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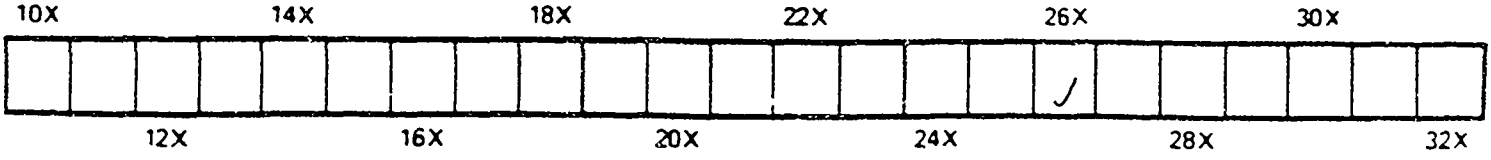

DIARY FOR AUGUST.

2 SUNDAY ... 9th Sunday after Trinity.
8. Saturday ..... Articles, &c., to be left with Secretary of Law Society.
9 SUNDAY ... 10th Sunday after Trinity.
12. Wednesday... Last day for service for County Court.
16. SUNDAY ... 11th Sunday after Trinity.
21. Friday ..... Long Vacation ends
22. Saturday .... Declare for County Court
23 SUNDAY..... 12th Sunday after Trinity.
24 Monday..... TRINITY TERM begins.
28. Friday ..... Paper Day, Q B.
29. Saturday ... Paper Day, C P.
30. SUNDAY..... 13th Sunday after Trinity.
31. Monday..... Paper Day, Q. B. Last day for notice of trial for Co. Courts.

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs Ardagh & Ardagh Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

AUGUST, 1863.

THE LAW AS TO CUSTODY OF CHILDREN.

The father is at common law, to the exclusion of all others (including the mother), the guardian of and entitled to the custody of the child, even though the child be an infant at the breast of its mother (*Rex* v. *DeManneville*, 5 East. 221), provided the child be legitimate (*The King* v. *Soper*, 5 T.R. 278; *In re Doyle*, 1 Clark, 154; *Hudson* v. *Hill*, 8 N. Hamp. 417; *Regina* v. *Armstrong*, 1 U.C. Prac. R. 8). It has been held that if a father consents to his child remaining with another person, he may at any time revoke the consent and recover possession of the child, although the consent was given in consideration of an agreement by the third person to take charge of the child, and although the father had entered into an agreement with such third person to pay for the maintenance of the child (*Regina* v. *Smith*, 22 L. J. Q. B. 116). So the father may, either by deed executed in his life time or by his last will and testament in writing, executed in the presence of two or more credible witnesses, in such manner and from time to time as he shall think fit, dispose of the custody and tuition of his child, not being married, for such time as the child remains under twenty-one years or any lesser time (12 Car. II. cap. 24, s. 8). The mother has no such right (*Ex parte Glover*, 4 Dowl. P. C. 491), and the right itself is not assignable to the mother or to any one else (*In re Bedford Charity*, 2 Swanst. 538).

The power of the parent over the child is however subordinate to that of the state (*Blisset's case*, Loft 748). The acknowledged rights of the father are conferred by the law with the view to the performance by him of certain duties towards his children, and in a sense on condition of performing these duties, but there is great difficulty in closely defining them. It is substantially impossible to ascertain or watch over their full performance. A man may be in narrow circumstances; he may be negligent, injudicious and faulty; he may be a person from whom the discreet, the intelligent and the well disposed, exercising a private judgment, would wish his children to be for their sakes and his own removed. But he may be all this without rendering himself liable to judicial interference. Before this jurisdiction can be called into action the court must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father is placed in such a position, or has shewn himself to be a person of such a description, or has so conducted himself, as to render it not merely better for the children, but essential to their safety or to their welfare in some very serious and important respect, that his right should be treated as lost or suspended (per Knight Bruce, V. C., *In re Fynn*, 2 De G. & S. 474.) Thus if the father be convicted of felony, the custody of the children will be taken from him (*Ex parte Bailey*, 4 Dowl. P.C. 311); or if, though not proved guilty of crime, he has so conducted himself that his children cannot associate with him without moral contamination (Anon, 2 Sim. N. S. 54); and yet it has been held that the father will not be deprived of his right on the ground that he has formed an adulterous connection which still continues, if it appear that he has never brought the adulteress to his house or into contact with his children, and does not intend to do so (*The King* v. *Greenhill*, 4 A. & E. 624; *S. P. Ball* v. *Ball*, 2 Sim. 35). Comparative destitution is certainly not sufficient (*Lyons* v. *Blenkin*, Jac. 245; *In re Pullbrook*, 11 Jur. 185); but such an habitual degree of cruelty as to render the father unfit to have the management of children may be a reason for the interference of the court (*Curtis* v. *Curtis*, 7 W. R. 474). So if it be shown that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles (2 Story's Equit. Jur. s. 134). It is not enough to show that the mere change would be a benefit to the infant. There must be some strong and weighty reason, rendering the same essential to their welfare. (Ib.)

In one case the court, on a representation by the wife of the father's profligacy and cruelty, referred the case to a barrister to determine as to the proper custody, the husband consenting to abide by the determination (*The*

King v. *Dobbyn*, 4 A. & E. 644, note). In another, it was referred to the Master to determine at what time and in what manner and under what circumstances the father who was unfit to have the custody of his children might have access to them (*The King* v. *Wilson*, 4 A. & E. 645, note).

When the father is dead the mother is guardian for nurture and guardianship for nurture continues till the child attains the age of fourteen years (*Ratcliff's case*, 3 Rep. 37 a, 38 b; *In re Moore*, 11 Ir. Com. Law Rep. 1). The legal sense of the word nurture is "to educate; to train; to bring up". (per Campbell, C. J., in *Regina* v. *Clarke*, 7 El. & B. 193). The mere fact that the father died a Protestant, and the mother is a Roman Catholic and will probably train up the child to the same faith, is no reason for depriving her of the right which the law gives her as guardian for nurture. (Ib.) It must be shewn that, for reasons such as those already specified in the case of a father, she is unfitted to train up her children, or that her doing so will be destructive to their welfare. (Ib.) Where the mother was left a widow in India, with two children, and the mother of her deceased husband offered to take charge of the children if they were sent home to her in England, and one of them was accordingly sent home to her and resided with her till the time of her death, when she left property to trustees in trust for the children, and after her death the children had been put to school by the trustees, with which arrangements the mother had at various times expressed her satisfaction, the court refused at the instance of the mother, who married a second time, in the absence of some good cause for change of custody, to order the children into her custody (*In re Preston*, 5 D. & L. 233).

The jurisdiction of the Court of Chancery extends to the care of the person of an infant, so far as necessary for his protection or education; and to the care of the property of the infant, for its due management and preservation and proper application for his maintenance. It is upon the ground of the necessity for the due protection and education of the infant that the court interferes with the ordinary rights of parents as guardians by nature or by nurture, in regard to the custody or care of children (2 Story's Eq. Jur. s. 1341; see also *Ex parte Warner*, 5 Brown's Chan. C. 101; *De Manneville* v. *De Manneville*, 10 Ves. 52; *Whitfield* v. *Hales*, 12 Ves. 492; *Wellesley* v. *Beaufort*, 2 Russ. 1; *Thomas* v. *Roberts*, 3 De G. & S. 758). The jurisdiction of the courts of common law in regard to the disposal of the custody of infants is not nearly so extensive as that of chancery. Indeed though courts of common law may under certain circumstances refuse to exercise their jurisdiction in favor of an unworthy father seeking the custody of his children, their jurisdiction under any circumstances (independently of the Con. Stat U.C. cap. 74, s. 8, to which we shall presently refer) to deprive him of that custody is gravely doubted (*In re Hakewell*, 12 C. B. 223; see also *Blisset's case*, Loft. 748; *Ex parte Skinner*, 9 Moore, 278; *De Manneville* v. *De Manneville*, 10 Ves. jun. 59; *Ex parte McLellan*, 1 Dowl. N.S 84).

In 1839, Mr. Sergeant Talfourd succeeded in effecting an important amendment in the law regarding the custody of infants. He introduced into the legislature and carried through a bill which is now known as 2 & 3 Vic. cap. 54, entitled "An Act to amend the law relating to the custody of infants." It enacted, among other things, that it shall be lawful for the Lord Chancellor or Master of the Rolls, in England, and for the Lord Chancellor and Master of the Rolls in Ireland, upon hearing the petition of the mother of any infant or infants being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for access of the petitioner to such infant or infants, at such times and subject to such regulations as he shall deem convenient and just; and if such infant or infants shall be within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as he shall deem convenient and just. (s. 1.)

The object of the act is to protect mothers from the tyranny of those husbands who ill use them. As the law stood before the act, however much a woman might have been injured, she was precluded from seeking justice from her husband by the terror of that power which the law gave him of taking her children from her. That was felt to be so great a hardship and injustice, that parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife without the risk of any injury being done to her feelings as a mother. That was the object with which the act was introduced, and that is the construction to be put upon it. It gives the court the power of interfering; and when the court sees that the maternal feelings are tortured for the purpose of obtaining any thing like an unjust advantage over the mother, that is precisely the case in which it would be called upon and ought to interfere (per Lord Cottenham, in *Wade* v. *Wade*, 2 Phil. C. C. 787; see also *Ex parte Bartlett*, 2 Col. 661). Therefore where the wife leaves her husband without sufficient cause, she is not entitled to claim the protection of the act (*In re Taylor*, 11 Sim. 178; see also *In re Tomlinson*, 3 De G. & S. 371).

If the protection of the children can be attained consis-

tently with the common law right of the father to the custody of his child, that right ought not to be interfered with (*In re Halliday*, 17 Jur. 56). In one case a petition had been presented on the part of a husband, praying that his two children, who were under the custody of their mother, from whom he was separated, should be transferred to him; and affidavits were made, as well on the part of the husband as the wife, detailing the several differences which existed between them and the various matters which led to their separation, when Sir Edwin Sugden, then Lord Chancellor of Ireland, spoke of the 2 & 3 Vic. cap. 54, as follows:—"I do not think the act contemplated this case. I myself paid great attention to the act in its progress through the Commons, but I did not imagine that it enabled the mother to make a *legal* defence against the application of her husband. The statute merely gives the mother a right to apply to the court for an order, either that she shall have access to the children, or that they shall be delivered unto her until the age mentioned in the statute. The act therefore does not enable the mother, in a case like the present, to resist the husband's application. At the same time this difficulty would necessarily follow, that although I should deliver over the children on his application to the husband, according to the general principle of this court, I should the next hour, on the application of the mother, under this act, take them back and transfer them again to her, assuming the case to be one in which the court would in its discretion interfere to this extent on behalf of the mother. It seems to me to be clearly a *casus omissus* in the act" (*Carsellis* v. *Carsellis*, 1 D. & War. 235; see also *In re Fynn*, 2 De G. & S. 457).

It will be observed that the act makes a difference in respect to the age of the child. With respect to that, the legislature evidently considered that as between the legal guardians and the mother the very young children (i. e. those under seven) required the mother's nurture; and notwithstanding the legal rights of the father, they should be entrusted to her; but still enabled the court, in its discretion, to do that which it thinks best for the interest of the children. It did not consider as between the father and mother that the father had an equal interest with her, but that in the majority of cases the custody should be given to the mother; but under ordinary circumstances it was most desirable that it should be made entirely discretionary in the court. In the exercise of that discretion the court must look at the interest of the children, which might be just as well preserved by giving the custody either to the father or mother, the tendency being to lean towards the mother where the children are of very tender age; but still the only material question was, what was for the children's benefit? (per Kindersley, V. C., in *Shilletto* v. *Collett*, 8 W. R. 683). Where it was shown that the mother was ignorant of managing her house and income, of non-domestic habits, married a second time, and concealed such marriage from the testamentary guardians, and was without means of personally contributing anything to the support of her children, the prayer of a petition presented by her under the above act was refused (*Shilletto* v. *Collett*, 8 W. R. 683; affirmed Ib. 696).

It now remains for us to add that our Legislature, in 1855, substantially adopted the Imperial statute 2 & 3 Vic. cap. 54, conferring the administration of the law as adopted upon the Superior Courts of Law and Equity in Upper Canada and to the Judges thereof (18 Vic. cap. 126). The act is now to be found in Con. Stat. U. C. cap. 74, s. 7, 8, 9, 10, and 11.

These sections are as follows:

"8. Any of the Superior Courts of Law or Equity in Upper Canada, or any judge of any such courts, upon hearing the petition of the mother of any infant, being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, may, if such court or judge sees fit, make order for the access of the petitioner to such infant, at such times and subject to such regulations as such court or judge thinks convenient and just, and if such infant be within the age of twelve years, may make order for the delivery of such infant to the petitioner, to remain in the care and custody of the petitioner until such infant attains the age of twelve years, subject to such regulations as such court or judge may direct, and such court or judge may also make order for the maintenance of such infant by payment by the father thereof, or by payment out of any estate to which such infant may be entitled, of such sum or sums of money from time to time, as, according to the pecuniary circumstances of such father or the value of such estate, such court or judge thinks just and reasonable.

"9. The court or judge as aforesaid may enforce the attendance of any person before such court or judge, to testify on oath respecting the matter of such petition by order or rule made for that purpose, and on the service of a copy thereof and the payment of expenses as a witness, in the same manner as in a suit or action in the said courts respectively, or may receive affidavits respecting the matters in such petition.

"10. All orders made by the court or a judge by virtue of this act, shall be enforceable by process of contempt by the court or judge by which or by whom such order has been made.

"11. No order directing that the mother shall have the custody of or access to an infant shall be made by virtue

of this act, in favor of a mother, against whom adultery has been established by judgment in an action for criminal conversation, at the suit of her husband against any person. 18 V. c. 126, s. 4."

Upon comparison of our act with the imperial act from which it is taken some differences will be discovered. One is, that under our act the mother is entitled to ask for the custody of the child if within the age of *twelve* years, and to keep the custody of the child till it attain that age, whereas the English act is restricted in that respect to children "within seven years of age." Another, is that under our act (though not under the English act) the court or judge may make an order for the maintenance of the infant by payment by the father thereof, or by payment out of any estate to which the infant may be entitled, of such sum or sums of money from time to time as according to the pecuniary circumstances of the father, or the value of the estate, the court or judge thinks just and reasonable. Another, is that the court or judge may not only, on applications under the act, receive affidavits as under the English act, but enforce the attendance of any person to testify on oath respecting the matter of the petition, for which there is no provision in the English act. These, appear to us to be the substantial points of difference between the two acts. Both acts, however, are in principle the same, and we apprehend that the same rules of construction will be applied to our act as have already prevailed in the construction of the English act. We need not therefore repeat them.

The right in Upper Canada of appointing guardians of an infant not having a father alive or any other legal guardian, belongs exclusively to the Surrogate Court of the county within which the infants reside (Con. Stat. U. C. cap. 74, s. 1).

The ordinary remedy of a father or other legal guardian complaining that an infant is in illegal custody, is the writ *habeas corpus*. It is a common law writ of right, and, as is well known, is of a highly remedial character. It in general lies to bring up persons who are in custody, and who are alleged not to be legally restrained of their liberty. When the court perceives that they are illegally restrained, it will discharge them (*Ex parte Glover*, 4 Dowl. P. C. 293). In cases where it is issuable under 31 Car. II. c. 2, s. 1, it may be issued as well in vacation as in term. But the statute of Charles is restricted to cases where the party is committed "for criminal or supposed criminal matter" The statute 56 George III. c. 100, s. 1, which extends the statute of Charles to cases of restraint other than those for criminal or supposed criminal matter, is not in force in Upper Canada; and owing to the unpardonable and long continued neglect on the part of those from time to time in authority, has never that we can discover been adopted by our legislature (see *Ex parte McLellan*, 1 Dowl. P. C. 81). The writ may be and often is granted in the first instance (*In re Pearson*, 4 Moore, 366); and in one case the court not only granted the writ in the first instance, but gave a rule calling upon the person in whose custody the child was to show cause why an information should not be filed against her (*The King* v. *Ward*, 1 W. Bl. 386). But inasmuch as the return cannot be controverted by affidavit, it is not prudent to take the writ in the first instance, but rather to move for a rule to shew cause why the writ should not issue, and then the grounds for and object of the writ, and necessity for it, will be discussed conveniently upon affidavits properly filed on both sides (*The Queen* v. *Sheriff*, 6 U. C. Q. B. 197).

Service of the writ need not be in all cases personal. Service by leaving it with the brother and agent of the party to whom addressed, at his place of abode, in a case where the writ was shown to have come to the knowledge of the party, was held sufficient (*In re Hakewell*, 12 C. B. 223); and the court will receive the return, although the party called upon to make it is not present. (Ib.) A return to the writ that a child under fourteen "is not *detained* by, or in the custody, power or possession, or under the care or control," of the party to whom addressed, or any person employed by him, was held insufficient (*Regina* v. *Roberts et al.* 2 Fort & Fire, 272). If a return, which on the face of it is ambiguous, is not fortified by affidavit clearing up all doubt, the return will be held evasive and bad (Ib.) A case of cruelty should be raised on the face of the return, and not brought in by affidavit merely, to uphold a return which is evasive and bad. (Ib.) In cases of writs of *habeas corpus* directed to private persons to bring up infants, the court is bound *ex debito justitiæ* to set the infants free from improper restraint, but not bound to deliver them over to any body, or to give them any privilege (per Lord Mansfield, in *Rex* v. *Delaval et al.*, 3 Burr. 1436). This latter is left to the discretion of the court, to be exercised according to circumstances. (Ib.) When the infant is of an age to exercise a choice, the court in general leaves him to elect where he will go (*Rex* v. *Clarke*, 1 Burr. 606; *In re Ann Lloyd*, 3 M. & G. 547; *Regina* v. *Butler* and *Regina* v. *Snooks*, 2 U.C.Q.B. 370). If he be not of that age, and a want of direction would only expose him to dangers or seductions, the court will make an order for his being placed in proper custody (per Denman, C. J., in *The King* v. *Greenhill*, 4 A. & E. 640). The difficulty is to fix the age at which the child can be said to be too young to exercise a choice (See *Regina* v. *Clarke*, 7 El. & B. 194). Cockburn, C. J., recently, in strong terms repudiated the doctrine that mental precocity

gives the right of choice, if the child has not arrived at the age of discretion which the law recognizes; for, as he well observed, "that very precocity might be the thing of all others to lead a young girl into misery and danger" (*Ex parte Barford*, 3 L. T., N.S. 468; S.C. nom. *Reg.* v. *Howes*, 7 Jur. N.S. 22). The court therefore felt itself constrained to lay down a general rule as to the age when the minor might be left to freedom of choice, and fixed upon the age of sixteen as that up to which a female child ought to be subject to parental control. (Ib.) In the case of a male child it has been held that guardianship for nurture continues only till the child attains the age of fourteen, so that after that period the child is at liberty to exercise a choice as to dwelling or remaining with his father (*Hyde* v. *Hyde*, 29 L. J. Mat. case, 150). The order of the court, commanding the wife to deliver to the husband the body of their child, is sufficiently complied with by the wife placing the child in the charge of her husband (*Regina* v. *Sheriff*, 7 U.C.Q.B. 403). If the child return of her own free will to the mother, and is not afterwards forcibly detained, the court will not further interfere. (Ib.)

SELECTIONS.

CASE OF THE ALABAMA.

The case of the *Alabama* is sufficiently remarkable, both in its facts and in the arguments to which it has given occasion, to call for a thorough review of both. It may be asserted, that, of all recent cases, this is the most likely to take its place as a leading one in the law of nations.

On June 23, 1862, Mr. Adams, the ambassador of the United States in London, addressed to Earl Russell, her Majesty's Secretary of State for Foreign Affairs, a letter in which, after mentioning the "equipment from the port of Liverpool of the gunboat, the *Oreto*, with intent to make war upon the United States," he says, "I am now under the painful necessity of apprising your lordship that a new and still more powerful war steamer is nearly ready for departure from the port of Liverpool on the same errand. This vessel has been built and launched from the dockyard of persons, one of whom is now sitting as a member of the House of Commons, and is fitting out for the especial and manifest purpose of carrying on hostilities by sea. * * * I now ask permission to solicit such action as may tend either to stop the projected expedition, or to establish the fact that its purpose is not inimical to the people of the United States." We omit the details which Mr. Adams communicated on this occasion in support of his statement, since they were not so authenticated that Lord Russell could take upon them any other action than that which he adopted without loss of time, in referring the matter to the Commissioners of Customs for inquiry. But we direct attention to the statement itself, because it expresses clearly the ground taken up by Mr. Adams, and to which he firmly adhered throughout. This is the more necessary on account of the subsequent introduction into the argument, by other parties to it, of the very different topic of passive contraband.

