam's hands, Mr. Barlow's right was at any time to direct him to apply it in payment of what was due to him in respect of his bill of costs, and the virtual bankruptcy of Mr. Esam cannot in any way derogate from that right. No doubt, the order in form directs payment to Messrs. Few & Co., but the payment was to be made to them only in their character of London agents of Mr. Esam, who was the petitioners' solicitor. But it was contended that this direction for the payment of costs to the London agents created a new right in them. I cannot accede to that argument. It is clear that if Mr. Barlow had paid Mr. Esam his costs, Messrs. Few & Co. could have no better right than Mr. Esam himself had. That rule was laid down by Lord Eldon in *Ward* v. *Hepple*, was adhered to by Lord Tenterden, and was followed by the present Lord Chancellor in *Waller* v. *Holmes*. I must, therefore, accede to the petition, and make the order asked for; but as it is enforcing an extreme right upon a novel point, there will be no order as to costs.

PROBATE.

In the Goods of Bailey (deceased).

Probate—Practice—Appointment of different executors in different wills—Codicil appointing sole executors—Implied revocation.

The testator appointed A. and B. executors in a will disposing of part of his property, A. and C. in a second will, disposing of another part of his property, and sole executors in the codicil thereto.

Held, that the appointment of the executors in the first will was revoked, and probate was granted of the three testamentary papers to A. and C.

[17 W. R. 401.]

John Bailey died on the 31st July, 1868, leaving three testamentary papers, and by a will dated the 3rd January, 1856, bequeathed several specific legacies, snd appointed his son, W. H. Bailey, and his daughter, Priscilla Bailey, executors.

By a codicil to the last mentioned will dated 24th of January, 1856, bequeathed several specific legacies out of other property—viz., certain South Sea Stock, and appointed his son and other daughter, Mary Jane Bailey, executors.

By a will of the 7th August, 1860, he bequeathed the residue, if any, of the South Sea Stock between his son and daughter, Mary Jane Bailey, and also appointed them his sole executors to this will.

Searle moved for a grant of probate of the will of the 3rd January, 1856, the codicil of the 24th January, 1856, and the will of the 7th August, 1860, to W. H. Bailey and his sisters, Priscilla Bailey and Mary Jane Bailey, the executors named in such wills. [Sir J. P. Wilde.—This is never done when the last codicil names certain persons to be sole executors and confirms the last will. It is a question of intention which depends on the language used in the documents.] In *Lowe's case*, 3 Sw. & Tr. 478, 33 L. J. Pr. & M. 155, a testator appointed A. and B. executors, and by a codicil appointed C. sole executrix of his will. Held, that the appointment of the executors of the will was revokod. In *Morgan's case*, L. R. 1 Pr. & D. 323, two testamentary papers were executed by a married woman. A. B. C. were, under different powers of appointment, appointed executors in the first will; C. was appointed sole executor in the last. Probate was granted to the three executors.

Sir J. P. Wilde.—Unless you can draw a distinction between this case and that of *In the goods of Lowe*, I shall follow the practice there laid down. For the words used in the last will clearly express an intention to revoke the appointment of the executors in the previous will. There is clearly a difference between the case of *In the goods of Lowe* and the case of *In the goods of Morgan*.

Granted probate of the will and codicil of 1856. and the will of 1860, as containing the last will of the testator to W. H. Bailey, and Mary Jane Bailey, the executors named in the last will dated August, 1860.

UNITED STATES REPORTS.

UNITED STATES SUPREME COURT.

Butler v. Horwitz.

(From The Pittsburgh Legal Journal.)

In contracts for the payment of a certain sum in gold and silver coin made prior to the passage of the acts of Congress making United States notes legal tender, the damages for non-payment must be assessed in coin according to the contract, and judgment rendered accordingly.

The principles determined in Bronson v. Rodes (4 Legal Jour., N. S., p. 278), reasserted and held to govern this case.

The question of the constitutionality of the acts of Congress making United States notes legal tender not decided.

Error to the Court of Common Pleas for the State of Maryland.

Daniel Bowly, on the 18th of February, 1791, leased to Conrad Orendor a lot of ground on Water street, in the city of Baltimore, for 99 years, renewable forever, reserving rent in the following words, "yielding and paying therefor to the said Daniel Bowley, his heirs and assigns, the yearly rent or sum of £15, current money of Maryland, payable in English golden guineas weighing five pennyweights and six grains, at thirty-five shillings each, and other gold and silver at their present established weight and rate according to act of Assembly, on the 1st day of January in each and every year during the continuance of the present demise."

