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DIARY FOR SEPTEMBER.

1. SUN... 11*th Sunday after Trinity.*
2. Mon. .. Last day for notice of trial for County Court Recorder's Court sits.
4. Wed... Notices for Chancery re-hearing Term to be served.
8. SUN... 12*th Sunday after Trinity.*
10. Tues... Quarter Sessions and County Court sittings in each County.
12. Thurs. Chancery re-hearing Term begins.
15. SUN... 13*th Sunday after Trinity.*
21. Sat. ... *St. Matthew.*
22. SUN... 14*th Sunday after Trinity.*
25. Wed... Appeals from Chancery Chambers.
29. Sat. ... 15*th Sunday after Trinity. St. Michael.*

THE

Upper Canada Law Journal.

SEPTEMBER, 1867.

THE MARRIAGE LAWS.

There is a case now standing for judgment in the Court of Chancery, which discloses the necessity for a thorough revision and amendment of our Marriage Laws.

An action for alimony was brought by the wife against the husband, on the ground of desertion, and the defence set up was that the alleged marriage of the parties was celebrated by the Roman Catholic Bishop of Toronto, without the publication of banns or the procurement of a license from the Governor, under the statute, and that such marriage was celebrated privately in the Bishop's house, without any witness being present, and after canonical hours. The aid of the English statute, known as Lord Hardwicke's Act, was also invoked, whereby it is provided that marriages celebrated without banns or license, shall be deemed clandestine, and shall be *null and void to all intents and purposes whatsoever.*

The plaintiff sought to avoid this defence by setting up that these acts did not apply to Roman Catholics (both parties being such in this case, and resident within the diocese of the Bishop who officiated at the marriage ceremony); that marriage was accounted a sacrament by the Roman Church, and as such, being a part of their religion, it was preserved to them intact by the stipulations made upon the capitulation of Canada, and that it was open to that church to regulate the celebration of marriage by their own ecclesiastical rules—and at all events, if the aforesaid statutes did apply, then the marriage was at most only irregular, but not null and void.

It is evident that here are very important questions as to the privileges of our Roman Catholic fellow subjects, and as to the status of many of those who are not Roman Catholics, upon which no shadow of doubt should be allowed any longer to rest. It should be one of the first objects of the Confederate Parliament, to declare the law authoritatively upon these points. On the one hand, privileges are claimed for the Roman Catholics which exceed those granted to any other religious body; on the other hand, if they are on the same footing as other churches, it would appear that a deviation from the requirements of Lord Hardwicke's Act, operating as a total annulment of the marriage tie, would produce consequences, especially as to the issue of such marriages, frightful to contemplate.

As regards the marriage in question, the matters presented for adjudication are, as the Chancellor remarked, whether the marriage of Roman Catholics by their own Bishop is regulated by our statute, or by the French law applicable to the subject which obtained at the time of the cession of Canada, or whether, exempt from both, the Roman Catholics are in this respect a law unto themselves.

It is our object, in a few papers, to discuss some of the points which present themselves in this case, in order that the necessity for legislative interference may be the more manifest, and that the best mode of applying a remedy may be elicited.

And, first, there would seem to be but little doubt that Lord Hardwicke's Act is in force in Upper Canada. Under English law, marriage is a civil contract, involving civil rights and liabilities, and the very first act of the Local Legislature of Upper Canada, when called into existence, was to pass an act adopting English law in regard to "all matters of controversy relative to property and *civil rights.*" P. S. 32 Geo. III. cap. 1, sec. 3. See Con. Stats. U. C. cap. 9, sec. 1. The marriage law, then in force in England, and by such act introduced into Upper Canada, was 26 Geo. II. cap. 33 (Lord Hardwicke's Act). This position appears to have been at first doubted by the late Chief Justice Robinson, in *Reg.* v. *Secker*, 14 U. C. Q. B. 604, and *Reg.* v. *Bell*, 15 U. C. Q. B. 290; but subsequently he announces the deliberate opinion of the court

in *Reg.* v. *Roblin*, 21 U. C. Q. B. 352, in the following language:—

"We consider that our adoption of 32 Geo. III. cap. 1, of the law of England * * * included the law generally which related to marriage. The statute 26 Geo. II. cap. 33, being in force in England when our statute 32 Geo. III. cap. 1 was passed, was adopted as well as other statutes, so far as it consisted with our civil institutions, being part of the law of England at that time *relating to civil rights*: that is, to the civil rights which an inhabitant of Upper Canada may claim as a husband or wife, or as lawful issue of a marriage alleged to have been solemnized in Upper Canada.

"The Legislature of Upper Canada have so regarded this matter, as appears by the statute 33 Geo. III. cap. 5, secs. 1, 3 and 6; 38 Geo. III. cap. 4, sec. 4; and 11 Geo. IV. cap. 36, in which they have recognized the English Marriage Act, in effect though not in express terms, as having the force of law here in a general sense, and controlling the manner in which marriage is to be solemnized.