The name of passive contraband, not much known in England, and implying a doctrine little countenanced by English statesmen, has been given to the sale by neutrals, on their own soil, to the agents of a belligerent, of those articles which, if the neutrals transported them by sea to the belligerent, would be articles of contraband property so called. The name of course implies that the traffic so designated is held to be a breach of the duties of neutrality; but since it takes place on a neutral soil, a belligerent who should deem himself aggrieved by it would have no means of executing justice on the neutral with his own hand. If the goods are shipped, and he takes them at sea, the neutral suffers no loss, because, from the nature of the case, the goods have already become the property of the enemy. War, then, against the neutral is the only possible remedy of the aggrieved belligerent; and much learning and philosophy have been expended on the question whether a war undertaken for such a cause would be just. Upon that question we shall not spend much time, knowing that for such a cause no recorded war has been undertaken, and believing it to be in the highest degree improbable that any ever should be. If we imagine a neutral country to be so great a mart for arms and munitions of war that either belligerent is essentially aided by purchasing them there, the chance is enormous that the other belligerent will also have resorted to the same source of supply; and although it is not true that a breach of neutrality is excused by offering similar advantages to both sides impartially, yet it is not very probable that the balance of advantage derived by either will, in the case we have supposed, be so great an inconvenience to the other that, by declaring war against the neutral, he will multiply his enemies in order to get rid of it. Far be it from us to license the indulgence of all unfriendly dispositions which in any particular instance may not be likely to draw down actual vengeance on the misdemeanants. But to assert international duties, the positive enforcement of which is utterly and in every case improbable, is a folly like that of enacting national laws with no sanction of any kind. As such enactments, being surely disobeyed, could only tend to bring all law into contempt, so the denunciation of passive contraband by theorists tends to make neutrals reckless of the duties really incumbent on them. It does even worse than this, for it encourages belligerents to cherish a grudge at being wronged by a traffic which in fact is inevitable, since scarcely even the most despotically governed country could endure so systematic an interference by the authorities with the dealings between individuals within its territory, as would be necessary in order to prohibit it with effect. These considerations must outweigh the importance of rounding off a theory about contraband, of which, since there is no commerce that does not, directly or indirectly, augment the resources of a nation for war, it will never, after all, be possible to give a consistent account, while any intercourse between neutrals and belligerents is permitted.

Mr. Adams, then, took up no ground so weak as that which we have been exposing. His representation was based on the duty of a neutral not to permit the use of his territory as a starting point, or base of operations, for a hostile expedition. This duty is clear: to furnish our government with the means of performing it was the main object with which the Foreign Enlistment Act was passed in 1819. But there is a point in its application at which it becomes a matter of some nicety to distinguish the cases which fall under it from those which belong to the chimerical field of passive contraband. Suppose, for instance, that a single vessel sails from our ports, built and adapted for war alone, and in the actual service of a belligerent government, but wholly unarmed and unprovided with the munitions of war, and having no one on board who was enlisted within our territory into the service of her government: does this vessel constitute in herself a hostile expedition—equally inapt as she is for war and commerce, though, even in her unfurnished state, not absolutely incapable of either? Is there anything more in her case than the sale to a belligerent of a hostile weapon, for such is eminently a ship built for the purposes of war, but a sale effected in a

neutral port, and therefore exposing the neutral to no blame, though the purchaser carry off his acquisition and use it to the serious detriment of his adversary? We should have no difficulty in accepting the former alternative, considering the public service and hostile errand on which the vessel quits our shores. And we should claim a strong support for that opinion in the seventh section of the Foreign Enlistment Act, which makes it a misdemeanour to "*fit out or* arm" a vessel, for employment in foreign service, "*as a transport or storeship, or* with intent to cruise or commit hostilities against friendly powers;" and proceeds to declare the forfeiture of such vessel, and to empower the officers of customs and excise to seize her. Hence it clearly appears that the gist of the offence against the act lies in the public service against alien friends, independently of any armament, and even in spite of proof that the service intended, though hostile, is not that of an armed ship of war. Nor could it be objected that the Foreign Enlistment Act does not declare the law of nations; for its preamble recites that the offences against which it is directed "may be prejudicial to, and tend to endanger, the peace and welfare of this kingdom," which can only be by their giving just ground of complaint to foreign powers." But the case we have supposed falls short of that of the Alabama, by wanting the material ingredient of there being men on board enlisted within our territory for the service of the belligerent government; yet we are sorry to say that the argument of the *Alabama* case, in the British press and in parliament, has been marked by a laborious attempt to assimilate it to the cases of so-called passive contraband.

The next date of importance in the narrative is July 21, when the United States' consul at Liverpool presented six affidavits to the collector of customs at that port, "requesting me," says the collector, "to seize the gunboat" to which Mr. Adams had referred in his letter of June 23, then known as No. 290, but since as the *Alabama*. Copies of the same affidavits were received by Lord Russell from Mr. Adams on the following day (July 22), with a report of the consul's application to the collector "to act under the powers conferred by the Enlistment Act." Of this circumstance, and those which followed, the Solicitor-General gave the following account to the House of Commons:—

"It was on the 22nd that he (Mr. Adams) transmitted his first series of depositions; *he did not complete his evidence till the 24th, and the letter in which he sent them was not received till the 26th, so that he did not place the evidence on which he relied in the hands of the government till the 26th of July.* In the meantime he obtained the opinion of the honourable and learned member for Plymouth, who, on the 16th, stated his belief that there was a case of suspicion, but not enough to justify the detention of the vessel. When the evidence was completed, it was laid before the honourable and learned gentlemen, who, on the 23rd, thought there was a case sufficient to warrant her detention. Upon that evidence the legal advisers of the government came to the same conclusion as the honourable and learned member. But I wish the House to understand that in those depositions there was a great mass of hearsay evidence, which, taken by itself, could not form the basis of any action. Of the six depositions transmitted on the 22nd of July, only one was good for anything at all, namely the evidence of a person named Passmore, which was sufficient to prove material facts. Two more were sent, corroborating Passmore, on the 24th, and were received by Earl Russell *on the 26th, Mr. Adams having taken all that time to get his evidence ready.* Now what is the delay of which we are accused? The 26th was Saturday, and the 27th Sunday *The complete evidence was not in the hands of Earl Russell till the 26th*, and he told Mr. Adams on the 28th, that is on the Monday, that the law officers of the Crown were consulted. He got their opinion on the 29th, and that very same day a telegraphic message was sent down to stop the ship. Really, sir, one is shocked at the perversion of mind which arises under, I admit, the most excusable circumstances; for the House will give me credit for sincerity when I say that no one makes more allowance than I do for the natural feeling of irritation on the part of the American nation. No one can be more anxious than I am that we should stand straight with them, and they with us; but I must say that, but for the perversion of mind consequent on an irritable state of feeling, traceable to causes with which we can sympathise, I cannot conceive how any human being can say that the government have not acted with the promptitude which they ought to have shown."

Three or four times in the above passage, and in as many different ways, does the Solicitor-General impress on the House and the world that Mr. Adams did not, till the 26th, complete his evidence, or get it ready, or place in the hands of the government the evidence on which he relied. We therefore believe that it is our readers who will have their turn of being shocked at the perversion of mind which arises under more or less excusable circumstances, when we tell them that the evidence transmitted by Mr. Adams to Earl Russell on the 22nd was a complete body of evidence; that he relied on it; that he requested her Majesty's government to act upon it; that he gave them no hint of any further evidence to come; and that if the government ever received any further evidence from Mr. Adams, it was not because he thought it necessary to his case, but because time had been given for its transmission by the refusal of the government to act upon the evidence on which they were formally and diplomatically required to act. That our readers may judge for themselves, we will place before them the full text of Mr. Adams's letter of the 22nd to Earl Russell:—

Legation of United States, London, July 22, 1862.

"My Lord,

"I have the honour to transmit copies of six depositions taken at Liverpool, tending to establish the character and destination of the vessel to which I called your lordship's attention in my note of the 23rd of June last.

"The originals of these papers have already been submitted to the collector of the customs at that port, in accordance with the suggestions made in your lordship's note to me of the 4th of July, as the basis of an application to him to act under the powers conferred by the Enlistment Act. But I feel it to be my duty further to communicate the facts, as there alleged, to her Majesty's government, and to request that such further proceedings may be had as may carry into full effect the determination which I doubt not it ever entertains to prevent, by all lawful means, the fitting out of hostile expeditions against the government of a country with which it is at peace. "I avail, &c.,

"Charles Francis Adams."

There cannot be a more hopeless contradiction than that which exists between the above letter and the statement that Mr. Adams did not, till the 26th, place in Earl Russell's hands the evidence on which he relied. But in Mr. Adams's letter of the 24th, enclosing the two additional depositions, and Mr. Collier's opinion on the case presented by all the eight affidavits, there does occur an expression which seems to sanction another of the phrases used by the Solicitor-General.

The letter is as follows:—

Legation of the United States, London, July 24, 1862.

"My Lord,

"In order that I may complete the evidence in the case of the vessel now fitting out at Liverpool, I have the honour to submit to your lordship's consideration the copies of two or more depositions taken respecting that subject.

"... he view which I have taken of this extraordinary proceeding as a violation of the Enlistment Act, I am happy to find myself sustained by the opinion of an eminent lawyer of Great Britain, a copy of which I do myself the honour likewise to submit. "Renewing, &c.,

"Charles Francis Adams."

What need was there that evidence should be "completed" on which Mr. Adams already relied? Clearly the completion was necessary to satisfy some other persons, who

did not rely on the evidence as it stood before. Who these persons were is shown by the following letter from the Commissioners of Customs to the Collector of Customs at Liverpool, which was not in the hands of members till after the delivery of the Solicitor-General's speech:—

London, July 22, 1862.

"Sir,

"Having considered your report of the 21st inst., No. 1,200, stating, with reference to previous correspondence which has taken place on the subject of a gunboat which is being fitted out by Messrs. Laird, of Birkenhead, that the United States' consul, accompanied by his solicitor, has attended at the custom-house with certain witnesses, whose affidavits you have taken and transmitted for our consideration, and has requested that the vessel may be seized under the provisions of the Foreign Enlistment Act, upon the ground that the evidence adduced affords proof that she is being fitted out for the government of the Confederate States of America:

"We acquaint you that we have communicated with our solicitor on the subject, who has advised us that the evidence submitted is not sufficient to justify any steps being taken against the vessel under either the 6th or 7th sec of Act 59 Geo. III, cap. 69; and you are to govern yourself accordingly.

"The solicitor has, however, stated that if there should be sufficient evidence to satisfy a court of enlistment of individuals, they would be liable to pecuniary penalties, for security of which, if recovered, this department might detain the ship until those penalties are satisfied, or good bail given; but there is not sufficient evidence to require the Customs to prosecute; it is, however, competent for the United States' consul, or any other person, to do so, at their own risk, if they see fit.

"T. F. Fremantle,
"G. C. L. Berkeley."

It is true that, in the published documents, there is no other trace that the opinion of the solicitor of the Customs was communicated to Mr. Adams, than that which is furnished by the pregnant phrase, "in order that I may complete the evidence," in his letter of the 24th. But, besides that phrase, it is not conceivable that Mr. Adams's letter of the 22nd should have remained altogether without acknowledgment until the 28th, as on the face of the papers it would seem to have done; and whether or not Mr. Adams received a verbal communication of the opinion, he would at any rate hear it from the United States' consul at Liverpool, to whom its effect, in the refusal to stop the ship, must have been immediately known. Hence, no doubt, it was that he took the opinion of Mr. Collier on the 23rd, and applied the final stimulus to the government by the transmission of that opinion enclosed in his letter of the following day. But, if this be so, Mr. Adams's expression, "in order that I may complete the evidence," which, as repeated by the Solicitor-General, must have aided in impressing on the House that he took all the time till the 26th to get ready that "evidence *on which he relied*," really conveyed to those who knew the facts the opposite meaning of an attempt to satisfy some who, in Mr. Adams's distinctly expressed judgment, ought to have been satisfied before. However this may be, two things stand out clearly: first, that Mr. Adams did, by the 22nd—even by the 21st, if we take the date of its communication to the collector at Liverpool, who had power to act—"get ready" that "evidence *on which he relied*;" secondly, that, since a government opinion was actually given on the 22nd, the only excuse which it remains possible to suggest for not stopping the *Alabama* is that the opinion given on that day was the right one on the evidence as it then stood. To the question whether this was so, we shall now address ourselves.

Now, that question is sufficiently answered by pointing out that the additional affidavits contain no facts of a different description from those deposed to in the former ones. They are the affidavits of a ship-carpenter and a mariner, who had been enlisted for the gunboat by Captain Butcher, her commander, in each case with full notice of her being built for the Confederate government; and in the case of the mariner, who had told the captain "that he wanted to get South in order to have retaliation of the Northerners for robbing him of his clothes," with an express intimation in reply, "that if he went with him in his vessel he would very shortly have that opportunity." But the seaman Passmore, one of the former deponents, had given still more direct evidence to the same effect.

"Captain Butcher asked me if I knew where the vessel was going; in reply to which I told him I did not rightly understand about it. He then told me the vessel was going out to the government of the Confederate States of America. I asked him if there would be any fighting; to which he replied, 'Yes, they were going to fight for the Southern government.' * * * The said Captain Butcher then engaged me as an able seaman on board the said vessel, at the wages of £4 10*s.* per month; and it was arranged that I should join the ship in Messrs. Laird and Co.'s yard on the following Monday. To enable me to get on board, Captain Butcher gave me as a password the number 290 * * There are now about thirty hands on board her, who have been engaged to go out in her. Most of them are men who have previously served on board fighting ships."

Well might the Solicitor-General confess that Passmore's evidence "was sufficient to prove material facts," and that the subsequent depositions merely "corroborated" him. Material, indeed! Why, besides the power which we have already quoted to seize a ship fitted out for a hostile service against alien friends, the fifth section of the Foreign Enlistment Act, to which the solicitor of the Customs did not refer, gives power to detain any vessel having on board persons enlisted or engaged within the kingdom for foreign military or naval service. Well, too, might so great an advocate feel that when the affidavits and the dates of their receipts were already in the hands of members, a case could only be made out for the government by labouring to show that Mr. Adams had not, on the 22nd, put them under the necessity of saying aye or no, whether they would act on Passmore's evidence. That the law officers should be consulted on the Monday, and that a telegram should be sent on the Tuesday to stop the ship, speaks well for their promptitude, though not better than all who know the Solicitor-General would expect. It is even possible that the defence might have been more candid, had any personal blame been in question. But, however that may be, when the vice of advocacy intrudes itself into questions of state, and especially when the finishing touch of its rhetoric is one of disdainful pity for a great and sensitive nation, with which, in this matter at least, no fault is to be found, it becomes a duty to expose it.

But the *Alabama* sailed on the eighth morning after the request to detain her was made to the collector at Liverpool, the morning of the day on which a tardy effort was made to prevent the expedition. Now the right of a foreign state, to claim satisfaction for the hostile use of a territory professedly friendly, depends in no way on the means of preventing such use which the government of that territory may possess. If the French had seized Antwerp, and were preparing an expedition from it against our shores, we should not refrain from hostilities in the Scheldt, because the kings of the Belgians and the Netherlands might demonstrate their perfect innocence of all complicity. If Canada were invaded by a party coming from the state of New York, our ambassador at Washington would treat with contempt any disquisition on the respective constitutional powers of the Federal and state governments. The answer would be: "Of your constitution we know nothing but this, that it points out the authorities at Washington as the only ones to whom we are allowed diplomatic access; to us, therefore, those authorities are answerable for all that takes place within the territories which, towards us, they claim to represent." And as little as foreign states are concerned with the relations between a federal government

and the members of the federation, so little are they concerned with the relations between a government and its individual subjects. Whether the central power be strong or weak, whether the bond of union between the elements of a nation be firm or loose, are questions for itself alone. The united responsibility of the nation to foreigners, for the amicable employment of its territory, is among the first principles of international law. We do not trouble ourselves with thorny questions of Brazilian law, when our citizens, not voluntarily landing in Brazil, but thrown on her coast by the common perils of the sea, receive there a treatment reprobated by the common voice of humanity. If our statute book should contain any provisions going beyond the received law of nations, as if an act should be passed to prohibit any traffic within British territory which is affected by no international doctrine but the chimera of passive contraband, an ambassador who should request our government to enforce it would be bound to accept it such as it might be. But, putting the case of the *Alabama* on the ground which he most properly took up from the first, Mr. Adams was in no way concerned with any limitations or imperfections of the Foreign Enlistment Act. He might even ignore the question as to what Lord Russell calls "the legal authority of the law officers."* We, indeed, have made up our minds on that question, and consider that, with the evidence we have quoted in his hands, a Foreign Secretary might, on July 22, 1862, have ventured to decide for himself that a hostile expedition was on the point of departure from our shores, and that the Foreign Enlistment Act applied to the case. Nay, we will venture to assert that the law officers are not more the constitutional advisers of the Crown in the law of the land, than its responsible ministers are in the law of nations; and that however proper a reference to the former may be on the effect of the Foreign Enlistment Act in a difficult point, or on prize law as actually administered in our Admiralty Court, yet a Chatham or a Canning would have held it his business to instruct the law officers, in case of need, in the duties of neutrality. But we must repeat that our duties to the United States in this matter are quite independent of our statute law and constitutional usage.

Such was the opinion of Mr. Canning, in the debates on the Foreign Enlistment Bill in 1819, and on the motion for the repeal of that law in 1823. He never put it as a boon to Spain; the law was wrung from him by a sense of duty, that the nation might fulfil obligations independently incumbent on her, while his keen sympathy was with the cause of the American colonies, to whose case it was first to apply. We have already seen how carefully the preamble appealed to the same argument, to justify a measure which would otherwise have been too alien to the principles of liberty to receive a moment's consideration from any government we have had since the revolution; and Mr. Canning's own words were these:—

"I do not now pretend to argue in favour of a system of neutrality; but it being declared that we intend to remain neutral, I call upon the House to abide by that declaration, so long as it shall remain unaltered. No matter what ulterior course we may be inclined to adopt; no matter whether, at some ulterior period, the honour and the interests of this country may force us into a war; still, while we declare ourselves neutral, let us avoid passing the strict line of demarcation. When war comes, if come it must, let us enter into it with all the spirit and energy which become us as a great and independent nation. That period, however, I do not wish to anticipate, much less desire to hasten. If a war must come, let it come in the shape of satisfaction to be demanded for injuries, of rights to be asserted, of interests to be protected, of treaties to be fulfilled. But, in God's name let it not come in the paltry, pettifogging way of fitting out ships in our harbours to cruise for gain.

"At all events, let the country disdain to be sneaked into a war. Let us abide strictly by our neutrality as long as we mean to adhere to it, and, by so doing, we shall, in the event of any necessity of abandoning that system be the better able to act with effect upon any other course which the policy of this country may require."*

This was the language of an English statesman, when the struggles were scarcely closed which had made international topics as popular in England as those of free trade have since become. The spirit in which the legislation of that day will now be enforced is a test of the temper which a long peace, at least with all our ancient and most dreaded foes, has engendered. We are bound to say, that there is at present no cause to be dissatisfied with that spirit, seeing the activity which, during the last few weeks, has been shown in detaining gunboats reasonably suspected of being built in contravention of the law. That a most unfortunate slip was made in the case of the *Alabama*, is widely admitted by well informed persons whose speech is not moulded to official accents. But if men in official positions will persevere in falsifying public doctrines in order to cover the consequences of that slip, they must not be allowed to do so without a protest, more especially in these days, in which the study of state papers and parliamentary discussions, as containing the elements of international law, has been so largely developed.

The old furniture of that science consisted mainly in compilations of treaties and the opinions of those who are called jurists, whence the curious result followed, that a writer, while a theorist to his contemporaries, became, almost by the mere fact that he had written, an authority to his successors. This procedure was justified by the plea of collecting testimonies to the consent of mankind, who, or at least the thinking portion of them were supposed to be governed on the whole by reason. But the criticism of the nineteenth century has detected philosophical partisanship and national prejudice even among the most respected of the elder jurists, and its prolific authorship has further diminished the authority of writers by increasing the numbers who claim to share it; and since, in truth, it is rather the consent of nations, than of men as individuals, which must decide, there is a still deeper reason why the utterances of private writers, no matter what their wisdom or their fame, cannot be reckoned with those of the statesmen who are specially deputed to manage this portion of the affairs of their respective countries. Especially since the close of the last general war, the cheapness of printing, and modern habits of publicity, have furnished large material for the kind of research which thus begins to distinguish international jurisprudence. Numerous cases which are made the subject of diplomatic correspondence, or of debates in public assemblies, but which neither give rise to treaties, nor would have become known in any authentic fashion to the writers of a century ago, are now recorded in the accumulating mass of published state papers. They illustrate international law in its daily working, as the laws of the land are illustrated by the experience of life, and supply that familiar knowledge of the matter with which its rules are concerned, without which he who should address himself to its more difficult questions would resemble a hermit brought from his desert into a strange city, to plead with book-learning a cause that turned on the manners of the place.

Nor need modern statesmen, as a class, fear the results of this publicity. They are not more warped by national interests and antipathies than the private writers of previous ages, who, moreover, were often put forward by their governments as unavowed and irresponsible champions. But as statesmen must now write and speak under a sense that they are furnishing quotations to generations of publicists yet unborn, so those who devote themselves to that line of research must be impartial, and as little connive at error as they would aid in propagating it. Their role must be that of Dante:—

* Letter to Mr. Adams, of January 24, 1863.

* Canning's Speeches, vol. v., pp. 62—2, 6 Hansard, N S, 1067.

"Ma per trattar del ben ch'ivi trovai,
Dirò dell' altre cose ch'io v'ho scorte."

We therefore point out for animadversion the attempt of Earl Russell to treat the case of the *Alabama* as analogous to "the accidental evasion of a municipal law of the United States by a particular ship;"* and the double error of the Solicitor General, in saying that "the Foreign Enlistment Act was passed for the defence of our neutrality against any invasion of it by other powers, and not in consequence of any obligation imposed on us;" and in representing the case of the Alabama as one simply of the sale of an instrument of war. The latter assumption runs through his whole speech, and comes to the surface in passages too numerous to cite, but of which the following may be taken as a sample:—"In the present instance, the sale of a vessel of war is an offence purely because our own law has declared it to be so." In fact, he altogether ignores the question of the hostile use of neutral territory, as the starting point of expeditions, and the base of their operations. So complete a preterition of a point often and clearly put by Mr. Adams, by an advocate whose intelligence never misses the force of an argument, and whose subtlety we never before knew at fault for an answer, is the highest testimony which we could have imagined to the strength of his adversary's case.