On the 1st of January, 1866, Mr. Horwitz was the owner of the rent and reversion, and Mr. Butler of the leasehold interest in the lot. Mr. Butler tendered the amount of the annual rent ($40) then due, in currency, which Mr. Horwitz refused to receive, and brought suit to recover the value of the gold, in currency, on the 1st of January, 1866, which was $58. Judge King, of the Court of Common Pleas, before whom the case was argued, gave judgment in favor of Mr. Horwitz for that amount, with interest. Mr Butler then applied for a writ of error, taking the case to the Supreme Court of the United States, there being involved in the case the construction of an United States statute, which was decided adversely to the party claiming its benefit, as he had a right to do, under the act of Congress of 1789.

Chief Justice Chase, in delivering the opinion of the Supreme Court, substantially affirmed the opinion and judgment of the Court of Common Pleas, the only difference being in the practical method of carrying out the views entertained alike by both Courts—the Baltimore Court reduced the gold to currency, and the Supreme Court determining that the judgment should be entered for the amount claimed, with interest, in gold.

The case was argued in the Supreme Court by J. R. Quinn, Esq., for plaintiff in error, and by Benjamin F. Horwitz, Esq, for defendant in error.

Chase, C. J.—The principles which determined the case of Bronson v. Rodes will govern our judgment in this case. The record shows a suit for breach of the covenant for payment of rent in a lease of certain premises in the city of Baltimore, made in 1791 for 99 years, renewable forever, upon an annual rent of £15, current money of Maryland, payable in English golden guineas, weighing five pennyweights sixteen grains, at 35 shillings each, and this gold and silver at their present weight and rate established by act of Assembly.

The obvious intent of the contract was to secure payment of a certain rent in gold and silver, and thereby avoid the fluctuations to which the currency of the country, in the days which preceded and followed the establishment of our independence, had been subject, and also all future fluctuations incident to arbitrary or uncertain measures of value, whether introduced by law or usage.

It was argued in the court below that the rent due upon the lease reduced to current gold and silver coin was, on the 1st of January, 1866, $40, and judgment was rendered on the 27th of June, 1866, for $59.17. This judgment was rendered as the legal result of two propositions:

1st. That the covenant in the lease required the delivery of a certain amount of gold and silver in payment of rent; and,

2d. That damages for non-performance must be assessed in the legal tender currency.

The first of these propositions is, in our judgment, correct; the second is, we think, erroneous

It is not necessary to go at length into the grounds of this conclusion. We will only state briefly the general proposition on which it rests, most of which has been stated more fully in Bronson v. Rodes.

A contract to pay a certain sum in gold and silver is in substance and legal effect a contract to deliver a certain weight of gold and silver, of a certain fineness, to be ascertained by count Damages for non-payment of such a contract may be recovered at law as for non-performance of a contract to deliver bullion, or any other commodity; but whether the contract be for delivery or payment of coin, or bullion or other property, damages for non-performance must be assessed in lawful money; that is to say, in money declared to be legal tender in payment, by a law made in pursuance of the Constitution of the United States.

It was not necessary in the case of Bronson v. Rodes, nor is it necessary now, to decide the question whether the acts making United States notes legal tender are warranted by the Constitution. We express no opinion on that point, but assume for the present the constitutionality of these acts. Proceeding upon this presumption, we find two descriptions of lawful money in use under the acts of Congress, in either of which damages for non-performance of contracts, whether made before or since the passage of the Currency acts, may be properly assessed in the absence of any different understanding or agreement between the parties; but the obvious intent in contracts for payment in coin to guard against fluctuations in the medium of payment warrants the inference that it was the understanding of the parties that such contracts should be satisfied, whether before or after the judgment, only by tender of coin; while the absence of any express stipulation as to description in contracts

for payment of money generally warrants the opposite inference of an understanding between parties that such contracts may be satisfied, be-or after judgment, by the tender of any lawful money.

The inference as to contracts made prior to the passage of the acts making United Strtes notes legal tender, is strengthened by the consideration that these acts not only do not prohibit, but by strong implication sanction contracts since their passage for the payment or delivery of coin, and consequently, taken in connection with the provision of the act of 1792, concerning money on account, require the damages upon such contracts to be assessed in coin, and judgment rendered accordingly, leaving the assessment of damages for breach of other contracts to be made and judgment rendered in lawful money.