"We find nothing in the ordinances of the Governor and Council of the province of Quebec, nor anything in the British Statutes, 14 Geo. III. cap. 83, or 31 Geo. III. cap. 31, or in any other British Statute passed between the 26 Geo. II. cap. 33, and the time of our adopting the law of England, which can affect us in this matter, nor anything in any British or Imperial act passed since, which either extends to the Colonies generally or to Canada in particular."

Besides the Provincial Statutes above cited by the Chief Justice, reference may also be made to 2 Geo. IV. cap. 11, sec. 1, which contains *express* mention and recognition of the English Marriage Act as in force in Upper Canada. The only case reported subsequent to *Reg.* v. *Roblin*, in which the marriage laws were considered, is that of *Hodgins* v. *McNeill*, 9 Grant, 305, wherein Esten, V. C., takes the same view of the law and substantially follows the previous case.

Both courts agree in this, that while Lord Hardwicke's Act is generally in force, yet the 11th section is not to be considered as part of the law of this Province. That section avoids the marriages of minors without the consent of their parents and guardians first had, and the 12th section provides that if the parents and guardians are of unsound mind, or beyond the seas, or shall unreasonably withhold consent, an application may be made to the Lord Chancellor who has power to order such marriage without such consent. And our courts hold that as it would work great hardship to have the 11th clause in force without the 12th or any other provision as a substitute for it, therefore it is to be taken that in this Province the marriages of minors without the consent of their parents or guardians, are not to be accounted invalid, but simply irregular, illegal, and in breach of the usual bond condition that no impediment exists.

QUIETING TITLES.

We give hereafter the recent orders under sec. 52 of the Act for Quieting Titles. The former orders are rescinded. It will be seen that the chief feature under the new orders is the giving of jurisdiction to the local Masters, subject to the supervision of an inspector in Toronto, so as to enable country practitioners in contested cases, or where *viva voce* testimony has to be given, to attend personally and avoid the necessity of employing counsel in Toronto, or of sending their witnesses for examination.

In consulting the interests of those at a distance from Toronto, by giving jurisdiction to local Masters, it seems to have been felt that some supervision was advisable by reason of the important consequences attending the decision of the referee and the certificate of title under section 30 of the Act. When, therefore, a local Master is named as referee, one of the Toronto referees is to act as inspector, with whom the local Master may, under order 7, correspond for advice and assistance, and by order 4, the petitioner must, when he selects a local Master as referee, endorse on his petition the name of either Mr. Turner or Mr. Leith as inspector, as he may think proper.

There may be cases depending on no disputed questions of fact, but solely on difficult questions of law, or cases in which, from the large amount involved, it may be thought expedient by an applicant to have the assistance of counsel in Toronto, and that the case should be heard before a Toronto referee without the intervention of a local Master, and power is given by order 3 to refer the case at once to either of the referees. Where also a case is referred directly to a Toronto referee, some delay may be avoided which might attend a reference to a local Master, and consequent communications between him and the inspector for advice, or on non-approval of

decision or otherwise. On reference to a Toronto referee, or indeed to any referee, he may correspond with the petitioner or his solicitor as to defects, and supplying of proof, &c. On the other hand the advantage of a local Master being selected as referee may outweigh all other considerations, where witnesses whose evidence has to be taken *viva voce*, reside at a distance from Toronto.

It is to be observed that in an uncontested case the referee under order 11 is to deal with it himself, without the necessity of hearing either counsel or solicitor, with whom, however, he may, under order 12, correspond as to proofs required or as to defects in the proof.

We imagine that in cases where a widely spread and yet groundless suspicion exists, as to the validity of a title, or where it depends on or a testimony of witnesses who may die or go abroad, or where the title is so complicated as to involve much expense on each dealing with the property, the Act may be resorted to with great advantage, as also in cases where a sale is to take place in lots, or the party in possession is desirous of establishing his title as against an adverse claimant, whose claim has an appearance of right, which considerably reduces the value of the property to the true owner, and when there is no mode of barring such adverse claimant.

We should probably have enlarged our observations, but that we understand, Mr. Turner, one of the inspectors and referees, will, in the course of two or three days, publish a short treatise on the Act and the practice under it; we therefore merely give the following brief remarks and suggestions to those who may apply under the Act:—

1. Consider carefully the title and the proof of it, and if it be defective do not apply—see secs. 6 & 32 & 48 of the Act.

2. In the petition, a form of which is given in the Act, state accurately the estate or interest claimed, and endorse thereon the referee selected, and if a local master and not a Toronto referee be selected, then endorse the name of a Toronto referee who is to act as inspector, (see order 3) and send the petition to him to be entered (see order 6) with his fee of $8—(see order 23).

3. After entry with the inspector, deliver to the registrar, who, if the application is under sec. 2 of the Act, will attend a judge for directions. The certificate to file with the County Registrar will be given by the registrar of the court, and the petition then be returned to the petitioner—see order 8.

4. Deliver all deeds, proofs and matters required by sec. 5, 6 & 8, and order 10, to the referee (see order 9),—as to proof, see order 9 & 10.