"It is clear," said Mr. Adams, in his letter to Earl Russell of November 20, 1862, "that the reciprocation of such practices could only lead in the end to the utter subversion of all security to private property upon the ocean. In the case of countries geographically approximated to one another, the preservation of peace between them for any length of time would be rendered by it almost impossible. *It would be, in short, permitting any or all irresponsible parties to prepare and fit out, in any country, just what armed enterprises against the property of their neighbours they might think fit to devise*, without the possibility of recovering a control over their acts the moment after they might succeed in escaping from the particular local jurisdiction into the high seas."

And again, in his letter to the same minister of December 30, 1862:—

"The only allegation which I find in your lordship's note in connexion with the United States is this, that vast supplies of arms and warlike stores have been purchased in this country, and have been shipped from British ports to New York for the use of the United States government. Admitting this statement to be true to its full extent, conceding even the propriety of the application of the term 'vast' to any purchases that have been made for the United States, the whole of it amounts to this, and no more, that arms and warlike stores have been purchased of British subjects by the agents of the government of the United States. It nowhere appears that the action of the British went further than simply to sell their goods for cash. *There has been no attempt whatever to embark it in a single undertaking for the assistance of the United States in the war they are carrying on;* no ships of any kind have been constructed or equipped by her Majesty's subjects for the purpose of sustaining their cause, either by lawful or unlawful means, nor a shilling of money, so far as I know, expended with the intent to turn the scale in their favour. Whatever transactions may have taken place have been carried on in the ordinary mode of bargain and sale, without regard to any other consideration than the mere profits of trade * * * My present object in referring so much at large to these offences is to show the great injustice of your lordship in proceeding to comment upon the action of the respective belligerents as if there was a semblance of similarity between them. So far as the United States are shown to be involved in censure, it is simply by the purchase and export of arms and munitions of war from a neutral—an act which your lordship expressly points out eminent authority to my attention to prove implies no censurable act on either party; whilst, on the other hand, it is American insurgents who find British allies to build, in this kingdom, and to equip and send forth war-ships to depredate on the commerce of a friendly nation. * * * * Surely this is a difference not unworthy of your lordship's deliberate observation."

This was no novel line of argument, and Earl Russell admitted its force. In his letter to Mr. Adams of January 24, 1863, after repeating the attempt to prove that the government had acted with sufficient promptitude, his lordship proceeds thus:—

"As to other points we are nearly agreed, so far as the law of nations is concerned. But with respect to the statement in your letter that large supplies of various kinds have been sent from this country by private speculators for the use of the Confederates, I have to observe that that statement is only a repetition, in detail, of a part of the assertion made in my previous letter of the 19th ultimo, that both parties in the civil war have, to the extent of their wants and means, induced British subjects to violate the Queen's proclamation of the 13th of May, 1861, which forbids her subjects from affording such supplies to either party. It is no doubt true that a neutral may furnish, as a matter of trade, supplies of arms and warlike stores impartially to both belligerents in a war, and it was not on the ground that such acts were at variance with the law of nations that the remark was made in the former note. But the Queen having issued a proclamation forbidding her subjects to afford such supplies to either party in the civil war, her Majesty's government are entitled to complain of both parties for having induced her Majesty's subjects to violate that proclamation; and their complaint applies most to the government of the United States, because it is by that government that by far the greatest amount of supplies have been ordered and procured."

It is rather strong, because a belligerent does not close his ports against contraband, to refuse to him the common duties of neutrality. And we find it hard to follow Lord Russell's reasoning about the Queen's proclamation. We have always understood that the sovereign of this realm can make nothing illegal by proclamation. So far, then, as the supply of arms and warlike stores to belligerents is not at variance either with the law of nations or with the statute law of England, a proclamation forbidding it must be a nullity; and it is not respectful to the sovereign to interpret in such a sense any proclamation which may have been issued. If, therefore, his lordship is not devoted to the theory of passive contraband—and the correspondence in this case sufficiently proves that he is not guilty of that heresy—we submit that he ought not to have expounded the Queen's proclamation as forbidding the sale of arms and warlike stores within the limits of her Majesty's dominions.* It was a desperate effort to cover, by recrimination, an unlucky practical slip, and we are happy to think that it does not interfere with the value of his lordship's recognition of the difference between common purchases in the markets of the world and the hostile use of neutral territory. We therefore leave this case with the confident

* Letter to Mr. Adams, of December 19, 1862, in Correspondence respecting the *Alabama*.

* The truth about the proclamation is simply this: it commands the Queen's subjects in general terms to observe a strict neutrality, and to abstain from violating either the law of the realm or that of nations, and it warns them of the consequences of certain specified acts, of which the carriage of contraband, but not its sale, is one. This is not what any one would understand from such an account of the proclamation as is given in Lord Russell's statement, that it "forbids the affording supplies." But let the expression pass. In substance, if his lordship refers to the *carriage* of contraband, the result is that, since no belligerent can really be expected to close his ports against that kind of commerce at the moment when he most needs it, any power may free itself from the obligations of neutrality by warning its subjects against the penal consequences of carrying contraband. And, if his lordship refers to the *sale*, then his statement that the proclamation forbids it must rest on the assumption that it is either a violation of neutrality, or of the law of England, or of the law of nations, every one of which things his lordship says repeatedly in this correspondence that it is not. We do not, therefore, positively insist on the suggestion in the text of a disrespectful interpretation of the Queen's proclamation. A theory at least equally plausible is that no intelligible interpretation at all is put on it in that memorable part of the correspondence which begins with the sentence—"With regard to the claim for compensation now put forward by the United States' government, it is, I regret to say, notorious that the Queen's proclamation of the 13th of May, 1861, enjoining neutrality in the unfortunate civil contest in North America, has in several instances been practically set at nought by parties in this country."—*Earl Russell's letter to Mr. Adams of December 19, 1862.*

belief that, memorable as it will remain among the precedents of international law, the sophistry which has been expended on it will not weaken any principle of that important science. —*Law Magazine and Law Review.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office"

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 178).

In case of the separation of a junior county from a union of counties, or the proceedings of any of the Division Courts of a senior county be transferred to any other Division Court, upon the order of the Judge, the clerks, or other officers of the courts, who hold writs or court documents, are required to deliver the same to such person as the Judge directs; and in case of refusal to do so, the clerk or officer in default is liable to be prosecuted in the same manner as persons wrongfully holding papers, may be proceeded against under section forty eight (sec. 12).

BAILIFF'S DUTIES.

As in the case of clerks, the details of a bailiffs' duty in respect to proceedings in the courts, will be fully treated of hereafter. The duties, generally, of bailiffs, are purely ministerial, and are to serve and execute all summonses, orders, warrants, and precepts delivered to them by the clerk for execution, whether bailiffs of the court out of which the same issue or not, and so soon as served, to return to the clerk of their own court (sec. 79). They may take confessions or acknowledgements of debt from any debtor or defendant desirous of executing the same (sec. 117). They must attend the sittings of the court, and see that order is preserved thereat; and every bailiff is required to exercise the authority of a constable during the actual holding of the court of which he is bailiff, with full power to prevent breaches of the peace, riots, or disturbances, not only in the court room or building in which the court is held, but in the public streets, squares, or other places within hearing of the court, and may, with or without warrant, arrest offenders, and bring them, for punishment, before a Justice of the Peace, or any other judicial officer having power to proceed in the matter (sec. 183).

In case the bailiff be assaulted while in the execution of any part of his duty, or any rescue be made or attempted of any property seized by him, under process of the court, he is authorised to take the offender into custody, with or without warrant, and bring him, for punishment, before the court, if sitting, or before a Justice of the Peace (sec. 184).

The general rules make specific provision in relation to the execution of process.

By the 11th Rule, a return must be made by the bailiff, to the clerk, of all summonses from the home court four days before the court day, at which they are returnable; and the returns must state the mode of service; and if a summons has not been served, the reason of non-service must be stated in writing, on the back thereof. Return of foreign summonses—that is, summonses from other courts—ought to be made immediately after service is effected, to allow time for their transmission to the court from which they issued.

Rule 21 is as follows:—"Where summons or other "process is required to be served out of the division of the "court, from which the same issues, the papers may be "transmitted by mail by the clerk issuing the same, (on "receiving the necessary postage and fees) to the clerk of "the division where the same is required to be served; and "such last mentioned clerk shall forthwith deliver such "summons or other process to the bailiff of his division, to "be executed; and such bailiff shall serve the same, and "forthwith make return thereof to the clerk of his court, in "the manner required by the eleventh rule; and such last "mentioned clerk, on return made, shall forthwith transmit "the papers by mail, with the necessary affidavits of service, "if effected, to the first-mentioned clerk."

In respect to executions, Rule 12 provides, that "Every bailiff levying and receiving any money by virtue of "any process, shall, within three days after the receipt "thereof, pay over or transmit the same to the proper "officer; and at every court, and at such other times as the "Judge shall require, the bailiff shall deliver to the clerk "of the court a statement or return, on oath, pursuant to "the form in the schedule, of what shall have been done "since his last return, under every warrant, precept, and "writ of execution, which he shall have been required to "execute."

This return must show the number and style of the cause—the nature of the process, and when received—the amount to be made—the amount levied, and when levied—the bailiff's charges—the amount paid to the clerk, and the time of payment.

To insure punctual discharge of this branch of the officer's duties, sec. 53 of the Act provides that if the bailiff neglects to return any process or execution within the time required by law—and the rules which have the force of law show when returns are to be made—he shall, for each such neglect, forfeit his fees thereon, which fees

the clerk must account for, and pay over to the county attorney of the county towards the fee fund; and by sec. 148 a bailiff neglecting to return an execution within three days after the return day thereof, or making a false return, may be held accountable for the whole amount of the execution.

It may be noticed, here, that a bailiff is not *required* to travel beyond the limits of his division, and is not allowed mileage for travel beyond the limits of the county (sec. 79).

UPPER CANADA REPORTS.

COURT OF ERROR AND APPEAL.

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

(*Reported by* ALEXANDER GRANT, Esq., *Barrister-at-Law*)

[Before the Hon. ARCHIBALD McLEAN, Chief Justice; The Hon. P. M. VANKOUGHNET, Chancellor, the Hon. W. H. DRAPER, C.B., Chief Justice (Common Pleas); the Hon. Vice-Chancellor ESTEN, the Hon. Vice-Chancellor SPRAGGE, the Hon Mr Justice HAGARTY,*; and the Hon. Mr. Justice MORRISON.]

SEXTON v. PAXTON.

Ejectment—Question of Boundary—Costs

Held, per Curiam—Affirming the judgment of the Court below, that in an action of ejectment, the question of boundary may be tried to ascertain whether the land in question formed part of the lot claimed by the plaintiff (DRAPER, C. J., and MORRISON, J., dissenting.)

Where the Court of Queen's Bench and Common Pleas had given opposing judgments on the same question this Court, on affirming one of those judgments, dismissed the appeal without costs.

From the pleadings and evidence it appeared that the appellant brought ejectment in the Court of Queen's Bench, to recover from the respondent seven acres, two roods, and twenty perches of land, being a portion of lot ten, in the twelfth concession of the township of Scugog, formerly Cartwright, and which piece of land may be better known as follows: commencing at a post planted by W. E. Yarnold, P. L. S., on the fifth day of June, one thousand eight hundred and sixty-one, at the north-west angle of said lot, then south sixteen degrees east, thirty-five chains, more or less, to the centre of the concession, then north seventy degrees, east two chains, twenty-five links, to a certain blazed line, thence along the said line north thirteen degrees, west thirty-five chains, more or less, to the rear of the concession, then south seventy-four degrees, west two chains, six links, to the place of beginning.

The respondent appeared and defended for the whole of the said premises.

The appellant claimed title by deed, from the executrix and executors of the last will and testament of John Tucker Williams, the grantee of the Crown.

And the respondent, besides denying the appellant's title, claimed the said parcel of land as part of lot number nine, in the twelfth concession of said township

The ownership of lots numbers ten and nine, by the appellant and respondent respectively, was admitted at the trial, when His Lordship, Mr Justice RICHARDS, before whom the trial was had, ruled that a verdict should be entered for the appellant, as he could only be entitled to recover, by his writ of possession, the land if it formed part of lot number ten, which was admitted to be his: and if it was part of lot number nine, the verdict and judgment to be entered thereon would not authorise him to take possession of it, and that an action of ejectment was not the proper form of action to try a question of boundary.

This verdict, the court in banc set aside, on the ground that the respondent ought to have been permitted to shew that the land claimed by the appellant was not part of lot number 10, as reported in the U. C. Q. B. Rep., vol. xxi., p. 382.

From this decision, the plaintiff in the court below appealed on the ground stated by the learned judge, for his ruling at *nisi prius*.

On the appeal coming on,

M. C. Cameron, for appellant, referred to *Lund* v. *Savage*. *Lund* v. *Nesbitt*, 12 (C. R. U. C.) 13, and *Irwin* v. *Sager*, 21 U. C. Q. B., 373, as containing all the cases bearing on the question involved in this appeal

J. Hillyard Cameron, Q. C., contra.

VANKOUGHNET, C.—I agree in the judgment delivered in the Court of Queen's Bench, upon the question submitted to us in this case. I think that the statute 19 Vic., ch 43, made no change in the office of the action of ejectment; indeed, section 271 of the act expressly preserves the same jurisdiction as was exercised in the old action of ejectment, and such change as is effected in the form of procedure is more favourable to the procuring, by the plaintiff, of the trial of a question of boundary, than was the old process: for, what does the present writ in ejectment enable the plaintiff to do? While it requires him to describe the premises of which he seeks possession with reasonable certainty, it enables him to set them out with great particularity, just as was done in the present case, and to obtain a judgment, which shall declare that the claimant "was, and still is, entitled to the possession of the land within mentioned, as in the writ alleged." So that if, as in the present case, the defendant was not permitted to shew that the portion of land to which plaintiff claims to be entitled, as being part of lot ten, which he owns, is really not part of lot ten, but part of lot nine, then all a plaintiff need do now, in any case in which he seeks to get into possession of another man's land, is to describe it by metes and bounds, as being part of a lot to which he has an indisputable title, and either on production of that title, or because it is not denied, obtain a solemn judgment of the Court, entitling him to possession of the particular premises which he describes in his writ, and under that judgment obtain possession of it, through the process of the Court. Could an action of trespass be afterwards maintained against him or the officer who put him in possession, for the act of taking possession under such authority? *Wilkinson* v. *Kerby*, 15 C. B., 430. In the old action of ejectment, every thing was at large, unless the defendant chose to confine the dispute to certain described premises The plaintiff had no object in narrowing them in his declaration, (though he might have done so, and have thereby directly presented a question involving boundary), and when the matter was left at large by the defendant, and the plaintiff showed title to any portion of the land covered by his declaration, he obtained a verdict, and took possession, at his peril, of more than his title covered But, here the plaintiff, by his writ, challenges enquiry into his title to, and right to possession of the piece of land particularly set out, by reason of his being owner of lot ten, and of this piece of land forming part of it—a double proposition, which, it seems to me, the defendant is invited to combat Under the statute it is expressly provided that at the trial it shall be a question whether the "Claimants are entitled to the whole or part, and if to part, then, to which part of the property in question?" and judgment is to be entered accordingly. How can this be done without trying the question of boundary? An action of ejectment is essentially a possessary action. Whatever a plaintiff's title may be, if he has not a right to the possession of the land at the time of action brought, he cannot recover. It is known as an action of trespass and ejectment. Indeed, the ouster, the act of trespass was the very foundation of the old form of action; and whereas a simple action of trespass, which can be supported by precisely the same evidence of title, would only give damages—an action of trespass and ejectment would give damages (in modern times only nominal, it is true,) and possession also. The action of ejectment was, as we all know, a fictitious proceeding, invented for the relief of termors who had been ousted of their possession; and originally questions of freehold title were not raised in it, but were left to be dealt with in real actions. In time, however, while the form of claiming by virtue of a term continued to be presumed, titles of landlords to the fee, came to be asserted in it. I have alluded to so much of the origin and early character of the action to shew that it was not originally intended as a means whereby titles to freehold should be tried. And yet, as I understand, it is now contended that nothing but a title can be tried in the action, and that you cannot in it enquire whether the title produced does, or does not, fit the particular piece of land in question. However rare may have been in England the instances in which a dispute as to boundary has been waged by means of this action, it is beyond doubt that such

* Was absent from the Province when judgment was pronounced.

an use of it has been made in this country for a long period of years, and for this no higher authority can be found than the judgment of that great and lamented judge, the late Chief Justice of the Queen's Bench, as reported in *Irving* v. *Sager*, 21 Q. B. 373. I need do no more on this head than refer to that report. We must take the Legislature to have known what was the law and practice of the courts, when they framed section 274 of the act already mentioned, and to have referred to our own courts, and the jurisdiction which had been exercised by them; and this, of itself, seems to me to settle the question. That ejectment is an inconvenient mode of trying such a question, and is, therefore, seldom, for that purpose, used in England, I admit, as it is not conclusive; but the same objection exists to trying a title in this form of action. A judgment in it is no more conclusive in the one case than in the other, and yet, there must be something tried in the action. Its principal object is to get possession of a particular parcel of land; and the plaintiff must either be compelled to adopt a less precise mode of description than he has done here—as, for instance, by claiming merely lot 10—to which claim no defence would have been made; or the defendant must, in justice, be allowed to shew, by any means he can, that the plaintiff is not entitled to the possession of the parcel described. To deny him this right would be to place him at the mercy of the plaintiff, and probably to allow the latter, by a fraud and an untruth, upheld by the process of the Court, to get his neighbour's property. It is not sufficient satisfaction to a defendant who has had his hands tied while this wrong is being committed on him, and he has, perhaps, been turned out of his dwelling house, to know that, in six months time, he can get into it again by, first, an action of trespass, to settle a question of boundary, which the plaintiff has, perhaps, improperly raised for his own purposes; and then, by an action of ejectment—or, by the latter action alone—inasmuch as the action, at the suit of the plaintiff, is not conclusive on the right. I think the Legislature, when they enacted "that the question at the trial shall be, whether the *statement* in the writ of the title of the claimant is true or false," meant something more than the mere enquiry into a title to lot 10, for instance, as in this case: they meant the enquiry to extend to the plaintiff's whole statement; and part of that statement here is a claim to a piece of land as being part of lot 10, and this, and only this, the defendant denies; and it is, therefore, the only question between the parties.

DRAPER, C. J.—I adhere to the judgment of the Court of Common Pleas in *Lund* v. *Savage* and *Lund* v. *Nesbitt*. The reasons for that judgment are fully expressed in the report in 12 C. P. U. C. 143. I need not here repeat them, for I have only to say that, in my humble opinion, they have, as yet, received no answer. There were but two substantial difficulties in that case, one arising from the enactment respecting improvements made by parties on land not their own, though believed to be so in consequence of unskilful surveys; the other arising from the practice which obtained in this Province, under the old form of the action of ejectment.

The first was, as I think, successfully dealt with in the judgment referred to. The difficulty was more easy to be got over, in the opinion of the Court, than those which the construction contended for under the Common Law Procedure Act, gave rise to. The latter was not considered by any of the Court of the importance which has been given to it.

So long as the action of ejectment was fictitious—moulded and governed by rules of Court—it was open to the power which created, to modify its own work. In Upper Canada, however, the deviation from the ordinary consent rule, which was without precedent or authority in English cases, seems to have introduced, without the sanction of the Court, in the first, though it was subsequently adopted and acted on. But I believe I am right in stating that there never was a general rule of Court introducing or sanctioning the innovation by which, when a plaintiff declared in ejectment for (*ex. gr.*) No. 1, in the 1st Con., the defendant in the consent rule could not, admitting possession as the general rule required, state that he was in possession of a specified piece of land which he claimed and defended for as part of No. 2. From the time this change was established, it became, practically, the rule to make the question of title entirely subservient and secondary to the question of boundary; and the practice so established, had its advantages for surveyors and for attornies, and for those suitors who did not count the cost of litigation, however often renewed. I repeat, however, that for this practice, neither reported cases of English Courts, nor text books of English writers, affords either precedent or authority.

And this practice was unchallenged until after the passing of our Common Law Procedure Act. Not that the objectionable results of it were undiscovered or unfelt, but from a deference to the authority which permitted it to grow up, and finally had recognised and sustained it.

With an exception, which I will presently notice, our Common Law Procedure Act of 1856, was, as to the ordinary action of ejectment, a transcript of the English statute. That an act of our Legislature, identical or nearly so in language with the English act, should mean the same thing, and should receive the same construction, is, I humbly submit, a reasonable expectation, more especially when we draw upon English authority, as upon the fountain from which our jurisprudence is derived. If the effect of the plain language of the act is to alter the practice and proceeding which was previously in use, then, we are bound by the expression of Legislative will, and no argument can be solidly based upon previous practice. The Courts may sanction a departure from their own rules, or an addition to what such rules prescribe, but the Courts have no power to add to or vary an act of Parliament; nor to add to the simple appearance which the statute directs; qualifying or varying matter, tending to raise a different question from that which the statute directs, namely, whether the statement in the writ of the title of the claimant be true or false. It is admitted that if the claimant proves title to a single inch of that which *he claims* in his writ, he must recover; that admission appears to me fatal to the contention that defendant can add anything to his appearance except the notice that he defends for part only, which is to form part of the issue to be tried. Up to this time I have not doubted that an appearance which contained additional matter was irregular, because, all the statute authorizes is, that the defendant may appear as he may in any other action: it goes no further, and impliedly, at least, prohibits more.