It would be unreasonable to suppose that the Legislature intended a different rule as to contracts prior to the enactment of the Currency laws, from that sanctioned by them in respect to contracts since. We are of the opinion, therefore, that assessments of damages, whether in coin or in lawful money, severally, and judgments upon such assessments, should be in conformity to the stipulation of contracts in regard to the medium of payments. It follows that in the case before us the judgment was erroneously entered. The damages should be assessed at the sum agreed to be due, with interest, in gold and silver coin, and judgment for that amount with costs.

The judgment of the Court of Common Pleas must therefore be reversed, and the cause remanded for further proceedings.

Mr. Justice Miller dissented, for reasons given by him in Bronson v. Rodes.

REVIEWS.

American Law Review. April, 1869. Little, Brown, & Co., Boston, U. S.

The April number of this valuable legal Magazine has been received. The principal articles are, Bluntschili's International Law; The Legal Qualifications of Representatives, and a discussion on the law of Copyright. There are also the usual Digests of Cases in the American Courts, Summary of Events Notice of Law Publications, &c. It notices that our namesake, the *Canada Law Journal*, in Lower Canada, has ceased to exist. Whilst we regret that it should have been found necessary to discontinue that publication, we cannot refrain from congratulating the *Review*, that the confusion caused by two publications in this country bearing the same name, is at an end.

Bench and Bar. Chicago: April, 1869.

This is the name of a new legal publication intended for the present to appear quarterly, and which will be mailed free of cost to such gentlemen of the profession as will forward their names to the publishers. It is thought that by this gratuitous distribution a larger class of readers will be reached than by affixing a subscription price. From our experience of journalism, we should think this will be found very likely. The class amongst the profession, at least in this country, that prefer a *gratuitous* distribution in this respect is very large, in fact their appreciation of the system is so great that they entirely ignore any silly promises to pay they may have made in a moment of weakness We expect, therefore, that the *Bench and Bar* will have a very extensive circulation in Ontario. We shall be happy to supply its publishers with a list of several hundred lawyers that its terms would exactly suit, particularly if the postage is prepaid. We would suggest that the publishers should, in addition, give to each of such "subscribers" an annual bonus of three to five dollars a year, payable in advance: this would tend to ensure the ultimate success of the undertaking.

In the case of the very nicely got up publication before us, the intention is probably to make it a sort of advertising medium for the publishers. But however that may be it seems to be edited with much ability. By the bye, Chicago can now boast of two novelties in the way of legal journals, the one before alluded to, and another published by the wife of one of the judges. The liberality and gallantry of our brethren south and west of us will perhaps make the latter even a greater success than the former.

Chicago Legal News.

This comes to us in an enlarged form. The energy and spirit with which the editress conducts this paper is truly appalling. She has secured the success of her novel undertaking.

Pittsburgh Legal Journal.

This is also increased in size under the auspices of a company, including amongst its members a number of the bar of the neighboring country.

Opinion of United States Supreme Court, by Chief Justice Chase, in the case of *The State of Texas* v. *White and others.* Washington: Jos. L. Pearson, 1869.

This is a leading case on the reorganization of State Governments after the late war, the effect of the alienation of State Property by insurgent governments, and notice to purchasers of such property.

Cæsar Griffin's Case.

This is also an opinion of the same Chief Justice in another important case.

APPOINTMENTS TO OFFICE.

(CANADA GAZETTE.)

PRESIDENT OF THE COUNCIL.

THE HON. JOSEPH HOWE, as President of the Privy Council of Canada, vice the HON. A. J. FERGUSON BLAIR, deceased. (Gazetted February 6, 1869.)

COUNTY JUDGES.

GEORGE DUGGAN, of Osgoode Hall and of the City of Toronto, in the Province of Ontario, Esq., Barrister-at-Law, to be the Judge of the County Court of the County of York, in the said Province of Ontario. (Gazetted Feb. 20, 1869.)

(ONTARIO GAZETTE.)

BOARD OF COUNTY JUDGES.