The exception I have above adverted to is the requirement that each party shall give to the other notice of the title on which he *means to rely at the trial*. I have not succeeded in extracting from this enactment any foundation for an opinion that our Legislature intended to depart from the English act, and to sanction mere questions of boundary being tried under the name or colour of disputes of title. That a claimant may so frame his writ of ejectment as to mix, inseparably, the questions of title and boundary, I do not, and did not, in the judgment referred to, deny. But the defendant can always obtain an order for better particulars of the land claimed, and has some authority in one judgment, at least, of the Court of Queen's Bench, for asking that the number of the lot, or other name of it—when it has one derived from public authority—should be given; and if the plaintiff then claims a lot, or part of a lot, to which the defendant has no title, he is under no necessity to defend. He never need be embarrassed by a want of reasonable certainty in the description in the writ, for, if that exists, the statute provides him a remedy; and this affords an answer to any suggestion of unfair advantage that an unscrupulous plaintiff, with the aid of a tricky attorney, might try to obtain.

I will only add that I have endeavoured, but in vain, to discover how the section which provides what the effect of a judgment in ejectment under our statute shall be, can influence a decision as to what it was intended by another section, should be the question raised at the trial.

If, after the most careful and repeated consideration, I felt any doubt as to the opinion I have formed, I would have let this case be disposed of without making an observation. The real doubt which the decision of this Court tends to create in my mind, is my ability to arrive at a right conclusion, and hence, must arise a distrust of my own judgment, embarrassing during the period, be it longer or shorter, during which I may continue in my present vocation. I may be excused from saying that if I stood alone in my opinion, this distrust would have been painfully increased. My opinion is shared by three of the present Judges of the Courts of Common Law. I submit, as in duty bound, to the authority of this tribunal, but I have not been able to add conviction to submission.

ESTEN, V. C.—I think the judgment should be affirmed with costs.

It appears that a practice had grown up in this country of trying questions of boundary by means of an action of ejectment. I think the late act makes no difference in this respect. By the 21st section, I consider that the writ and notices annexed to it are incorporated for the purpose of affording a statement of the plaintiff's title; and the question to be determined, at the trial is, whether their statement is or not true In the present instance, if we take the writ and the notices together, we shall see that the plaintiff shews a title, by his notice, only to lot 10; but not at all to the piece of land in dispute: by his writ, however, he shews a title to that as part of lot 10; and the title, as claimed, is composed of a right to lot 10, and a right to the piece of land in dispute as part of that lot; and the question to be determined at the trial was whether that claim was or not true. The plaintiff, who did not simply claim lot 10, has, by the form of his claim, raised a question of boundary, and the defendant, only meeting him on his own ground, ought, I think, to have been allowed to prove his case.

SPRAGGE, V. C., concurred in the opinion delivered by V. C. Esten.

MORRISON, J., agreed with the views expressed by His Lordship the Chief Justice of the Common Pleas.

MCLEAN, C. J., suggested that as the courts below had come to different conclusions on the same question, it was a proper case in which to dismiss the appeal without costs, although on dismissing appeals the practice was almost uniform to give to the successful party, his costs of the appeal.

Per Curiam.—Appeal dismissed without costs. [DRAPER, C. J., and MORRISON, J., dissenting.]

RICHARDS, J., who was present when judgment was delivered, stated that having been absent on the argument of the appeal, he could not give any judgment. At the same time stating that subsequent consideration of the point had failed to change his views, and that he adhered to the opinion delivered by him in the cases referred to by his Lordship, the Chief Justice of the Common Pleas.

COMMON PLEAS.

(*Reported by* E. C. JONES, *Barrister-at-Law, Reporter to the Court.*)

CRAWFORD v. BEARD ET AL.

Contract—To pay money in Cleveland—Payment into court—Payment in Canada funds—Pleading.

The declaration claimed a sum of money upon the common counts. The defendants pleaded as to goods sold and delivered, a contract entered into for the purchase of 724 tons of coal at $2 75 per ton, that the amount due thereon, $1991, was payable to plaintiff at Cleveland; also another quantity of 284 tons, payable in $804 of current money of Canada; and as to the money due in Cleveland they bring into court $1314.06 of lawful money of Canada, and say the same is sufficient to satisfy the plaintiff's claim.

To this the plaintiff demurred, because the plea admitted a cause of action for a certain sum, and pleaded payment of a smaller sum in satisfaction. *Held*, that upon this plea the only question was whether the sum paid into court was equal in value to the amount admitted to be due the plaintiff which, being a matter of fact to be tried by a jury, the defendants were entitled to judgment.

(C. P., H. T., 26 Vic., 1863.)

Declaration for goods sold and delivered; goods bargained and sold; money lent; money paid; money received; interest and account stated.

Plea.—Except as to the claim for goods sold and delivered and for interest—never indebted, and as to the claim for goods sold and delivered and for interest—that the said goods were a quantity, to wit, 724 tons of coal, sold and delivered to defendants under a contract to deliver and accept the same at Cleveland in the United States of America, and defendants agreed to pay and plaintiff to accept for said coal, two dollars and seventy-five cents per ton That $1991 was the amount so payable for the 724 tons, which amount was to be paid to plaintiff at Cleveland in the said United States. And also another quantity, to wit, 284 tons of coal, which was sold and delivered by virtue of another contract, to be delivered and accepted at Cleveland aforesaid, and plaintiff agreed to accept, and defendants agreed to pay, $804, of lawful money of Canada, for the last mentioned coal. That the interest mentioned in the declaration is the interest on the said sums of $1991 and $804, and amounts to $42 05. And so the defendants say that except as to the sum of $1991 of lawful currency of the United States of America, which said sum of $1991 of lawful currency of the United States of America is equal in value to $1314.06 of lawful money of Canada, and the said sum of $804 of lawful money of Canada, and the said sum of $40 of lawful money of Canada, making in all the sum of $2152 of lawful money of Canada, they were never indebted, and they bring into court $1158.06, and say the same is enough to satisfy the plaintiff's claim.

Demurrer to this plea, because it admits the plaintiff's cause of action to a certain amount, and shews no answer except bringing into court a much smaller sum in discharge thereof.

Eccles, Q. C., supported the demurrer.

Anderson and *Crombie*, contra, referred to *Eakins v. East India Co.*, 1 P. W. 396.

DRAPER, C. J.—Whether the sum of $1991 of lawful currency of the United States of America is equal in value to $1314 06 of lawful money of Canada and no more, as the plea affirms, is a question of fact and not of law. It is true each sum of money is expressed in dollars, but unless we can judicially notice the value of a dollar in the United States, we can neither say that the plea is good as a matter of fact, if its truth be denied nor that it is bad, because the sum brought into court is less than the sum in answer to which it is pleaded We know that a dollar of lawful money of Canada is to be held to be equivalent to and to represent ¼ of 101-321-1000, grains troy weight of gold of the standard of fineness prescribed by law for the gold coins of the United Kingdom, on the 1st of August, 1854. We know also that the gold eagle of the United States, coined before the 1st of July, 1834, and of a certain weight, is a legal tender in this province for $10 662-3-100, and that the gold eagle of the United States, coined after that date and before the 1st of January, 1852, or after that day, but while the standard of fineness for gold coins then fixed by the laws of the United States remains unchanged, is a legal tender in this province for $10, but it does not follow that, at the time the payment to be made under the contract pleaded fell due, or at the time of plea pleaded the dollar in the United States and the dollar in Canada were of the same value. The similarity of the name of the coin affords no criterion of identity of actual or of current value. The English shilling and the Irish shilling were formerly of different values, and the shilling of Halifax currency and that of New York currency were similar only in name, and whatever the par of exchange between the two countries may be, the rate of exchange may be wholly different, and would, if different, affect the amount in our money necessary to pay a similar nominal amount in the United States.

Looking at the whole plea, it appears to me substantially to aver that the value of the money brought into court is equal in value to the amount admitted to be due to the plaintiff; whether it is or not, is, I think, clearly a question of fact, and therefore the defendant must have judgment on this demurrer.

It is not improbable from what fell during the argument, that there is a confusion of ideas, between a money payment and a payment in notes or bills of some sort, which are of much less current value than money. The demurrer presents no such question, and the contract is stated to be that defendant should pay $2 75 for each ton of coal at Cleveland in the United States. *Primâ facie* this imports a payment in money and not in some substitute for, or representative of, money.

Per cur.—Judgment for defendants.

HAMILTON ET AL v. HOLCOMB.

Judgment—Power of attorney—Assignment for benefit of creditors—Execution of, under power of attorney.

The plaintiffs in this action executed a power of attorney authorising one J. H. to take such proceedings as he should think proper to secure, or for the recovery of a judgment and to accept any security for the whole or any part of the same, and upon such terms as should seem meet, and to give time for payment and to execute and do all agreements, deeds, matters and things that might be expedient or necessary in the premises.

Under this power of attorney J. H executed a deed of assignment dated the 20th of July, 1858, which contained a releasing clause from all those creditors who should execute the same.

This action was brought to recover the amount of this judgment, to which the defendants pleaded the release executed under the above power of attorney.

Held, that by the power of attorney no authority was given to the attorney to compromise or accept a part in satisfaction of the whole, the general words therein applying only to what immediately precede them, that is, the accepting of security, and the giving of time. And therefore the defendants were not released.

Debt on judgment recovered by the plaintiffs on the 12th of January, 1858, against defendant, John McPherson and Samuel Crane, for £505 11s. 8d., with £19 7s. 6d. costs.

Pleas.—1. That the said judgment was not, at the commencement of this suit, and is not unsatisfied. 2nd. That after the said judgment was recovered there was a deed, bearing date on the 2nd January, 1858, but executed by plaintiffs after the recovery of the said judgment, made between the said McPherson and Crane of the first part, the wives of the said McPherson and Crane of the second part, Thomas Kirkpatrick of the third part, and the several other persons creditors of the said parties of the first part who should subscribe their names and affix their seals thereto of the fourth part. That the plaintiffs become parties thereto as parties of the fourth part as creditors of McPherson and Crane for and on account of the judgment so recovered by signing and sealing the same, and did thereby release McPherson and Crane from all actions, suits, claims and demands, in respect of the judgment and of the demand thereby secured. 3rd. That before action the judgment was satisfied in this, that the plaintiffs, on the 1st of July, 1858, caused a *ca. sa.* to be issued against the said John McPherson in satisfaction of the judgment, by virtue whereof the said John McPherson, one of the defendants in the judgment declared upon, was arrested and detained in close custody in satisfaction of the said judgment, until he was by the authority of the plaintiffs discharged from custody by the sheriff, whereby the said judgment was satisfied.

Replication.—Demurrer to the third plea.

Issue was taken on all the pleas.

2nd replication to the second plea on equitable grounds, that the judgment was recovered by plaintiffs on a bill of exchange drawn by the now defendant upon and accepted by McPherson and Crane for the accommodation of the now defendant, that McPherson and Crane received no value for such acceptance, and were only sureties for the now defendant; that the debt for which the judgment was recorded was and is the debt of the now defendant; and that since McPherson and Crane made the assignment in the 2nd plea mentioned the plaintiffs have not received any dividend under the assignment, nor any money or property whatever on account of said judgment, and that the said judgment is not in whole or in part paid, satisfied, or discharged as against the now defendant.

2nd replication to third plea, on equitable grounds, that the judgment was recovered by plaintiffs on a bi. of exchange drawn by the now defendant upon and accepted by McPherson and Crane for the accommodation of the now defendant; that McPherson and Crane received no value for such acceptance, and were only sureties for the now defendant; that the debt for which the judgment was recovered was and is the debt of the now defendant; that after the arrest of the said John McPherson he applied for and obtained the benefit of the limits of the gaol, and while on the limits the plaintiffs consented to the discharge of the said John McPherson from such limits, which is the discharge from custody referred to in the third plea, and that plaintiffs did not receive, &c., as in the preceding replication.

The defendant demurred to these special replications. Judgment was given in favour of the plaintiffs on this demurrer, and in favour of the defendant on the demurrer to the third plea.

The case came on for trial at the assizes for York and Peel in October, 1862, before *Morrison*, J.

The first issue was withdrawn by consent of both parties. The defendant's counsel put in the deed of assignment dated the 2nd of January, 1858, which was set out in the second plea, by which McPherson and Crane (their wives joining for the purpose of relinquishing their respective claims to dower) conveyed to Thomas Kirkpatrick real and personal estate, effects and property described and designated in the said deed upon trust to convert the same into money, and to collect debts, and to be possessed of such money after paying the expenses incident thereto, and to the execution of the deed, and of the trusts thereby created, in trust, 1st, to pay all such charges and expenses. 2nd, to retain five per cent. as a remuneration. 3rd, to pay the debts of the then registered and execution creditors if any of McPherson and Crane, according to the priorities thereof. 4th, to pay all the other creditors of McPherson and Crane, parties thereto of the fourth part who came in and executed the deed within two months from the date, (the same having been tendered to them for execution, or notice thereof in writing having been delivered to them by the said T. Kirkpatrick,) and agree to accept such dividend as the residue of the estate will yield in full of their respective debts. Lastly to pay over the surplus to McPherson and Crane. Provided that the creditors, coming in and taking benefit under the trusts, do agree to accept the same in full satisfaction of their respective claims and demands against McPherson and Crane.

It was admitted that the plaintiffs executed a power of attorney under seal, which was produced, dated the 19th July, 1858, appointing the Hon. John Hamilton of Kingston their attorney to take such proceedings as he should thing proper for the securing or recovering the judgment on which the present action is brought, and to accept any security for the whole or part of the said judgment from the said defendants, and upon such terms as to him should seem proper, and to give time for payment, and generally to do whatever he should think fit in relation to the premises, and to execute and do all agreements, deeds, matters and things that might be expedient or necessary in the premises. It was further admitted that Mr. Hamilton executed the deed of assignment on the 20th of July, 1858.

It was then contended for the plaintiffs, that they were entitled to a verdict on the second issue, because the power of attorney did not convey authority to Mr. Hamilton to execute the deeds of assignment. That the release only operated as to those parties of the fourth part who came in and executed within two months, and generally that the assignment was void.

It was then agreed that a verdict should be entered on the 1st and 2nd issues, as they stood, (the first plea and issue being withdrawn, with leave to plaintiffs to move to enter a verdict for them on the first of these two issues, damages being assessed at £676 5s. 2d.

In Michaelmas Term, *R. A. Harrison* obtained a rule *nisi* that the verdict on the issue on the plea of release be entered for the plaintiffs on the leave reserved, on the three grounds taken at the trial.

Galt, Q. C., shewed cause. He contended that the language of the power of attorney authorised the execution of the indenture of assignment, and the release of the debt due on the judgment to the plaintiffs.

Harrison, contra, cited *Hogg* v. *Snaith*, 1 Taunt. 347; *Atwood* v. *Munnings*, 7 B. & C. 278; *Dick* v. *Gordon*, 6 Grant, 394; *Hesse* v. *Stevenson*, 3 B. & P., Lord *Alvanley's* judgment, page 374, as to the first point. As to the second, *Collins* v. *Reece*, 1 Coll. R. C. 675; *Lane* v. *Husband*,, 14 Sim. 656; *Raworth* v. *Parker*, 2 K. & J. 163; *Biron* v. *Mount*, 24 Beav. 642, reported also in 4 Jur. N. S. 43. The third point was given up.

DRAPER, C. J.—The power of attorney gives authority to use and take means and proceedings to secure or recover the debt, naming the amount; to accept any security of any nature or kind for the whole or any part of the debt on such terms and conditions as the attorney shall think proper; to give time for the payment of the whole or any part of the debt on such terms as the attorney shall think proper; and *generally* to do whatever the attorney shall think fit or expedient in relation to the *premises*, and to execute and do all agreements, deeds, matters, and things that may be expedient or necessary *in the premises*. While special powers are given to recover to take security and to give time, the two latter extending to the whole or any part of the amount due to the plaintiffs, there is no special power to compromise or to accept a part in satisfaction of the whole. The general powers are given expressly in relation to the premises, *i. e.*, to what had gone before.

General words cannot apply to anything as to which limited power is given, and in this case they can only extend to the cases in which a more general authority is requisite to give full execution and effect to the limited powers which are specially given. And therefore it seems to me that as the premises do not authorise the the attorney to make a compromise and to release the whole debt on payment of or obtaining security for a part, the general words will not convey such authority. So far as the intention of the plaintiffs is to be inferred from the language used, they do not appear to me to have contemplated the execution by their attorney of the deed of assignment and release. I am of opinion, therefore, that the plaintiffs are entitled to have this rule made absolute to enter a verdict for them on the issue on the second, *i. e.*, the plea of a lease by executing the deed of assignment to *Kirkpatrick*.

It is unnecessary to decide on the question arising from the fact that the deed (if duly executed at all) was not executed until after the expiration of the two months, limited. I am not at present prepared to decide in the plaintiff's favour on that ground. (See *Nicholson* v. *Tutin*, 1 Jur. N. S. 1201.)

Per cur.—Rule absolute.

CHAMBERS.

Reported by ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*

FLEURYNCK v. CLIFTON.*

Where a cause was referred to arbitration, costs of the cause to abide the event, and costs of the reference, in the discretion of the arbitrator, and an award of £4 was made in favour of plaintiff, the taxing master refused to tax costs subsequent to the making of the award, as division court costs only, and his decision was upheld.

(Chambers 22 Victoria).

This cause was referred to arbitration—the costs of the cause to abide the event, and the costs of reference to be in discretion of arbitrators.

The arbitrators awarded £4 to plaintiff, and that the costs of the reference should be paid by the parties equally.

Plaintiff obtained a judges order to enter judgment. The master on taxation allowed the plaintiff superior court costs, on moving for leave to enter judgment, and entering judgment, &c., and defendant took out summons in Chambers to show cause why the taxation should not be revised with costs.

BURNS, J.—The costs of which the defendant complains, viz., the entry of judgmeut, &c., amounting to £2 12*s.* 6*d*, are expenses incurred subsequent to the award, and incurred with a view to enforce payment of the amount awarded They have been taxed on the scale of the costs of the superior courts. Defendant thinks they should have been taxed as division court costs only. I know of no authority which obliges the master to adopt this lower scale of taxation, either in any act of Parliament, or in the rule of court; and, therefore, I decline to interfere. The defendant could easily have prevented all this by paying the award, and there would have been no necessity to apply to have it enforced. I discharge the summons with costs, as it is moved with costs.

CURRY v. TURNER.

Proceedings against prisoner—Rules of court 98–100—*Construction of.*

Defendant having been at large on bail when the verdict was obtained against him was rendered by his bail near the end of the ensuing term, and not having been charged in execution during that term, applied for his discharge *Held*, that he was not a prisoner, within the meaning of the rules of court, at the time of the trial, not having been in close custody, and the application was refused.

(Chambers, July, 1862.)

This was an application to discharge defendant from custody, on the ground that he was not charged in execution within the time fixed by the practice.

A verdict was taken for the plaintiff at the last Oxford assizes. The defendant was then out on bail. During the issuing term of Easter, on the 26th of May, he was duly rendered by his bail, and had since remained in close custody. Judgment was not entered until the 26th June, several days after the close of the term, and no *ca. sa.* had as yet issued. The summons for discharge was issued on the 1st of July, 1862.

HAGARTY, J.—Rule 99 of this province says:—"The plaintiff shall proceed to trial or final judgment against a prisoner in the term next after issue is joined, or at the sittings or assizes next after such trial or judgment, unless the court or a judge shall otherwise order, and shall cause the defendant to be charged in execution within the term next after such trial or judgment." This rule is exactly the same as the English rule of 1853.

The decision turns, in my mind, on the point whether this defendant can be considered a prisoner within the meaning of our rules. I have arrived at the conclusion that inasmuch as he was at large on bail when the trial took place, and was not rendered until near the end of the ensuing term, this application must fail. It seems clear to me, from a perusal of rules 98, 99, 100, that "prisoner" means an actual prisoner, and not a man delivered to bail to certain sureties. The words of the 98th rule speak of an order of a judge "directing the discharge of a defendant out of custody, upon special bail being put in and perfected."

In Robinson and Harrison's Digest, page 50, there is a note of an unreported case, *Jennings* v. *Ready*, Easter Term, 3 Vic., "where a prisoner, surrendered by his bail after judgment, applies for a supersedeas, the plaintiff not having charged him in execution in due time, he must shew when notice of render was given." *Thorne* v *Leslie*, (8 A. & E 195;) *Borer* v. *Baker*, (2 Dowl. P. C. 608;) *Baxter* v. *Bailey*, (3 M. & W. 415) in these cases it seems clear that it was only render that defendant was considered a prisoner under the rules.

The English practice may be found in Chitty's Archbold, 1155, 10th edition.

Had the defendant been rendered in the vacation before Easter Term, a different question would have arisen on the authority of *Borer* v. *Baker*.

I discharge the summons without costs.*

CROFTS v. MCMASTER ET AL.

Cause struck out at trial—Costs.

Where defendants' counsel was ready at the assizes, and the plaintiff's counsel not being prepared the cause was struck out, *Held*, that defendants were not entitled to costs for not proceeding to trial pursuant to notice, but that their proper course was to have insisted upon a nonsuit.

[Chambers, June, 1863.]

On the 22nd of May last the defendants obtained a rule of court that the master do tax them their costs, for that the plaintiff had not proceeded to trial pursuant to his notice, if it should appear to the master that costs ought to be paid.

This rule was duly served.

In reference to it the master he decided as follows:—

"I think costs cannot be allowed. Defendants should have moved for a nonsuit if they were ready to go on at *nisi prius*.

"22nd May, 1863." "C. C. SMALL."

The affidavit on which the rule issued stated,—That issue was joined on the 7th of March, 1863. That notice of trial was given thereon for the last assizes held at London on the 16th of March last. That the plaintiff did not proceed to trial nor countermand such notice in due time. That the record was struck out by the judge because the plaintiff was not ready to proceed with the trial.

John Wilson, Esquire, made affidavit that he was defendants' attorney in this cause: that he was present in court at the assizes when the record was struck out, the plaintiff's attorney not being ready to proceed with the trial, and assigning as a reason therefor the absence of a witness.

McBride, for defendants, now applied for an order upon the master to tax to the defendants their costs upon the above rule, and he contended that at any rate, where the defendant's attorney was present in court and ready to proceed with the trial, and the plaintiff's attorney was either not present or not ready to proceed, that costs of the day, or costs for not proceeding to trial pursuant to notice, might be taxed to him, for the judge might strike the cause out of the list in such a case, and that the defendants were not bound to have the plaintiff called and nonsuited.

He referred to the following authorities bearing upon the question: *Allott* v. *Rearcroft*, 4 D. & L. 327; *Morgan* v. *Fernyhaugh*, 25 L. T. Rep. 219, S. C., 11 Exch. 205; *Leech* . *Gibson*, 10 Weekly Reporter, 354.

ADAM WILSON, J.—It is said in Marshall's Law of Costs, p. 126, "In town causes the 'costs of the day' means only the costs of the last day when the record is withdrawn or the cause is made a remanet. But at the assizes the costs of the day are not confined to the day when the record is withdrawn, but extend to the whole assizes. Where upon a writ of trial notice was given for the 28th of October, and on that day the trial was adjourned to the 30th, and the same was subsequently adjourned to the 2nd and then to the 4th of November, and the writ was then withdrawn, a question arose whether the defendant was entitled to the costs of all the above days or only of the last day. The masters were of opinion that defendant was only entitled to the costs of the last day."

* The Editors have to thank the taxing officer of the Court of Common Pleas for a report of this case. It was overlooked at the time it was given, but is now published as being an important decision on a point of practice, by one whose judgment, in such matters, commanded the greatest respect.

* See *Brash* v. *Latta*, 5 U. C. L. J. 226.—EDS. L. J.

In Gray's Law of Costs, 371, "costs of the day" are said to be such costs which have been incurred by the party in preparing to try the cause according to notice as are thrown away and must be incurred over again for the purpose of a trial at a future time.

It has been the invariable rule of practice in this province that "costs of the day are all such costs which have been incurred by the party in preparing to try according to notice, as are thrown away and must be incurred over again for the purpose of a trial;" and to treat those costs which a party is entitled to where his opponent does not proceed to trial pursuant to notice as the costs of the day. These two expressions mean the same thing, and I do not think we are at all affected by the niceties that may exist in England about town causes and others, and whether tried at the sittings in term or out of term or at the assizes.

It is true by our C. L. P. Act, sections 205, 226, and 227, a distinction is made between town and country causes, but that is for the mere purpose of providing for the extra assize which takes place in the city of Toronto and in York and Peel.

The course of proceeding at the trial is stated to be as follows, in the 11th Edition of Archbold's Practice, 381: "The attorneys for the plaintiff and defendant should take care to be in court with their evidence and witnesses in readiness when the cause is called on; otherwise, if the plaintiff's attorney and witnesses be not in attendance, the plaintiff will be nonsuited; or if the defendant's attorney and witnesses be not in attendance, the plaintiff may proceed in their absence. If neither party be present when the cause is called on it will be struck out of the list."

The question which arises in this case is whether, when the defendant's counsel is present and ready to proceed, but the plaintiff's counsel is not present, the defendant's counsel must have a jury sworn and the plaintiff called and nonsuited to entitle him to costs, or whether he may get the costs of the day for not proceeding to trial pursuant to notice if in such a case the cause is struck out of the list.

No doubt, if the plaintiff give notice of trial and do not countermand or enter the record, or even if he enter his record but afterwards withdraw it, the defendant may get the costs of the day; but can the defendant get the costs of the day in any case when the cause is struck out of the list, the plaintiff not being present, and he, the defendant, although present, not asking for a nonsuit?

In *Warne* v. *Hill*, (7 C. B. N. S. 726, 6 Jur. N. S. 959,) it is said by Williams, J., that if the defendant is present and the plaintiff is not, he may pursue one of two courses—either he may get the cause struck out and then come to the court and ask for costs of the day, or he may insist upon a nonsuit; and *Allott* v. *Bearcroft* (4 D. & L. 327,) is referred to as laying down the rule as above stated.

In *Morgan* v. *Fernyhaugh*, (11 Exch. 205,) it was held that a defendant is not entitled to costs of the day for the plaintiff not proceeding to trial pursuant to notice, where no one appeared on the defendant's behalf at the trial when the cause was struck out. It is not quite easy to make out from the case whether the court in their further observations mean that even if the defendant had been present he could not have claimed the costs of the day when the cause was struck out, because his proper course was to have the plaintiff nonsuited, or what else is meant, for the Chief Baron says: "If the defendant had been present at the trial, the costs he now seeks to recover would not have been thrown away." That is, a nonsuit would have ended the suit entirely, whereas, after the costs of the day are paid, the defendant may again take the plaintiff down to trial, and nonsuit him, which is going over a part of the same proceedings again, which have been already paid for, to gain the same end, namely, a nonsuit, which might have been had upon the first occasion.

There can be no question but that formerly the defendant might have got a rule for costs of the day for one default, and judgment as in the case of a nonsuit for a subsequent default. *Clarke* v. *Simpson*, (4 Taunt. 591,) *Dyke* v. *Edwards*, (2 Dowl. P. C. 53.) But in *Leech* v. *Gibson*, (10 Weekly Reporter, 354,) it is expressly decided that if a defendant be in court, and the plaintiff be not ready to try, the defendant must insist upon a nonsuit, if he desire to get the costs for not going to trial, and if he do not take this course, but the cause is struck out by the judge, he cannot then have the costs of the day. The plaintiff applied to set aside the rule of the defendant, directing the plaintiff to pay the costs of the day. The cause was entered for trial at Liverpool. The plaintiff's attorney had not delivered any brief, nor was he in court with his witnesses when the cause was called on. The defendant's affidavits shewed that the defendant's counsel was present, and said he was ready when the cause was called, and that he had his witnesses also present. The defendant's counsel did not apply for a nonsuit, and the cause was simply struck out. "*Brett, Q. C.*, for the defendant showed cause. A defendant is not bound to ask for a nonsuit. [Wilde, B.—But if he does not do so, can he have the costs?] The costs of the day, which are quite different from the costs of a nonsuit. [Wilde, B.—But if he waives the costs to which he is entitled, can he have other and different costs, to which, by the practice, he is not entitled?] The cause was struck out. [Channell, B.—If the defendant does not apply for a nonsuit it is the act of the court to strike out the cause.] [Bramwell, B.—There is the side-bar rule for costs for not proceeding to trial. The plaintiff did not proceed to trial. It might be said, perhaps, in your favour, that a defendant is not only not bound to ask for a nonsuit, but may prefer that the plaintiff should not be nonsuited, because that allows him to sue again, and the defendant may desire not to have another action. Now the plaintiff, if there is no nonsuit must either go on with the same action, or give up his action altogether; and the defendant may say, 'I do not wish to help him to put an end to this action, and so leave him to bring another: I wish to have the action put an end to at once.'] Just so. [Bramwell, B.—Only that tends to shew that your proper course was to take out a rule for costs for not proceeding to trial.] [Pollock, C.B.—As you did not apply for any thing, it was as though you had not appeared at all at the trial.] It has never been so held. [Pollock, C. B.—The contrary has never been held.] Perhaps not, but if it is so held now, it will come to this, that a defendant must always *insist* upon a nonsuit. The effect will be to increase the expense of litigation. [Wilde, B.—There is good sense in that argument, no doubt. * * Suppose you had applied to me for costs of the day, could I have given them?] Yes [Wilde, B.—The plaintiff not being there? Surely not.] [Channell, B.—It has been held that the plaintiff cannot be nonsuited if the defendant is not present to have the cause called, and the jury sworn.—*Morgan* v. *Fernyhaugh*, 1 Jur. N.S. 688.] There the defendant was in default. [Wilde, B,—Still the case is, *in principle*, the same as this. The defendant in this case, in effect, did not appear. He did not apply to have the case called on.] * * ["Bramwell, B.—The rule must be absolute to set aside the defendant's side-bar rule for costs of the day. It is not necessary to say anything more than was said in the course of the argument. We abide by the principle then laid down, that the defendant must take the ordinary course of applying for a nonsuit. If the cause is once entered for trial, it may be said that the plaintiff has proceeded to trial, for he has taken the record down to trial, and put it in the power of the defendant to have it called on for trial, and insist upon a nonsuit. If the defendant does not take that course, he cannot claim the costs of the day. The cases cited on the argument are very nearly in point."

Theoretically, the decision just referred to is the proper one, but this has not been the course of practice in this province. I cannot, however, say that when these defendants' counsel was ready at the trial, and the plaintiff's counsel was not, and the defendants' counsel did not ask for a nonsuit, but the judge struck the cause out of the list, that the master has done wrong in refusing to tax to the defendants their costs for the plaintiff not proceeding to trial pursuant to notice, for, as above stated. "It may be said that the plaintiff has proceeded to trial, for he has taken the record down to trial, and put it in the power of the defendants to have it called on for trial, and to insist upon a nonsuit."

And it appears to me there is much force in this reasoning, for it was held, while judgment as in the case of a nonsuit could be moved for, that such a motion never could be made when the cause had been once taken down to trial, and made a remanet, or referred to arbitration, &c., for the plaintiff had complied with the statute by having it taken down, and it was for the defendant afterwards to take the record down by proviso.

I must therefore refuse the application, and refer the defendants to the full court, if they shall be so advised to proceed further.

Order refused.

Calder v. Gilbert.

Arbitration—Costs.

A cause was referred at *nisi prius*, and a verdict taken subject to an award. Costs of the cause were to abide the event, and the same power was given to the arbitrators to certify for costs as the judge at the trial would have. The award reduced the verdict to $68, and directed that the defendant should pay the plaintiff's costs of suit according to the scale to be certified by the court of Queen's Bench.

Held, that the arbitrators having express power to certify, and having omitted to do so, a judge in Chambers had no power to order full costs.

[Chambers, June, 1863.]

At *nisi prius* a verdict by consent was taken for the plaintiff, for $414 damages, subject to be increased, reduced, or a verdict entered for defendant, subject to a reference to two persons, and to such third person as they should appoint, to whom all matters in difference in the cause were referred.

The costs of the cause were to abide the event, and the costs of the reference and award to be in the discretion of the arbitrators, and the arbitrators were to have the same power to certify for costs, and amend particulars or pleadings, as a judge at *nisi prius* would have.

The award was that the plaintiff should recover from the defendant $68, in full of his claim, and that the defendant should pay the plaintiff the plaintiff's costs of suit according to the scale to be certified by the Court of Queen's Bench, and should also pay the costs of the reference and award.

Richards, Q. C., now moved for an order upon these papers, and upon affidavits, to the master to tax full costs of suit to the plaintiff.

Adam Wilson, J.—The affidavits shew a case very clearly beyond the jurisdiction of the county court, but the verdict as reduced by the award shews a case within the competency of the division court.

If the costs had been merely to abide the event of the suit, it is likely the cases cited by Mr. Richards, of *Morse* v. *Teetzel*, (1 U. C. P. R. 375,) and *Elmore* v. *Colman*, (4 U. C. O. S. 321,) would have been full authority for granting an order for full costs.

But in this case the arbitrators have the power to certify for costs as a judge at *nisi prius* could have done, and they have not certified, but they have left the scale of costs to be certified by the court.

Now this is the very thing—the scale of costs—they were to have adjudicated upon themselves, for the control of the costs was not submitted to them: they were to abide the event of the award. And how can the court now, when both plaintiff and defendant have by express agreement conferred this power upon the arbitrators, assume to decide this very question at the plaintiff's request, either *ex parte* at his instance, or adversely upon notice to the defendant?

I think this is not a case within the 162nd section of the C. L. P. Act, in which the arbitrator may "state his award as to the whole or any part in the form of a special case for the opinion of the court."

Spain v. *Cadell*, (9 Dowl. P. C. 745,) and the other cases cited in Harrison's C. L. P. Act, 516, &c., clearly shew, I think, that this power was exerciseable by the arbitrators, and that it must be exercised in like manner as the judge would have exercised it, namely, immediately after his decision, by putting it in the award, which precludes the power of a reference by him to the court.

If the arbitrators have power to certify and omit to exercise it, the judge before whom the cause came on for trial cannot grant a certificate, his power being transferred by the submission to the arbitrator.—*Richardson* v. *Kensit*, (6 M. & G. 712.) Where the certificate of the judge may be given at any time, and no power is given to the arbitrator to certify for costs, the judge by whom the cause was referred may certify after the award made.—*Ivey* v. *Young*, (5 Dowl. P. C. 450,) Russell on Awards, 389-90; *Astley* v. *Joy*, (9 A. & E. 702.)

Section 328 of the C. L. P. Act requires this certificate to be given by the judge who tried the cause. His power may be delegated to an arbitrator; then the arbitrator must exercise it. He has not done so. I cannot therefore interfere. It is needless to say whether, if no power had been given to the arbitrator to certify, either a court or a judge could properly interfere. The cases above cited in our own courts shew it might be done, but this case is not such a case as was decided upon on either of these occasions.

I therefore must refuse the order.

Order refused.

Bonser v. Boice.

Overholding tenancy—Con. Stat. U. C., cap. 27, secs. 63, 68—Precept to Sheriff.

Where A B, having become purchaser at Sheriff's sale, under execution, of C. D's interest in a term of years, held under a third party, at a time when C D was in possession—afterwards upon C. D's request, allowed him to continue in possession for five days, it was held that there was no privity between the parties, so as to bring the case within the overholding tenancy clauses of the ejectment act; and so, although the jury summoned under the act, found in favor of the claimant, a precept to the Sheriff, to deliver possession pursuant to the finding, was refused.

(Chambers, June, 1863.)

This was an application for a precept to the Sheriff under sec. 68 of the ejectment act, commanding the Sheriff to put a landlord in possession of premises said to be overheld by his tenant.

On a *fi. fa.* goods in a case of *Cleveland* v. *Boice*, the Sheriff of Oxford, on 28th of February, 1863, sold to plaintiff (Bonser) the right of defendant (Boice) to a term of years, ending 1st of March, 1865; and on same day made a deed thereof to Bonser.

On the 18th of March, a writ issued against the defendant as an over-holding tenant; and on 24th of March last an inquisition was had on this writ before the County Judge, and he certified a finding of the jury that Boice was tenant to Bonser for a term expired, and wrongfully refused to go out of possession.

The evidence taken before the jury returned, and was produced on this application.

It was not shewn under whom Boice held, but it was sworn that at or after the sale to Bonser, Boice asked him to leave him in possession till March 5, (five days) to which Bonser assented.

Boice afterwards refused to go out, and on the 7th of March, Bonser demanded possession.

At the taking of the inquisition, *Richardson*, counsel for Boice, objected that there was no evidence of any tenancy between the parties.

Hagarty, J.—I cannot understand on what pretence the overholding tenancy clauses are resorted to to enforce possession in favour of the purchaser, at Sheriff's sale, of a tenant's interest in a term held under some other person. I presume it is urged that, by Boice asking leave to remain for five days, and Bonser assenting, a term was thereby created between them for that period. I cannot agree to this on such evidence as this case presents. I see no privity between the parties, and nothing to bring the case within the statute, and, therefore, refuse the application for a precept to Sheriff to place Bonser in possession.

Order refused.

Hall v. Boulton.

Execution.

Under the old law (before the 20 Vic., ch. 57, sec. 10) it was sufficient to issue a writ of execution within a year from the entry of judgment, and it was unnecessary to return and file it within that time.

[Chambers, June, 1863.]

The defendant obtained a summons calling on the plaintiff to shew cause why the *fi. fa.* herein in this cause should not be set aside, on the ground that the judgment on which it was issued was more than ten years old, and had not been revived; and on the ground that the judgment had been satisfied by agreement and settlement between the parties, and that the execution was issued in breach of the agreement, and contrary to good faith.

The defendant filed an affidavit that the action was commenced in the fall of 1851, and a verdict obtained in October of that year for £30 15s.; that in February following an execution issued, which was in due course returned *nulla bona*; that though eleven years had passed since the entry of judgment, no application or order to revive the same had been made; and that the *fi. fa.* now moved against, and in the hands of the sheriff of the county of Simcoe, was issued and tested on the 30th of December, 1862.

The plaintiff's affidavits stated that the original writ of *fi. fa.* was issued and returned by the sheriff within a year and a day of the entry of the judgment; and that the said writ having been lost, a judge's order was obtained in August, 1862, allowing a duplicate to issue, to which a return was procured, and on such writ and return the present writ was issued. The supposed inability of defendant to meet the demand was alleged as the reason for the long delay.

Affidavits were filed on both sides as to the settlement mentioned in the summons, which was denied by the plaintiff, and upon that branch of the case, which it is unnecessary to report, the learned judge refused to interfere.

ADAM WILSON, J.—As to the objection to the issuing of the present execution without first reviving the judgment, the question is, must an execution under the old law be not only issued on the judgment within one year from the entry of the judgment, but be also returned and filed in the office from which it issued within that time?

If it must be so issued, returned, and filed within that period, then the present execution was irregularly issued; if it need not, then so far as the point of law or practice is concerned it is not irregular.

Under the law as it existed in England before the 15 & 16 Vic., ch. 76, sec. 128, which prevailed here before the 20 Vic., ch. 57, sec. 10, now embodied in our C. L. P. Act, sec. 301, an execution was required to be issued within a year from the entry of the judgment, but it was not necessary it should have been returned and filed within the year.

The case of *Simpson* v. *Heath* (5 M. & W. 631) clearly settled this to have been the practice in England, and it certainly was the practice here also. I know it to have been the practice of the profession, and I am aware of the point having been decided more than once in Chambers. I know of no decision to the contrary, while the case of *Wilson* v. *Jamieson* (6 O. S. 481), takes this point for granted.

No question arises under the 301st section of the C. L. P. Act, before referred to, as the first writ issued many years before that act was passed. The question of regularity therefore is to be determed by the old law and the old law I take to be quite clearly in favour of the regularity of the proceedings.

Summons discharged with costs.

WARD v. VANCE—THOMPSON, GARNISHEE.

Garnishment—Service of the attaching order and summons to pay over—Unauthorised acceptance of service—Waiver by appearing to the summons.

An attaching order had been served by leaving a copy at the store and residence of the garnishee. Service of a summons to pay over was accepted for him by a practising attorney, and this summons, with such acceptance endorsed, was afterwards served in the same way as the order. On the return of it another attorney appeared for the garnishee, and objected that the acceptance was given without authority, and that the service was insufficient.

Held, that personal service of the summons and order was not indispensable, but that the service in this case, if moved against, would have been insufficient, as it was not shewn that personal service could not have been effected, or that the papers had come to the knowledge of the garnishee; but

Held, also, that in this case no such application having been made, the acceptance should be held sufficient, and that any defect in the service of the attaching order was thus cured.

Held also that the appearance of the garnishee by another attorney duly authorised was a waiver of any objection to the service.

The order to pay over was therefore made.

[CHAMBERS, June, 1863.]

The execution creditor had obtained a summons upon the garnishee to shew cause why he should not pay the judgment creditor the debt due to the judgment debtor, or so much thereof as might be sufficient to satisfy the judgment debtor.

On the summons was endorsed an acceptance by Mr. Wilson, an attorney practising at Bradford, of service for Mr. Thompson.

O'Brien appeared on the return of the summons, and objected for Mr. Thompson to the service made, on the ground that Mr. Wilson had no authority from Mr. Thompson to accept this summons.

The summons was enlarged, subject to this exception.

On the return, *John Paterson* appeared and renewed the objection for Mr. Thompson. And he contended that the attaching order had never been properly served on Mr. Thompson, as the affidavit shewed that it was on the 14th of April served on Mr. Thompson, "by delivering a true copy thereof to and leaving it with Mr. Brunskill at the store and residence of the said David Thompson;" and on the 15th of April, "that a true copy of the summons and order, *and also of the endorsement thereon*, were served on the said David Thompson by leaving copies at the store and residence of said David Thompson." *Paterson* further urged that the 289th section of the C. L. P. Act—which provides that the "service upon the garnishee of an order that debts due," &c., "shall be attached, or notice thereof to the garnishee in such manner as the judge directs, shall bind such debts in his hands, and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge,' &c., "to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor," &c.—shews very clearly that personal service was contemplated by the act, and more particularly when by other provisions of the act the process is so summary against him "in case he does not appear upon the summons," which might readily happen if personal service were not made and insisted upon.

Tilt, in support of the summons, urged that the appearance now of Mr. Paterson for Mr. Thompson was quite sufficient to cure any defect of service, if there was any defect—but that there was none: that the acceptance of service by Mr. Wilson, being an attorney of this court, was *primâ facie* sufficient evidence of his authority to give such acceptance, and cured all prior defects, whatever they were, in the service.

ADAM WILSON, J.—The statute does not require in express terms that there shall be a personal service, as our King's Bench Act of 1822 did of the *Ca. Re.* upon the defendant; and I cannot say that the rule of law is so stringent as to require a personal service of a copy of the attaching order, or to make void every other service than a personal service.