JAMES ROBERT GOWAN, Judge of the County Court of the County of Simcoe; STEPHEN JAMES JONES, Judge of the County Court of the County of Brant; DAVID JOHN HUGHES, Judge of the County Court of the County of Elgin; JAMES DANIELL, Judge of the County Court of the United Counties of Prescott and Russell, and JAMES SMITH, Judge of the County Court of the County of Victoria, Esquires, to be the Board of County Judges, constituted under the Act, Statutes of Ontario, 32 Vic. cap. 23, and for the purposes therein mentioned. (Gazetted March 27, 1869.)

CLERK OF EXECUTIVE COUNCIL.

JAMES ROSS, of the Town of Belleville, Esquire, to be Clerk of the Executive Council of the Province of Ontario, in the room and stead of JOHN SHUTER SMITH, Esq., resigned. (Gazetted March 13, 1869.)

REGISTRARS.

JAMES WEBSTER, of the Town of Guelph, Esquire, Barrister-at-Law, to be Registrar of the County of Wellington, in the room and stead of JAMES WEBSTER, Esq., deceased. (Gazetted March 13, 1869.)

WILLIAM HENRY EYRE, of the Township of Hamilton, Esquire, to be Registrar for the west riding of the County of Northumberland, in the room and stead of the HON. GEORGE STRANGE BOULTON, deceased. (Gazetted March 13, 1869.)

NOTARIES PUBLIC.

JACOB PAUL CLARK, of Brampton, gentleman. (Gazetted January 23, 1869.)

JAMES EDWARD ROBERTSON, of the City of Toronto, Barrister-at-Law. (Gazetted February 20, 1869.)

ALBERT G. BROWN, of the Town of St. Catharines, Esquire, Barrister-at-Law. (Gazetted March 6, 1869.)

WILLIAM ALLAN McLEAN, of the City of Toronto, gentleman, Attorney-at-Law. (Gazetted March 13, 1869.)

ROBERT McGEE, of the Village of Oshawa, gentleman, Attorney-at-law. (Gazetted March 20, 1869.)

DANIEL BLACK CHISHOLM, of the City of Hamilton, Esquire, Barrister-at-Law. (Gazetted April 3, 1869.)

CORONERS.

FRIEND RICHARD ECCLES, of the Village of Arkona, Esquire, M.D., to be an Associate Coroner in and for the County of Lambton. (Gazetted February 13, 1869.)

CHARLES R. STEWART, of Haliburton, Esquire, in and for the County of Peterboro'. (Gazetted February 20, 1869.)

JACQUES C. T. BEAUBIEN, of Ottawa, Esquire, M.D., in and for the City of Ottawa. (Gazetted Feb. 20, 1869.)

CHARLES ROBINSON, of the Township of Chinguacousy, Esq., M.D., in and for the County of Peel. (Gazetted March 20, 1869.)

WILLIAM RICHARDSON, of the Township of Nelson, Esq., M.D., in and for the County of Halton. (Gazetted April 3, 1869.)

THOMAS HOSSACK, of the Village of Lucan, Esquire, M.D., in and for the County of Middlesex. (Gazetted April 10, 1869.)

JOHN COVENTRY, of the Village of Wardsville, Esq., M.D., in and for the County of Elgin. (Gazetted April 10, 1869.)

JOHN BARE, of the Township of Melancthon, Esq., M.D., in and for the County of Grey. (Gazetted May 8, 1869.)

A gentleman appeared in a police-court a few days ago and asked the magistrate to put in force the new Master and Servants Act (30 & 31 Vict. c. 141) against his butler, who had absented himself without leave all Christmas Day, and on his return home next morning was very abusive. The magistrate informed the applicant that the Act in question does not apply to domestic servants, but suggested the dismissal of the offending butler without notice. The master said that if he adopted that course, he would have to pay the butler a month's wages in lieu of notice, which he objected to do; but the magistrate informed him that he was quite in error on that point. It is surprising how many people appear to be ignorant of the very simple rule of law that when a domesitc servant disobeyes any reasonable order, or is guilty of any misconduct, or neglects or refuses to work, he or she may be dismissed without notice, and that when so dismissed not only is there no claim to a month's wages in lieu of notice, but all wages actually due to the offending party are in strict law forfeited.—*Solicitors' Journal.*

Judge Story and Edward Everett were once the prominent personages at a public dinner in Boston. The former, as a voluntary toast, gave the following:—"Fame follows merit where Everett goes!" The gentleman thus delicately complimented at once arose, and replied with this equally felicitous impromptu: "To whatever height judicial learning may attain in this country, there will always be one Story higher."