On the contrary, I am inclined to think that personal service is not imperatively demanded unless in those cases where it is sought—that is, where it is the purpose and object—to charge the party with a contempt for not appearing to or for not performing some act required by the summons, writ, rule or order.

I find this laid down in Tidd's Pr., 9th Ed., 500; Arch. Pr. 6th Ed., 1,210; and Arch. Pr., 11th Ed., 162.

Then as to some of the decisions upon this point:—in *Jones dem Griffiths* v. *Marsh*, (4 T. R., 464) it was decided that a notice to quit possession of land did not require personal service, although it was urged "this notice was to determine an interest in lands;" and service upon a maid-servant of the tenant at his house, although the house was not upon the premises in question, the notice being explained to her, but it was not shewn that it ever came to the defendant's hands, was held good service. Lord Kenyon, C. J., said, "This is different from cases of personal process; but even in the case alluded to of service" (of declaration of ejectment) "on the wife, I do not know that it is confined to a service on her on the premises; I believe that if it be served on her in the house it is sufficient. But in every case of the service of a notice, leaving it at the dwelling house of a party has always been deemed sufficient. So wherever the legislature has enacted that before a party shall be affected by any act, notice shall be given to him, leaving that notice at his house is sufficient. * * And indeed in some instances of process leaving it at the house is sufficient, as a subpœna out of Chancery, or a *Quo Minus* out of the Exchequer. In general, the difference is between process to bring the party into contempt and a notice of this kind, the former of which only need be personally served on him." "Buller, J., *Ex concessis* personal service is not necessary in all cases."

The service of the process of the courts it will clearly appear did not formerly require personal service, by a reference to Tidd's Pr., 109, 155 and 156, and to 2 Price, 2 and 4, and 3 Bl Com., 279, &c, although a *distringas* against lands and goods issued if the party failed to appear.

The summons in real actions was formerly served by attaching a copy of it to a white wand set up on the premises; and it is familiar law to practioners who remember the former proceeding in ejectment, that personal service to change the title was not demanded.

The nature or kind of service is entirely different from an utter want of service, and may be insufficient as a general course of practice, while the latter is utterly void; as when a defendant was ordered to pay under the Court of Requests Act in England, corresponding with our Act, 13 & 14 Vic., ch. 53, secs 91-93, it was held that if he made default he must be summoned to shew cause why he had made such default before he could be committed to confinement.—See *Abley* v. *Dale*, 14 Jur. 1070, citing 1 Str. 567; where it is said, "The laws of God and man both give the party an opportunity to make his defence if he has any."

I am not prepared, then, to say as a rule of law that the service of the attaching order or of the summons upon the garnishee to shew cause why he should not pay over must be personal, and if not personal that it must be void, and be therefore set aside by the court.

Then as to the particular cases in which services not personal have been held to be sufficient:—In *Howard* v. *Ramsbottom*, (3 Taunt. 526,) the statute required that the notice of disputing the proceedings in bankruptcy should be given to the assignees. And the court held that although service on a maid-servant at the assignee's residence was not sufficient, yet service on the attorney was sufficient.

In *Rhodes* v. *Innes*, (7 Bing. 329,) where a father eluded personal service of process, and it was served on the son at his, defendant's residence, who, on being told what it was, said he would give it to his father, who was in the house: *Held*, this was good personal service of the process, under the statute, which required personal service. Tindal, C. J., says, "There is no magic in the word *personal*, and if a party by his conduct or agreement chooses to waive personal service, a service less strict may be sufficient." This case must be considered as very much qualified, if not overruled, by the cases of *Gogg* v. *Lord Huntingtower*, (1 D. & L., 599) *Christmas* v. *Eicke*, (6 D. & L., 156) *Russell* v. *Lowe*, (2 Dowl. N. S., 233) and *Grand Junction Water Works Co.* v. *Roy*, (16 L. J. C. P., 209).

In *The Queen* v. *The Justices of the North Riding of Yorkshire* (7 Q. B., 154) the statute provided that an appeal from a conviction of justices might be brought by the party "first giving or causing to be given to the surveyor or surveyors, or to such justice or other person by whose act such person shall think himself aggrieved, notice in writing of his intention," &c. It was held that service of such notice at the dwelling-house of the justices, though not personal, was sufficient, although it was urged the appeal affected them as to costs, and as to their liability to an action of trespass, and that it did not appear the notice had ever come to their hands.

In *Mason* v. *Muggeridge*, (18 C. B., 642) service of a judge's order for the defendant to appear and be examined as to debts due to him, &c., was held not sufficiently made by serving the wife, without shewing that it had since come to the defendant's knowledge, and the attachment was refused. But this was because the process was to procure an attachment if default were made.

In *Warwick* v. *Bacon*, (7 M. & G., 961) service of a rule to compute on a clerk of defendant at the defendant's counting-house, *held*, not sufficient, the usual and proper course being to serve at the *dwelling-house* all rules which need not be personally served.

In *Rowland Vizetelly, et al.*, (6 M. & G., 723) a rule to compute served "on a clerk or servant of the defendant's at their warehouse," was held insufficient. Maule, J., says, "Service on a domestic servant at the defendant's place of residence is held sufficient, on the ground that it is the servant's duty to receive papers and letters left there for his master, and to deliver them to him. That may not be the case with respect to this clerk."

I am not quite prepared to say that the service of the attaching order was well made by serving *a clerk* at the store, and even *at the residence* of the garnishee, without shewing that the order had subsequently come to the knowledge or hands of the garnishee, or without shewing some excuse why a service on the garnishee was not made, or was not made on some member of the garnishee's family at his dwelling-house. For all that appears from the affidavit, the garnishee could have been served personally, in which case a better service should have been made.

As was said by Mr. Justice Williams, in *Davies* v. *Westmacott*, (7 C. B. N. S., 829) "Every word of the affidavit may be true, and yet the process-server might without any difficulty have ascertained the defendant's dwelling;" or to apply it to this case, might without any difficulty have made a better service than was made on the clerk at the garnishee's store and residence.

I think I should, if the application had been duly made, have held that this affidavit did not shew sufficient facts to constitute the service made a good service, without holding that it was absolutely necessary the service should have been a *personal* service.

But this objection arises not directly, but incidentally, upon the summons to pay over, after one attorney has accepted service of it for the garnishee and another attorney has appeared on the return of the summons to except against the validity and effect of this acceptance by the attorney.

Now, as to the acceptance by the attorney of the service of the attaching order, I conceive this to have been irregular if the attorney had no authority to receive it.

The rule is, as is laid down in *Bayley* v. *Buckland*, (1 Ex 6,) "When a defendant has been served with process, and an attorney without authority appears for him, we think the court must proceed as if the attorney really had authority, because in that case, the defendant having knowledge of the suit being commenced, is guilty of an omission in not appearing and making defence by his own attorney, if he has any defence on the merits. There the plaintiff is without blame, and the defendant is guilty of negligence; but even in that case, if the attorney be not solvent, we should relieve the defendant upon equitable terms if he had a defence on the merits. If the attorney was solvent, it would not be unjust to leave the defendant to his remedy by summary application against him. On the other hand, if the plaintiff, without serving the defendant, accepts the appearance of an unauthorised attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant there is wholly free from blame, and the plaintiff not so."

But although this acceptance by the attorney was on the 17th of the month, and although this matter has been several times before the Judge in Chambers, no application has yet been made by the garnishee to set aside this service. He only asserts by another attorney that the first attorney had no such authority as he has assumed to exercise, but makes no affidavit of the fact.

I think, under such circumstances, I should not interfere with the act of the first attorney. This supineness of the garnishee is some evidence of actual authority in the first attorney, and he is, moreover, within the language of the above decision, "guilty of negligence."

If this service stands, I think the prior *primâ facie* defective service of the attaching order is cured.

But assuming that the acceptance by the attorney was irregular, does the appearance of the party by a duly constituted attorney to object to this service as cause why he should not answer the summons, cure the objection of service.

In *Levy* v. *Duncombe*, (3 Dowl. P. C., 444) a rule *nisi* had been obtained by the plaintiff for an attachment against his late attorney, for not having delivered his bill of costs pursuant to judge's order, and which had been made a rule of court, and personally served. Humfrey and Hughes shewed cause, and objected that the rule could not be made absolute, because it had not been personally served. Lord Abinger, C. B.—"The rule *nisi* is served merely for the purpose of bringing the party here; if he appears, as he does here by his counsel, that obviates the necessity of enquiring whether the service of the rule was personal or not, though if no one had appeared, the court would probably not have made the rule absolute for an attachment, except on an affidavit of personal service. The contempt for which the attachment is prayed was in not obeying a previous rule, which had been personally served."

So in this case, the object of this summons was "merely for the purpose of bringing the party here," and he has appeared by counsel or attorney; and I think in such a case, although he appears to object to no service, or no sufficient service, that his appearance does of itself remove the objection, and answer the purpose for which the summons was issued.

While an *essoin* or excuse for not appearing to process could be cast, it was refused to a party who was seen in court, as in the case of the secondary of the court himself claiming it, while he was actually in attendance upon the *essoin* day, wherein he *essoined*. *Anson* v. *Jefferson* (2 Wils. 164.)

And perhaps the former course in England of declaring "by the bye," may illustrate what the effect is of a party being actually or presumably present in court.

The plaintiff in every case, and in some cases any other person who had not sued out process against the defendant at all, when

the defendant had appeared, or when an appearance was entered for him, or when he was in the actual custody of the marshal, could serve a declaration against him for any different cause of action than that he had been brought into court to answer; and the reason of it was that the defendant being actually or presumably in court, there was no necessity to take out other process against him, and that being in court for one purpose, he was present for all purposes, and for every one, and not only for the plaintiff who had brought him there. *Smith* v. *Miller*, (3 T. R., 627); *Miller* v. *Andrews*, (5 T. R., 634); *Sulyard* v. *Harris*, (4 Burr. 2180)

I here think, then,

That as a rule of law, personal service is not necessary, either of the order to attach or of the summons to shew cause why the garnishee should not pay over:—

That the service, if not personal, should at any rate be shewn to have been made upon the wife, or upon some member of the family at the dwelling-house of the party, in such a manner as would have constituted good service under the old practice of the declaration in ejectment, by which the possession was sought to be changed:—

That the service in the case of the attaching order is *primâ facie* not sufficient:—

That the acceptance of service of the summons to pay over by an attorney is *primâ facie* sufficient:—

That either of these services could have been set aside by an application for the purpose:—

That as no such application has been made, but as an attorney has appeared to shew cause against the validity of the last service, his appearance is in truth an appearance to the summons, and cures all previous defects.

But such an appearance as this must be distinguished from a substantive application, after proceedings have been taken upon the defective service, to set them aside: and from those cases where the court has held the service deficient when no cause was shewn; and also from those where service is not denied, but it is complained of as having been made on an improper day, as a Sunday, at too late an hour, at an improper place, or while the party was in attendance upon the courts, and so privileged for the time—for in all these cases the service is admitted, but the regularity of it is alone questioned, which is very different from a case where the effect and substance of the objection is that no service has been made at all, and yet there is the anomaly of the party being seen in court, and personally making an excuse for not being there.

Under all these circumstances I will make the order, which is, of course, subject to the correction and revision of the court.

Order accordingly.

COUNTY COURTS.

In the County Court of the United Counties of Huron and Bruce, before ROBERT COOPER, Esq., County Judge.

HOLMES v. McLEAN & ROSS.

Action on a joint and several promissory note. Set off by agreement of a separate demand. Demurrer. Equitable pleading.

This was an action on a joint and several promissory note, dated 1st May, 1860, made by the defendants, payable to the plaintiff on or before 15th April, 1861, for $130.

Pleas—The defendant Ross pleaded a set off of $400, balance due on a covenant dated 30th January, 1858, made between him and the plaintiff, whereby the plaintiff covenanted to pay him $800 on a day which had elapsed before the commencement of this suit. Alleging that at the time the note was made it was agreed between the plaintiff and the defendants that the plaintiff would deduct the amount of the note out of the amount due by him to the defendant Ross on the covenant, and concluding with the allegation that it was on this understanding that defendant Ross signed the note.

The defendant McLean pleaded on equitable grounds that he made the note jointly and severally with Ross, and for Ross's accommodation and as his surety only, which the plaintiff well knew. That when he made the note, there was outstanding and in full force against the plaintiff and in favor of the defendant Ross, the covenant set out in defendant Ross's plea. Averment that at the time of the making of the note it was agreed by and between the plaintiff and the defendant Ross, that the plaintiff should, at the maturity of the note, deduct the amount thereof out of the said covenant, and that in pursuance of that agreement the defendant McLean made the said note as aforesaid. This plea then proceeded as follows: "And the defendant McLean further avers that the plaintiff, at the commencement of this suit, was and still is indebted to the defendant Ross in an amount greater than the plaintiff's claim upon a deed bearing date" (Setting out the deed as in Ross's plea), concluding thus: "And the defendant McLean avers that the defendant Ross has always been ready and willing to deduct from said amount due on said covenant the amount claimed on said note by the plaintiff, and to set off the same against said covenant, of all which the plaintiff had due notice"

The plaintiff took issue upon and demurred to both these pleas, on the following grounds, among others.

Demurrer to Ross's plea—

1. That a debt due by the plaintiff to the defendant Ross cannot be set off in this action brought by the plaintiff against the defendants, McLean and Ross.

2. That the alleged subject matter of set off is not shewn in its nature and circumstances to arise out of or to be connected with the promissory note sued upon.

3. That the agreement in said plea mentioned, as stated, is a *nudum pactum*.

4. That said plea seeks to introduce parol evidence to vary, contradict and control, the operation of a written contract

5. That said plea confesses, without avoiding, the plaintiff's cause of action.

Demurrer to McLean's plea—

1. That the debt due by the plaintiff to the defendant Ross does not constitute an equity attaching to the note sued upon by the plaintiff.

2. Same as 2nd ground of demurrer to Ross's plea.

3. Same as 3rd ground of demurrer to Ross's plea.

4. Same as 4th ground of demurrer to Ross's plea.

5. That said plea discloses no matter entitling the defendant McLean to an absolute and unconditional injunction in a court of equity.

6 That said plea, if admitted as a defence in this action, would render necessary the taking of accounts before relief could be granted, and so is not such a plea as can be pleaded as an equitable defence in a court of law.

Joinder in demurrer.

The issues in law were first disposed of.

Saunders for demurrer.

Malcolm C. Cameron contra.

COOPER, Co. J.—The defendant Ross pleads set off. He sets up an outstanding specialty debt. It is not necessary to consider whether this could be set off without any agreement that it should be; for the plea goes further, and sets up an agreement—good—taking the statements to be true—that the two claims should be set off.

The plea is clearly good. It sets up that which if proven would be a good answer to the action.

Lest this should not be sufficient, the defendant has put nearly the same defence in substance in the shape of an equitable plea.

I do not understand the doctrine that an equitable plea must set up a state of facts, enabling this court to give complete relief. In a County Court there can be no injunction. If therefore every equitable defence on which the courts of common law cannot grant final relief is shut out, then the system of equitable defences at common law ceases in effect to exist. The language, "absolute and unconditional injunction," is not easily understood in relation to this argument. If it means that the plea is such, that if it were framed as a bill in equity it would not state sufficient facts to entitle the pleader to relief in equity, then the demurrer does not hold, for the plea does state such a case. It sets up a sufficient equitable defence. Both pleas might possibly have been more concise, but any surplusage does not render them bad. It

is not the only case in which an answer might be set up on the same facts, either in the shape of a legal defence or an equitable case or defence. The rule that you must necessarily elect to invoke the jurisdiction of either a court of law or a court of equity is not without its exceptions, and these exceptions have necessarily become more apparent since the system of equitable defences to legal claims has been adopted.

I think both pleas must be sustained, though grounded mainly on the same facts. Judgment for defendant.

QUARTER SESSIONS.

(In the Quarter Sessions for the County of Elgin, his Honor JUDGE HUGHES, Chairman.)

McLEAN, Appellant v. McLEAN, Respondent.

Power of Justices to alter their Order for Quashing a Summary Conviction during the same Session.

On the first day of the session, the appellant's counsel called on and proved his case. The respondent did not appear. It was not known that he had employed counsel. And the Court ordered the conviction to be granted

On the second day, counsel appeared and stated he had been employed, and was taken by surprise; and applied to have the order of the Court discharged for a hearing.

Held, that the Court had power to revoke the order for quashing the conviction.

On the 9th of December, 1862 (the first day of the sittings) *Horton*, for the appellant, entered an appeal, proved his case, and the conviction was ordered to be quashed. No one appeared for the respondent.

On the 10th of December (the second day of the session) *Stanton* appeared, and stated he had been employed as counsel by the respondent, and then, for the first time, to his surprise, learned that the appeal had been heard on the preceding day, and moved the Court to discharge the order for quashing the conviction, and for a rehearing.

Horton, contra, stated he was not aware Mr. Stanton had been retained, but objected that the case could not be heard again, nor could the Court grant a new trial.

HUGHES, County Judge, Chairman.—With reference to this appeal, and the application of the respondent's counsel for the Court to discharge its order for quashing the conviction, I think the authorities cited open the way for our doing so; but it must not be understood as in the nature of a new trial, for, had a jury decided this case, I doubt the authority of this Court to disturb the verdict.

Assuming that all the respondent's counsel has stated to the Court to be true, as explaining the cause of the respondent's not appearing yesterday, and its not appearing to be doubted on the opposite side, I think the case reported in 2 Salk., 494 and 606, as digested in Arch. Q. S. practice, 289 and 290, (*St. Andrews Holborn v. Clement Danes*) to be very similar to this case to establish the principle, and should govern us in the present application.

It is there said, "The Justices may alter their judgments at any time during the same session; where, upon hearing an appeal against an order for removal, the respondents not appearing, the order was quashed; but afterwards, during the same session, the respondents were let in to try the appeal, on payment of costs; and upon the trial the order was confirmed. All these orders being removed by *certiorari*, it was moved in one of the Superior Courts to quash the latter order of session, by which the order of removal was confirmed on the ground that the sessions having once made the order for quashing the order for removal, could not afterwards make another order to confirm it; but the Court above denied this, and said the sessions has authority to alter their judgments at any time during the same sessions."

The order of this Court, therefore, passed yesterday, should be cancelled upon payment of costs.

This power ought to be, as suggested in Dickenson Q. S. practice 934, "to be exercised with delicacy and discretion." I have known it once, in the spirit of party, to have been attempted to reverse the decision of about thirty magistrates of the Court by a fresh accession of justices the next day, after most of the thirty had gone to their homes; but all such instances will be discouraged. This application does not bear that complexion.

In this determination the Court are unanimous.

Per cur.—Order cancelled on payment of costs.

In the Matter of Appeal between ROBERT NEIL, Appellant, and JOHN SELLS, Respondent.

Appeal from a Summary Conviction in a case not criminal—Recognizance not necessary as a preliminary step to give the Court jurisdiction.

Appeal against a summary conviction for breach of a by-law of the Corporation of St. Thomas for selling spirituous liquors without license. The appellant gave notice of appeal in due time, but entered into no recognizance to prosecute his appeal with effect; nor did he afterwards give notice before the sittings of the Sessions, of the abandonment of his appeal, under Sec. 4 of Con. Stat. of U. C., page 964.

Held, respondent entitled to costs.

Horton, counsel for respondent, put in a notice of appeal, served upon his clients, which *Stanton*, for appellant, admitted was served, but contended that the Court could not make any order, as they had no jurisdiction, inasmuch as the appellant had not entered into a recognizance to prosecute his appeal with effect, and cited Dickenson, Q. S. 639. *Rex* v. *Oxfordshire*, 1 M. & S., 448. *Rex* v. *King's Langley*, Salk. 605. *Rex* v. *Lincolnshire*, 3 B. & C., 548; 7 U. C. L. J., page 6, and Arch. Q. S. practice, 280, and Con. Stat. of U. C., 114, section 1.

HUGHES, County Judge, Chairman.—There can be no question whatever, that in order to give the Court jurisdiction, or the parties a *locus standi* in the Court, the preliminaries required by law must be entered into.

It is to be observed, however, that the preliminary steps required by the statute respecting appeals in cases of summary conviction before Justices of the Peace, in cases not amounting to crimes, (Con. Stat. of U. C., 963) are different from those required by the Con. Stat. of Canada, page 1304, in cases of summary convictions under the criminal acts; for, in the latter it is necessary for the appellant, in all cases where the party thinks himself aggrieved by the conviction or decision, and wishes to appeal to the Sessions, within three days after the conviction, and seven days before the Sessions, to give to the other party notice in writing of his intention to appeal, and either to remain in custody until the Sessions, or enter into a recognizance with two sufficient sureties, before a Justice of the Peace, conditioned to appear at the Sessions and try the appeal.

Under the first named statute, the recognizance is not, in all cases, necessary. It is applicable only to cases where the convicted party is in custody or on bail.

This case is admitted not to be for breach of any criminal law, but for selling liquor without license, contrary to a municipal by-law, and that the appellant was neither in custody nor on bail. I therefore think the notice of appeal was all that was necessary, and that a recognizance was unnecessary, and that the respondent is entitled to ask for costs, because the appellant did not give notice to the respondent, under the 4th sec. of the act first alluded to, of the appeal being abandond. *Rex* v. *Justices of Essex*, 4 Bar. and Ald., 276, shews that under 30 Geo. 3, cap. 48, sec. 25, no notice of appeal was necessary, but merely a recognizance. Here the notice of appeal was necessary, and not the recognizance.

In an analogous case to the present, in this Court, of *Barclay*, appellant v. *Barr*, respondent, at the June Quarter Sessions, 1861, the counsel for this appellant contended that a recognizance was not necessary under the statute first referred to, and the Court thought with him, and so decided. This conviction must be affirmed.

Per cur.—Judgment for respondent, with costs.

In the case of an appeal against a poor rate, unless the appeal is *entered*, the Sessions cannot order the appellant to pay the costs which his notice may have occasioned to the respondents, in preparing to resist the appeal, for it is not "*heard and determined*." Dickenson Q. S. 659. In *Rex* v. *Justices of Essex*, 8 T. R. 583, it was determined that the Court of Quarter Sessions have no authority to award costs under 17 Geo. II. ch. 38, s. 4, unless an appeal has been "*entered and determined*"—for the determination of the appeal is a condition precedent to their power to give costs. The decision however, in the foregoing case, seems to have turned upon the necessity of entering into a recognizance under the particular circumstances and statute, to which allusion is made.

In the Matter of Appeal between JOHN FERRIN, Appellant, and JOHN NEIL, Respondent.

Master and Servants Act—Con. Stat. U. C., cap. 75.

Under Master and Apprentices' Act a magistrate has no jurisdiction to award the payment of wages.

The respondent was a minor, and by indentures, was apprenticed for a term of three years, unexpired, to the appellant, and was to get $35 the first year, and increased wages afterwards. No time was fixed for the payment of wages. The appellant gave up his business for a short time—abandoned himself to habits of intemperance—and afterwards resumed his business, but did not pay the wages due to respondent up to the time of the respondent leaving him, which was during the currency, and not at the end of the first year. He had served 9½ months only.

The respondent complained before the Mayor of St. Thomas, who ordered the master to pay wages, with costs, under the master and servants act. (Con. Stat. U. C., cap. 75).

The master appealed to the Quarter Sessions.

Horton, for appellant, objected, 1. That the respondent being a minor, could not sue in his own name, excepting in the Division Court, and if any proceeding were adopted, either at common law or otherwise, except in the Division Court, it should have been in the name of the father, and cited *Ferris* v. *Fox*, 11 U. C. Q B 612.

2 That the respondent is an apprentice, bound by indentures, and that a magistrate has no jurisdiction in a matter of wages between a master and his apprentice, and referred to 9th sec. Con. Stat. of U. C., cap. 76.

3. That there are no wages due until the end of the first year, and that the indentures could not be cancelled without the consent of the father.

Stanton, for respondent, contended, 1. That, under the master and servants act, and the master and apprentices' act, the magistrate had the right to award a sum for not providing the apprentice with provisions.

2. That, under the master and servants act, the conviction can be sustained, because the agreement existing was cancelled, and a new agreement made. The respondent had been discharged, and the relation of master and servant subsisted.

Horton, contra, cited *Rex* v. *Inhabitants of Elengale*, 21 E. C L. R., 158; also, *Rex* v. *Inhabitants of St. Margarets Lynn*, 13 E. C. L. R., 108; *Rex* v. *Inhabitants of Combre*, 8 Bar. & Cr., 82. 15 E. C. L., 155; *In re Joyce and Anglim*, 19 U. C. Q. B, 197; *Regina* v. *Roberts*, 11 U. C Q. B., 621; and contended there were no wages due until the end of the year, and respondent could make no agreement without the consent of his father.

The Court decided that the relation of master and servant did not subsist between the parties; and the magistrate had no jurisdiction to order payment of wages, as between a master and an apprentice; and that respondent, being an apprentice, and not a servant, the conviction was bad.

Per cur.—Conviction quashed.

LOWER CANADA REPORTS.

SUPERIOR COURT.—MONTREAL.

(*From the Lower Canada Reports.*)

BOTTOMLEY, ET AL., VS. LUMLEY.

By the Consolidated Statutes of L. C., chap. 87, sec. 8, it is enacted that the Superior Court of L. C., or any Judge thereof, may order any person arrested for debt to be discharged from custody, on satisfactory proof "that the cause of action arose in a foreign country."

Held:—That for the purposes of this act, England must be considered to be a foreign country; and that the defendant arrested in Lower Canada, for a debt contracted for goods purchased in England, for which he had accepted bills of exchange drawn upon him at his then place of business at Toronto, but made payable at a bank in England, must be discharged and the *capias* quashed notwithstanding a disclosure of evident fraud in the affidavit.

Judgment rendered the 25th February, 1863.

MONK, J.—In this cause a writ of *capias ad respondendum* was issued against the defendant, formerly of Toronto, in Upper Canada, now described as of the city of Montreal, for a debt (£1078. 8*s*. 10*d*.) for goods purchased by the defendant from the plaintiffs in England, for which the defendant had accepted bills drawn on him at Toronto, and made payable at a Bank in England. A motion has been made to quash the *capias* on several grounds, but the only ground which has attracted the attention of the Court, is one founded upon the provincial statute, which enacts as follows: "The Court or any Judge of the Court whence any pro- "cess has issued to arrest any person, may, either in term or in "vacation, order such person to be discharged out of custody, if it "is made to appear, on summary petition and satisfactory proof, "either that the defendant is a priest or a minister of any religious "denomination, or is of the age of seventy years or upwards, or is "a female, *or that the cause of action arose in a foreign country, &c.* (Consol. Stat. L. C., Chap. 87, sect. 8, p. 810.)

The affidavit discloses with minuteness and precision one of the grossest cases of fraud, and on a scale quite unusual, and is in every respect complete; the difficulty arises as to whether under the clause of the statute England is to be considered a "foreign country." It was held in a recent case, (See 6 L. C. Jurist. p. 312.) by the senior Judge of this Court, that under this statute, Barbadoes must be held to be a foreign country, and this decision was rendered after much deliberation. When the question was raised, I strongly dissented from the conclusion arrived at; nor do I see how England can be held to be a foreign country, when the imperial parliament can pass laws reaching to Canada, and when our supreme resort is appeal to Her Majesty in Her Privy Council. Under the circumstances which connect us with the mother country our merchants, in trading with England, cannot surely be supposed to be trading with foreigners. It was urged that under the act for the proof of foreign judgments and decrees (Consol. Stat. of L. C., chap. 90, sect. 1.) a foreign judgment was therein declared to be one "not obtained in either Upper or Lower Canada," and the declaration was unintelligible for the purposes of that act. I do not however think that in this case, England can be held to be a *pays étranger*, but the matter must be held to be one of very considerable doubt, and I therefore consider it more prudent to follow the judgment rendered by the learned judge referred to, although in this case, I do so with much regret and hesitation, considering the atrocity of the fraud disclosed in the affidavit.

Judgment, quashing *capias*.

Robertson, A. and *W.*, for plaintiffs.
Devlin, for defendant.

ENGLISH REPORTS.

PRIVY COUNCIL.

GRANT v. THE ETNA INSURANCE COMPANY.

Marine Insurance—Construction of Policy—Warranty—Description.

Held, that the words in a Policy of Insurance describing the vessel insured "as now lying in Tait's Dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for winter in a place approved of by the Company, who will not be liable for explosion by steam or gunpowder," did not amount to a warranty that the vessel should be used as described, but mere matter of description immaterial to the risk. (July 5, 1862.)

This was an appeal to the Privy Council from the decision of the Court of Queen's Bench in Lower Canada. The facts of the case sufficiently appear in the judgment, which was read by Lord Kingsdown. It was as follows.

On the 30th July, 1858, the appellant effected an insurance with the respondents on the steam-boat "Malakoff," by which the Company engaged to assure the appellant against loss by fire to the steamboat for twelve months to the extent of £1,000.

The policy of insurance described the "Malakoff" "as now lying in Tait's Dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for winter in a place approved of by the Company, who will not be liable for explosion either by steam or gunpowder."

The steam-boat never left Tait's Wharf, and was burnt there on the 25th June, 1859.

An action was brought by the appellant in the Superior Court of

Lower Canada to recover damages upon the policy. The case was tried by a jury, and a verdict found for the plaintiff.

An application by way of motion was made to the court by the defendants on the 20th February, 1860, that judgment *non obstante veredicto* might be entered for the defendants, and that the plaintiff's action might be dismissed with costs.

On the 31st March, 1860, the Superior Court made an order to that effect.

The plaintiff appealed against the order to the Court of Queen's Bench in Lower Canada, when it was affirmed, the Chief Justice dissenting from the majority of the Judges.

The case now comes before us on appeal to Her Majesty in Council from these several orders. The judgments in the courts below proceeded on the ground that the words which we have read from the policy contained a warranty that the steam-boat should navigate the St. Lawrence and the lakes in the manner there described, and that, as in fact she never left Tait's Dock, the policy became void.

It was contended before us, in a very able argument, that the words referred to contained no warranty; but that if they did the warranty extended only to this—that an intention to employ the ship in the manner described was *bonâ fide* entertained by the insured when the policy was effected.

It was argued that this would be the meaning of the words if they were merely representations, according to several authorities cited; and it was argued that though the effect of a warranty was very different from that of a representation, the meaning of the words used must be the same, whether they were found in or out of the policy.

Their Lordships are of opinion that the question depends entirely on the meaning to be attached to these words. If they import an agreement that the ship shall navigate in the manner described in the policy—then being an engagement contained in the policy—they must be considered as a warranty, and the engagement not having been performed, whether the engagement was material or not material, the insurers are discharged

But their Lordships think that this is not the true meaning of the words used They consider that the clause in question amounts only to this: The assured says, my ship is now lying in Tait's Dock; I mean to remove her for the purpose of navigation in the manner described, and if I do the policy shall still be in force; but in that case I engage to lay her up in winter in a place to be approved of by the Company.

This construction, which implies no contract to navigate, seems to their Lordships the natural meaning of the words used, and imputes a reasonable intention to the parties to the Policy.

Their Lordships must, therefore, advise Her Majesty to reverse the judgments complained of, and to direct that the defendant's motion be dismissed, and that the appellant's costs of the motion in the Superior Court, and of the appeal to the Queen's Bench, and of the appeal to Her Majesty in Council, be paid to him by the respondents.

It is unnecessary to pronounce any decision on a point raised in the argument, viz., that it is not competent to a defendant in a suit to make a motion for judgment *non obstante veredicto*. Such appears to be the rule in England, but the practice in jury trials in Lower Canada differs in many and important respects from that which prevails in this country. Their Lordships are always indisposed to interfere with the judgment of a colonial court on a question of its forms and practice.

It appears that, besides the motion of which we are now disposing, two other motions were made by the respondents in the Superior Court, one in arrest of judgment, and the other for a new trial. Neither of these motions is before us, and we do not express any opinion upon them, or intend to affect the rights either of the appellant or respondents in respect of them. They will stand in the same situation as if the Queen's Bench had made the order upon this motion, which we think that it ought to have made. To prevent any misconstruction upon this point, which, however, we do not think likely, we shall advise Her Majesty to add to the order which we have already suggested, a declaration "that this order is not intended in any manner to prejudice the rights either of the appellant or respondents with respect to any other proceedings which have taken place, or may take place in the cause."

Appeal allowed.

JUDGE'S CHAMBERS.

Cruickshank v. Moss.

Fi. fa.

To issue execution on the same day that costs are taxed, is an abuse of the procedure of the court, and the costs of such an execution were ordered to be returned.

This was an application to set aside the writ of *fi fa.*, and all subsequent proceedings.

Clare for the plaintiff; *James* for the defendant.

The circumstances of the case were as follows:—The plaintiff having made an order of Williams, J. a rule of court, taxed his costs, and forthwith, on the same day, issued execution. On the same day, and before the execution had been levied, the defendant tendered to the plaintiff's attorney the amount of the master's allocatur, which was, however, refused. A levy was subsequently made, and thereupon the defendant paid the amount under protest, and made the present application.

James contended that the defendant was entitled to the whole of the day on which the master had given his allocatur, and cited *Perkins* v. *The National Assurance Company*, 20 L. T. Rep. 65.

Willes, J., having taken time to consider, made an order that the writ of *fi. fa*, and all subsequent proceedings, should be set aside, on the ground that they were an abuse of the practice of the court; that the money paid to the sheriff should be returned, and that the plaintiff should pay the costs of and occasioned by the application.

UNITED STATES REPORTS.

SUPREME COURT OF NEW YORK.

From the Luzerne Legal Observer.

Hayne v. Powers.

Congress has power under the Constitution to declare treasury notes a legal tender in payment of all debts.

Johnston, J.—The tender by the defendant of the legal tender notes, in satisfaction of the plaintiff's demand, was valid, and they should have been received by the latter, unless it shall be found upon examination, that his objection, that the act of Congress under which such notes were issued and declared to be a legal tender is unconstitutional, was tenable.

The act in question, which was approved February 25, 1862, amongst other provisions, declared that these notes, when issued, "shall also be lawful money and a legal tender in payment of all debts, public and private, except duties on imports and interest as aforesaid."

Any law made by the Congress in the United States, in pursuance of the Constitution, and duly approved, "the supreme law of the land, and the Judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (Constitution, Art 6.) Unless, therefore, it can be shown that the act of Congress in question is not in pursuance of the Constitution, it is the supreme law of the land, and the tender was valid and must be held to satisfy and discharge the demand created by the deposit.

The General Government possessing all the essential attributes of a national sovereignty, and the Legislature being the branch thereof invested with paramount authority, the presumption is unquestionably in favor of the validity of any and all of its acts, and it lies primarily with the party objecting to show that any particular act is in derogation of the Constitution. This, however, is of little consequence where the standard is a written organic law, which may always be appealed to, and must determine in all cases where the authority to enact is seriously challenged.

In considering the question thus presented, it must be admitted in the outset that the Government of the United States is limited in its powers and authority, to the exercise of those conferred by the organic law, in which it has its being, and that all powers not delegated to it by the Constitution, nor prohibited by it to the

States, are reserved to the States respectively or to the people thereof.

But it by no means follows from this, that it can take nothing by implication, like a special and inferior tribunal created by statute. It is still a national sovereignty, and within the just scope and measure of the powers with which it has been endowed, is as supreme and potent in its authority as any other human government. And in passing upon the question of the constitutionality of any law of Congress, this important consideration is not to be lost sight of.

The object which the framers of the Constitution and the people who ratified and adopted it as the organic law of this National Government had in view, is clearly and plainly expressed in the preamble. It was amongst other things to "establish justice, insure domestic tranquility, provide for the common defence and general welfare, and to secure the blessings of liberty to ourselves and our posterity."

To secure the attainment of these cardinal ends of all government, the powers deemed necessary or essential thereto were enumerated and conferred under separate and distinct general heads; each of which necessarily comprehends and embraces, as it was intended, all the subordinate and auxilliary powers necessary or incident to the supremacy of such general head of power. And hence, in section eight, after specifying the several powers which Congress shall have, in sub-division seventeen, the power is in express terms given "to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Here is a plain and unambiguous test in the text of the Constitution itself, if the rule prescribed by the statute is not within the plain letter or evident scope of the power enumerated. The question then is whether the law is necessary or proper for carrying into execution all or either of the enumerated and granted powers If it is either necessary or proper without being absolutely necessary, the statute is valid and becomes the supreme law of the land, binding upon the judges of every State.

But to come more directly to the statute in question: has Congress the power within the letter or evident meaning of either of the enumerated powers conferred, to declare these treasury notes lawful money; and make them a legal tender in payment of all debts, public and private?—Among the powers enumerated and expressly conferred, are these: to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States; to borrow money on the credit of the United States; to regulate commerce with foreign nations and among the several States, and with the Indian tribes; to coin money and regulate the value thereof and of foreign coin; to provide for the punishment of counterfeiting the securities and current coin of the United States; to declare war, to raise and support armies; to provide and maintain a navy.

Unless the power to declare these notes lawful money is fairly embraced in the terms of the power "to coin money and regulate the value thereof," it must be conceded that it is not within the express letter of any of the powers enumerated.

It is perfectly obvious upon looking into the various provisions of the Constitution that it was the intention to place the entire power of creating money, and determining and regulating its value for the whole country in the General Government; and hence it is forbidden to the several States by section 10 to "coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts." Money is the medium of exchange—the standard or representative of all commercial values. It is that which men receive in exchange and in satisfaction of labor and its various products; and whether it is intrinsically valuable or otherwise, it is the standard of values by which alone they are all measured In all civilized governments it consists of coin, of gold, silver and copper, and of bank bills, or bills of credit, issued by the authority of such government.

Gold and silver are not naturally money, any more than any other metal product or fabric They are made so by law only when manufactured into pieces of coin of prescribed weight and fineness, and stamped with the requisite inscriptions and devices.

These metals are by common consent better adapted for use as money than any other yet discovered, but they become money by the force and operation of law alone.

It is conceded, as I understand the argument, that the power "to coin money and regulate the value thereof," is a power given to Congress to enact suitable laws on the subject of the current-money of the country. But it is insisted that the power is limited to the enactment of laws for the minting or fabrication of gold and silver only into money, and the regulation and value of money of that description. This might be so if the language employed had been, "to coin gold and silver into money and regulate the value thereof." But the terms used are "coin money, and regulate the value thereof." In order, therefore, to place this restriction, it must be made to appear not only that "to coin" signifies shaping and stamping metals exclusively, but also that the term "money" in its ordinary popular signification, at the time the Constitution was framed and adopted, meant gold and silver coin and nothing else.

But neither of these propositions is true. By looking into any dictionary it will be seen that "to coin," means not only to shape and stamp, or mint metals, but to make or fabricate other things as well. And we cannot but know from the history of the times, that at the adoption of the Constitution, neither in this country nor in any other civilized country, did the money in use consist of gold and silver exclusively. It consisted then, as it has ever since, and probably ever will, in gold and silver, and in paper representing gold and silver in the shape of bank bills, or bills of credit.

The power is, in my judgment, most clearly, to make laws, prescribing what the money of the country shall be, and the value of the money thus created by such laws. If it was intended to restrict the exercise of this power to enactments on the subject of gold and silver only, we should naturally expect that some terms would have been chosen clearly expressing such limitations.

The framers of the Constitution certainly must be supposed to have known something of what is termed the evils of paper money, and if it was intended to exclude the creation of that species of money from the power of Congress, nothing is more rational or national than that something of the kind should have been said in clear and explicit terms.

If "to coin" is to be restricted in its definition to work upon metals, it applies to other metals as well as gold and silver, and proves too much for the argument. It is not claimed that it was the design to have any other species of metal created money by law; and as neither gold nor silver is mentioned as the substance to be coined, I think it must be held, that the power granted is simply to determine by law what the money of the country shall consist of and to regulate its standard value.

Considerable stress is laid upon the debates in the Convention in which the Constitution was framed but I think it far safer to look carefully at the Constitution as it was adopted, and endeavor to construe it according to its evident and natural import. It is by no means certain that these debates may not rather mislead than enlighten the judicial mind.

The framers of the Constitution were but the agents of the people, to prepare it for their acceptance or rejection, and if we could be certain that we have arrived at the exact meaning of these agents, we might still doubt whether the people, when they ratified and accepted it, did not give it a broader and more generous interpretation.

We can only arrive at their intention with any degree of certainty by attending carefully to the ideas expressed. I can have no doubt that should any other metal, or combination of metals, be discovered, which, in the judgment of Congress, was more convenient and suitable for use as money than gold or silver, it might by law make such metal or combination money, and prohibit the use of gold and silver as money.

And I have as little doubt that Congress has, under this general head of power, to make laws on the subject of the money of the country, ample authority to declare and make by law these promises of the Government, money and a legal tender in payment of all debts whatever. This seems to me a fair and reasonable interpretation of the instrument in view of the subject of the power, the nature and functions of the body upon which it was conferred, and the purposes for which it was thus conferred.

The interpretation contended for in behalf of the plaintiff, so far from being strict and rigid, as is claimed, would, as it seems to me, be exceedingly loose and conjectural in its very narrowness and poverty of apprehension. It is an authority to make a supreme law and not a mere employment to bestow labor upon metals, as it would seem to be regarded.

It must be admitted that no power is in express terms anywhere given in the Constitution to Congress, to make anything a legal tender in payment of debts public or private. The States are prohibited from making anything but gold and silver such legal tender. But Congress is neither prohibited from making a law upon the subject, nor expressly authorized to enact one. If a direct and explicit authority is needed, it has no power whatever to make gold or silver even, or bullion, or bank notes, or bills of credit, such legal tender. This power, if it exists in Congress at all, is lodged there as a necessary and proper incident only, to the full and perfect exercise of some power expressly granted in the instrument And the statute in this regard, must find its warrant and sanction in the fact of its necessity or propriety as an auxillary to the legitimate exercise of some one or more of the enumerated and granted powers.

But there is, I think, no serious difficulty in respect to the existence of this power in Congress, to provide that a legal tender may be made in payment, and satisfaction of all debts existing within the jurisdiction of the Government whether public or private

The only controversy which can seriously arise, as it seems to me, must be in regard to what shall be made the legal tender. It is a power which Congress has uniformly exercised, and is clearly an incident to the power to regulate commerce. Contracting and paying debts are strictly part and parcel of commerce. And under no civilized government can its commercial business be regulated, without some specific provision of law, in regard to paying, satisfying and discharging all debts and obligations, not only to the Government, but between individuals. The power to regulate commerce includes the power to make laws for everything which belongs to commerce, a material part of whic is the contracting and the payment and final discharge of the debts created thereby.

It is claimed, however, on behalf of the plaintiff, that conceding to Congress the power to provide by law for a legal tender, in payment and satisfaction of debts, it is limited in the exercise of such power by the Constitution, to making gold and silver coin only such tender. It is admitted that no such restriction is to be found in the language of the Constitution, but it is claimed to be irresistibly inferable from the provision prohibiting the States from making anything else a legal tender. This proposition is wholly untenable. To say, as matter of judicial construction, that a limitation and restriction upon the power of and inferior, by a superior, implies the same limitation and restriction upon the power of the superior, would be in the last degree unwarrantable, within any known rule of construction. The mere statement of such a proposition is its sufficient refutation. Another argument is sought to be derived against the existence of the power to make paper of this description a legal tender, from what is claimed to have been the uniform practice of the Government, from the beginning, to make nothing but gold and silver coin such legal tender.

This, if it had been the uniform practice, would be in no respect conclusive, though it would not be entirely without force as an argument. For it is well understood that the General Government has many powers which it has never called into existence, the occasion for their proper exercise having never as yet arisen.

But the fact is otherwise. The Government has not only issued paper of this description from the beginning, whenever the public exigencies required it, but has generally provided by law that it should be receivable in payment of all public dues. And it was held to be a lawful tender in payment of such dues by Judge Story, in *Thorndike* v. *The United States*, 2 Mason, 1.

It is said, in answer to this, that Government may properly make such regulations in regard to its own debts as it chooses, and that it would not follow that it could make such notes a lawful tender between individuals, if it could in discharge of its own dues

But this is no answer. The question is not what the Government may do by contract between its agents and other individuals, but what rule it may prescribe as a public and general law

If Congress has no power to pass a law making them a legal tender, any such law would be void and they could not be lawfully tendered in satisfaction of a debt, even to the Government. But if Congress has the power to make them a lawful tender in payment of any debt, it may unquestionably make them such in payment of all debts.

The decision, therefore, necessarily affirms the power of Congress to make a valid law authorizing the tender in question.

A debt between individuals is no more sacred or removed from the reach of the power of Government than one from an individual to the Government. The question is, has Congress the power to provide by law that they shall be a legal tender in payment of any debt?

It is thus seen that Congress has, in repeated instances, exercised this very power, not to the same extent or in the same degree, perhaps, but identical in kind, whenever in its judgment the necessities or the inconvenience of the country required it. The power is clearly, in my judgment is one of the attributes of governmental sovereignty, and may be exercised whenever it is deemed necessary or proper by the sovereign authority. And were it even true and made lawful money, I have no doubt they could still be made a legal tender. Congress having the power to provide for a tender, in satisfaction of a debt, has necessarily the right to declare what the tender shall consist of. It is not a question of policy or expediency merely, but of power.—Of the expediency and propriety of the measure, Congress is the sole and exclusive judge. If it has the power to make such a law, its judgment as to the necessity or propriety of it at the present time, is conclusive. The Courts have no right to question it, except to determine the existence of the power.

It is also claimed that the act is invalid on the ground that it impairs the obligation of contracts by compelling the creditor to receive something less valuable than gold or silver coin in payment of his lawful demands against his debtors.

It cannot be denied that it does in one sense and to a material extent impair the obligation of contracts in the particular above stated. But it is not invalid for that reason. The power to pass laws to impair the obligations of contracts is prohibited to the States only which can pass no law impairing directly or indirectly the obligations of any contract. There is no such limitation upon the power of Congress. The argument that the one implies the other has already been answered. The same effect may, however, be produced by regulating the value of coin, which, it is admitted may properly be made a legal tender. Instances are not wanting in our own Legislature of changing by law, the existing standard or degree of fineness of our coin, and laws making foreign coin, a legal tender have been repealed. Congress has also enacted general brankrupt laws, which, to a still greater degree, affect the obligation of contracts, destroying entirely their obligatory force, without the consent of the creditor. Such acts have been held constitutional by the Supreme Court of the United States and by State Courts. In the matter of Edward Kleim How. U. S. R, 277; opinion of Mr. Justice Catron; *M'Cormic* v. *Pickering*, 4 Coms, 276; *Kinzler* v. *Kohans*, 5 Hill, 317; *Sacket* v. *Andross*, id. 327.

I do not, however, rely upon these decisions as controlling in the present case. The power to enact a general brankrupt law, so manifestly includes in it the power to impair the obligations of contracts brought within the operation of the law, that there scarcely seems room for two opinions on the subject.

There is, however, authority for the proposition, that where the subject of the enactment is clearly within the granted powers the fact that it incidentally impairs the obligation of contracts furnishes no valid ground of objection that the act is unconstitutional.

The grant of the power to make all laws which shall be necessary or proper for carrying into execution "The foregoing power and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," is an express and not an implied grant. It carries with it, and includes in it, all legitimate incidents and consequences of the laws thus made of necessity. It would be a strange and unwarrantable

proposition that a law clearly within the letter and spirit of an express power, should be held invalid and unconstitutional, merely because in its operation it affected some particular right or interest injuriously.

But while I am able to find ample authority in the grant of power to regulate commerce, for making the notes in question a legal tender, I do not intend by any means to rest my opinion upon that head of power exclusively. We must of necessity take judicial notice of the alarming and critical condition of the Government and of the country. We cannot, if we would ignore the fact that armed rebellion, by open and flagrant violence, is seeking the overthrow of the Government, menacing its complete and total destruction. Nor that the Government thus assailed, in order to perserve its existence and restore its rightful authority, is compelled to raise and support powerful armies and supply them with munitions of war, to provide and maintain a navy of a magnitude wholly unprecedented in our history involving an expenditure probably of millions of dollars daily. To meet this extraordinary demand, the ordinary means of the Government, and indeed, the ordinary currency of the whole country, is entirely inadequate The Government must, therefore, not only borrow but must create, as far as practicable, an additional currency, to meet its urgent and immediate necessities. The right to borrow necessarily includes in it the right to promise to pay. But in order to borrow to advantage, or indeed to borrow at all, its promises must necessarily have credit, and should have the highest credit which the Goverment is able to confer upon them. If, in the judgment of Congress, it was either necessary or proper to enhance the credit of these Goverment promises, to make them a legal tender in payment of private as well as public debts, it had, unquestionable, as I think, the right so to do, and even to declare them lawful money. It would be but the making of a law, necessary and proper for carrying fairly and reasonably into execution several of the powers expressly granted.

That this was the object and purpose Congress had in view, is evident not only from the debates when the act was under consideration before that body, but also from the application of the Secretary of the Treasury to it to insert such a provision in the act.

Amongst other reasons assigned by that officer to Congress in favour of this act he says, "But unfortunately there are some persons and some institutions which refuse to receive and pay them, and whose action tends not merely to the unnecessary depreciations in business against those who in this matter give a candid support to the Government, and in favor of those who do not." But we can see plainly, aside from this, that it was a means well adapted to the accomplishment of the purpose, and therefore entirely legitimate. And this brings this feature of the law within the express words of the grant of power "to make all laws which shall be necessary or proper for carrying into execution the foregoing power."

I have no hesitation, therefore, in pronouncing this provision of the act in question perfectly in accordance with the plain letter, intent and spirit of the Constitution.

I have come to the conclusion upon what has seemed to my mind the plain and necessary construction of the organic law, as it stands written by its framers, and without calling to aid the consideration of those ultimate and extreme powers which every government, having the right to an existence and a place among the nations of the earth, may of necessity employ as a means of self-preservation when assailed by a public enemy with flagrant violence, and thus involved in actual war. No one doubts, I suppose, that any government thus situated may rightfully, if need be, by any suitable means, call to its aid and service the might of every arm and the use of every dollar of the property of each and every subject and citizen within its jurisdiction. These are, however considerations which it is wholly unnecessary to press into this case.

The defendant is therefore entitled to judgment upon the facts presented by the case.

Judge E. D. Smith concurred in a separate opinion, reaching the same result, and the other judge concurred in the above opinion.

GENERAL CORRESPONDENCE.

Articled clerk—Under age—Father not party to the articles—Effect thereof.

TO THE EDITORS OF THE LAW JOURNAL.

London, July 28, 1863.

GENTLEMEN,—Could you inform me, through the pages of your valuable periodical, whether a father is a necessary party to articles of clerkship, where the son is living with the father and under age, to enable him to pass his examination and be admitted as an attorney?

And oblige yours truly,

LAW STUDENT.

[Where an articled clerk is a minor, the father is a necessary party merely for the protection of the attorney to whom the minor is articled, because the minor himself is incapable of making a binding engagement of the kind. But where the minor, without his father being a party to the articles of clerkship, faithfully serves his term of probation, ratifies the articles when he comes of age, and is of age at the time of his application for admission, and is in other respects qualified for examination and admission, we apprehend that the fact of his father not having been a party to the contract of service at the time it was entered into, will not be an objection on the part of the Law Society.—EDS. L. J.]

Articled Clerks—Articles expiring within fourteen days of term—Remedy.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Profiting by your suggestion in the *Journal* for this month my remarks shall be brief and questions few.

By cap. 35, Con. Stat. U. C., persons applying for admission as attorneys are required, at least fourteen days next before the first day of the Term in which they seek admission, to deposit with the Secretary of the Law Society their contract of service, and an affidavit of the execution thereof and due service thereunder, &c. Now, I see that the practice in England, as per Archbold's Practice, page 40, is to deposit those papers in the proper office within the first fourteen days of the Term, thereby preventing in many cases a loss of three months to the student. My articles expire ten days prior to the first day of Michaelmas Term of this year. *Query*—Could my examination be proceeded with in Michaelmas upon the papers being filed fourteen days before the first day of Term, with an affidavit of due service thereunder up to that time, and that four days thereafter the full term of five years would be completed; or could I in any other way obtain admission during that Term? Or if not, could my examination be made during that Term, and my admission during the following Term?

LAW STUDENT.

[*In re MacGachen*, 7 U. C. L. J. 147, is apparently conclusive against the right of our correspondent, under the law as it stands, to obtain admission during Michaelmas Term, but upon inquiry we learn from the Treasurer of the Law Society

that the Benchers have come to the conclusion, in the case of students whose articles expire within fourteen days of a particular Term, to allow the student at least fourteen days before the Term to leave with the Secretary of the Law Society:—

1. His contract of service;
2. Any assignment thereof;
3. An affidavit of the execution thereof;
4. A certificate of his having attended the sitting of the court or courts during two Terms;
5. And a special affidavit showing that his articles not expired—that they will expire within fourteen days before Term—and of service during so much of the term as expired.

And then to undergo his examination *de bene esse*, and afterwards on the first day of Term to file a further affidavit showing the expiry of the articles and service thereunder for remainder of the term, and so gain admission without the loss of three months.

This will be good news to our correspondent and others in like circumstances. The Benchers deserve great credit for the desire which they have thus evinced of securing deserving young men, who can ill afford any loss, against the loss of a Term.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. C. GREGORY v. GORTAN.

Covenant—Demise of chattels—Judgment against executor.

In an action of covenant upon a demise of bleach works, and articles, matters, and things, mentioned in the indenture which the lessee was authorized to replace, the declaration alleged that in case a valuation at the end of the term, should exceed a certain sum, it was agreed that the lessor, his heirs, executors, administrators, or assigns, should pay the difference; that during the term the lessor died, having by his will appointed the defendant his executor, and having devised the several reversions in the demised premises and articles, matters and things to the defendant, and that the defendant had not paid the amount of the said difference between the value &c., of the said articles, matters and things. The jury having found for the plaintiff.

Held (upon error assigned on the record) that the covenant did not run with the land, and that the judgment ought to be against the defendant as executor,—as to damages and costs *de bonis testatoris et si non*,—as to costs *de bonis propriis*.

EX. C. WOOLLEN v. WRIGHT.

Sheriff—Interpleader issue, acceptance of, by execution creditor—Ratification.

The acceptance by an execution creditor of an interpleader issue, is not a ratification of an illegal seizure by the sheriff, where the sheriff under a *fi. fa.* upon a judgment obtained by the defendant against J., seized the plaintiff's goods, and the defendant, who, except by delivering the writ to the sheriff, had not interfered before the seizure accepted on interpleader issue.

It was *held* in an action for trespass, that he was not responsible.

C. C. R. REG v. EDWARD HOLMAN.

Pleading—Misjoinder of counts—Election.

An indictment contained two counts, the first embezzlement as servant, the second for larceny as bailee. At the close of the case for the prosecution, it was objected that the indictment was bad for misjoinder of counts, and that the court had no power to allow the counsel for the prosecution, to elect on which count he would proceed. The court overruled the objection, and the counsel for the prosecution having elected to proceed upon the second count, the prisoner was convicted.

Held, that the conviction must be affirmed.

EX. HUDSON v. MALCOLM.

Mortgage—Re-conveyance—Order for delivery up of deeds—Attachment for non performance.

When there has been an assignment of a mortgage and a re-conveyance to mortgagor, and then a re-mortgage to the same mortgagee, upon the usual order on redemption for delivering up of deeds relating to the title of the mortgaged property, the original mortgage and re conveyance, as they form links in the title, ought to be delivered up.

EX. STUCKLEY v. BAILEY.

Contract—Warranty—Evidence—Letter—Representation.

Though, where parties have communicated entirely by letter, so that their contract must be wholly in writing, the construction of it is for the court; yet where it is not so, as in the case of sale, where the parties or their agents have had interviews and oral communications, and have seen the subject of the contract together, the whole matter must be for the jury; and evidence of oral communication to the plaintiff, to the effect that if he desired to be satisfied as to latent unsoundness, he must have the article examined.

Held, admissible, as tending to show that the statement as to soundness in the letters were not part of the contract, but that they were matters of mere representation.

Quære, whether at the sale of a ship, a warranty not mentioned in the bill of sale can be set up.

C. P. POOLE v. WHITCOMBE.

Costs—Verdict—Improper statement to jury.

The jury at a trial of a cause, have no right in estimating damage to take into their consideration what amount will carry costs; and if it appears they were thereby influenced in their finding, it is ground for granting a new trial.

TANVACO AND OTHERS v. LUCAS AND OTHERS.

Ship and shipping—Contract to deliver "shipping documents"—Policy, sufficiency of a question for jury.

A contract was made in London by which the plaintiffs sold to the defendants a cargo of wheat, 40s. per quarter, free on board at Lagangrog, and including freight and insurance to any safe port in the United Kingdom. The wheat was to be shipped in a particular class of vessel, and payment to be by cash in London, in exchange for shipping documents. The plaintiffs having obtained in market a cargo afloat answering the requirements of the contract, tendered to the defendants the shipping documents, and a provisional invoice which, following the bill of lading, stated the cargo to be 1,860 quarters at 50s. £4,625 less frieght at 10s. 9d. per quarter, £1,001 10s. The policy of assurance tendered as one of the shipping documents, was on the cargo of 1,850 quarters, valued at £3,600. The defendants refused the tender and defended an action for the contract, on the ground that the policy tendered was of unsufficient amount.

Held, that it was a question for the jury, whether the policy tendered was a shipping document, within the meaning of the contract.

LAWSON v. BURNESS.

Shipping—Charter party—Demurrage—Delay on loading—Regular term for loading—Custom of colliery or wharf—Reasonable term—Liability to chartered.

Where a ship had been chartered to proceed to a certain dock and there take and load in the customary manner from agents of the charterer, a full and complete cargo of the coal of a particular colliery, to be loaded in regular turn, and it being found as a fact

that this meant the "turn" on which the vessel should arrive and be ready to receive cargo, not merely the "turn" according to the custom of the colliery, (it not being a known and established custom.)

Held, that the charterer was liable for demurrage during a delay in loading, caused by the ship not being able to receive her cargo, when ready to do so not in the order in which according to the custom of the colliery, she was allowed to be loaded.

EX. SCOTT v. SEYMOUR.

Right of action—Assault committed abroad—Foreign jurisdiction.

An action lies in this country for an assault and battery committed in a foreign land by one British subject upon another, although it appears that it is a matter there of criminal cognizance.

Quære, whether it would be so if it also appeared that it was not of civil cognizance, and that no claim for compensation could be supported in the courts of a foreign country.

EX. SHEEN v. BUMSTED.

Evidence—Fradulent representation—Question as to belief or repute.

In an action for a false representation, that a third party to the best of his knowledge, was responsible, the defendant may be asked in chief whether at the time of the representation he believed the debtor to be in good credit, and other persons residing in the neighbourhood may be asked a similar question.

EX. WILKS v. HORNBY.

Bill of exchange—Pleading—Consideration—Failure of—Fraudulent misrepresentation—Accommodation, acceptance, which is—Disputed accounts.

In an action on a bill of exchange, on pleas of fraud and of an accommodation acceptance, it is no defence that the bill was given for a supposed balance of account, as represented by the plaintiff, but which, as alleged by the defendant, did not exist nor was really due.

EX. BRADWORTH v. FOSHAW.

Pleading—Action for negligence—Proof—Practice—Trial—Amendment.

An amendment of a declaration will not be allowed at the trial, where in a case of tort the plaintiff has stated one cause of action, and then, his evidence failing to sustain it, has endeavoured to raise another one.

Q. B. PATTESON v. HARRIS.

Costs—Taxation—Policy of assurance—Total loss—Partial loss—Divisibility.

Where, upon an insurance of goods, part of the goods is lost by perils of the sea, and subsequently the remaining part is lost not by perils of the sea, the issue upon the plea denying the loss is divisible; and the plaintiff can only enter a verdict in respect of the part lost by perils of the sea, and the defendant may enter a verdict for the remainder.

C. P. OFFORD v. DAVIES AND ANOTHER.

Revocation of guarantee—Demurrer.

The declaration set out the following guarantee: "In consideration of your discounting at our request bills of exchange for D. & Co., we hereby jointly and severally guarantee, for the space of twelve months, the due payment of all such bills to the extent of £600." To this one of the defendants pleaded that, after making the said guarantee and before the plaintiff had discounted such bills and before he had advanced such sums of money, the defendant countermanded the said guarantee, and requested the plaintiff not to discount such bills of exchange or to advance such sums of money.

Held on demurrer, that the defendant had a right to revoke the promise, and that the rights of the parties were not affected either by the promise for twelve months or by the fact that some discount had been made and repaid.

REVIEWS.

THE LAW MAGAZINE AND LAW REVIEW, for May, 1863. London: Butterworths, 7 Fleet Street, Strand.

Our notice of this number has been unavoidably delayed. We refer to the number with pleasure.

The articles are, as usual, instructive and well written, viz., 1. Discipline of the bar—a paper suggested by the misconduct of Edwin James and Digby Seymour. 2. The rights, disabilities and usages of the ancient English peasantry, continued. 3. Accord and satisfaction—a brief and practical paper on an important branch of law. 4. May's Constitutional History of England reviewed. 5. Administration to foreigners dying in England. 6. Frederick Carl Von Savigny—a biography of this remarkrble and learned man. 7. Case of the *Alabama*, which we copy entire. 8. Lord Mackenzie on Roman law. 9. Judicial Statistics, 1861.

The subscription to the *Law Magazine and Review* is only 20s. sterling per annum. Its cheapness, combined with its worth, should secure for the publication a much more extended support than it possesses in Canada. It is of use not only to the lawyer, but to the jurisconsult and the legislator. The articles are at all times suggestive, and as such give much pleasure to the intelligent reader. The reading of this magazine is of itself a great relaxation to the practical lawyer. His mind, while relieved, is instructed. In a word, both pleasure and profit are the portions of those who habitually read the Law Magazine and Review.

APPOINTMENTS TO OFFICE, &C.

JUDGES.

The Honorable ARCHIBALD McLEAN, late Chief Justice of Upper Canada, to be the Presiding Judge of the Court of Error and Appeal in Upper Canada, in the room and stead of the Honorable Sir John Beverley Robinson, Baronet, C. B., deceased. (Gazetted July 25, 1863.)

The Honorable WILLIAM HENRY DRAPER, C B., Chief Justice of the Court of Common Pleas in Upper Canada, to be Chief Justice of Upper Canada, in the room and stead of the Honorable Archibald McLean, resigned. (Gazetted, July 25, 1863.)

The Honorable WILLIAM BUELL RICHARDS, one of her Majesty's Justices of the Court of Common Pleas in Upper Canada, to be Chief Justice of the said Court of Common Pleas in Upper Canada, in the room and stead of the Honorable William Henry Draper, C.B., resigned. (Gazetted July 25, 1863.)

The Honorable JOHN WILSON, of Osgoode Hall, Barrister-at Law and Q.C., to be one of her Majesty's Justices of the Court of Common Pleas in Upper Canada. (Gazetted July 25, 1863.)

POLICE MAGISTRATE.

MARTIN O'GARA, Esquire, Barrister-at-Law, to be Police Magistrate for the City of Ottawa, in the room and stead of John B. Lewis, Esquire, resigned. (Gazetted July 25, 1863.)

CROWN ATTORNEY.

SAMUEL H. COCHRANE LL.B., of Osgoode Hall, Esquire, Barrister-at-Law, to be County Crown Attorney for the County of Ontario, in the room and stead of W. H. Tremayne, Esquire, removed. (Gazetted July 25, 1863.)

NOTARIES PUBLIC.

SAMUEL BARKER, of the City of London, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted July 4, 1863.)

STEPHEN KNEESHAW, of the City of Toronto Esquire, Attorney at-Law, to be a Notary Public in Upper Canada. (Gazetted July 4, 1863.)

DAVID G. HATTON, of Peterborough, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted July 11, 1863.)

THOMAS BEASLEY, of Hamilton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted July 11, 1863.)

JAMES CAUFIELD, of Ingersoll, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted July 18, 1863.)

PETER JOHNSON BROWN, of Ingersoll, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted July 18, 1863.)

CORONER.

JOHN WESLEY CORSON, Esquire, M D., Associate Coroner United Counties of York and Peel. (Gazetted July 11, 1863.)

TO CORRESPONDENTS.

LAW STUDENT—LAW STUDENT.—Under the head of "General Correspondence."