The case is then in the hands of the referee for adjudication, and he will proceed according as he finds the title perfect or defective in an uncontested case, or hear the parties or take evidence in contested cases.

Alexander Leith, Esq., Barrister-at-law, has been appointed the second Inspector and Referee under the new orders. His well known ability and thorough knowledge of real property law will render him a most efficient officer, and his appointment will, we doubt not, be favorably received by the profession.

JUDGMENTS—EASTER TERM, 1867.

QUEEN'S BENCH.

Present: DRAPER, C. J.; HAGARTY, J.; and MORRISON, J.

[Saturday, Sept. 6th, 1867.]

Fraser v. *Grand Trunk Railway Company.*—Rule absolute for new trial without costs.

Green v. *Lewis.*—Rule discharged.

Lodge v. *Thompson* —Rule absolute to enter nonsuit unless plaintiff consent to take a rule for a new trial on payment of costs within one month.

Clarke v. *McCullough.*—Rule discharged, leave to appeal granted.

Gilpin v. *Royal Canadian Bank.*—Rule absolute for a new trial without costs.

Gibbs v. *Gildersleeve.*—Rule discharged.

Regina v. *Township of Hamilton.* — Judgment arrested.

Farrell v. *Farrell.*—Special case. Postea to plaintiff. Leave to appeal granted.

Hatch (*Trustee*) v. *Parker.*—New trial. Costs to abide the event.

Barr v. *Canada Life Assurance Co.*—Rule to set aside nonsuit discharged.

Jacobs v *Clarke.*—Rule to enter nonsuit discharged.

Jacobs v. *Clarke.*—New trial on payment of costs.

Creighton v. *Fretz, et al.*—Rule absolute as to Lewis Fretz, discharged as to Allan Fretz.

McDonald v. *McGillis.* — New trial without costs.

Commercial Bank v. *Harris.*—Judgment for defendant on demurrer. (*Morrison*, J. dissenting.)

Fitzgibbon of the City of Toronto.—Not sufficient material before the court.

IN CHANCERY.—ORDERS OF COURT.

August 31, 1867.

1. Under the Act for Quieting Titles to Real Estate in Upper Canada the petition for an investigation of title is not to include two or more properties dependent on separate and distinct titles; but may include any number of lots or parcels belonging to the same person and dependent on one and the same chain of title.

2. Where an application is made under the 2nd section of the Act, the Registrar is to attend one of the Judges with the petition for directions, before the same is referred for investigation.

3. A petition under the Act may, at the option of the Petitioner, be referred to any of the Officers of the Court at Toronto, or to any Conveyancing Counsel, who may from time to time be designated by the Court for the purpose; or to any of the following local Masters, viz., the Masters at Barrie, Belleville, Brantford, Brockville, Cobourg, Cornwall, Goderich, Guelph, Hamilton, Kingston, Lindsay, London, Owen Sound, Peterborough, Sandwich, Sarnia, Simcoe, Stratford, St. Catharines, Whitby, and Woodstock; or to any other of the local Masters who shall hereafter be designated.

4. To facilitate the proceedings in cases referred to the local Masters, two Inspectors of Titles will be named by the Court, for the purposes, and with the powers, mentioned in, and provided for by the 25th and 26th sections of the said Act; and on the petition are to be endorsed the names of one of the Inspectors, and of the local Master, thus: "To be referred to the Master at —— and to Mr. ——— Inspector of Titles."

5. Petitions filed unindorsed with the name of a Referee are to be referred to the Referees in Toronto in rotation, or otherwise as the Court from time to time directs; but a Petition indorsed with the name of any Referee is to be referred to him accordingly, unless the Court otherwise directs.

6. Where the Petitioner desires the reference to a local Master, the Petition is to be entered with the Inspector of Titles before being filed with the Registrar as required by the Statute, and the Inspector is to note thereon the day of entering the same, adding to such note his own initials, and is thereupon to deliver the Petition to the Solicitor, or, if duly stamped, to the Registrar, to be filed.

7. The local Master shall be entitled to confer or correspond from time to time with the Inspector of Titles, for advice and assistance on questions of practice or evidence, or other questions arising under the Act or under these Orders.

8. The Registrar is to deliver to the party filing a Petition under the Act, a certificate of the filing thereof, for registration in the proper County; and thereupon the Petition is forthwith to be referred, and delivered or posted by the Registrar, to the Referee named for that purpose.

9. The particulars necessary under the 5th section of the Act to support the Petition are to be delivered or sent by the Petitioner or his Solicitor to the Referee, and are to be forthwith examined and considered by him.

10. In every case of an investigation of the title to property under the said Act, the petitioner is to shew, by affidavit or otherwise, whether possession has always accompanied the title under which he claims the property, or how otherwise, or is to show some sufficient reason for dispensing with such proof either wholly or in part.

11. Where there is no contest, the attendance of the Petitioner, or of any Solicitor on his behalf, is not to be required on the examination of the title, except where, for any special reason, the Referee directs such attendance.

12. If, on such examination as aforesaid, the Referee finds the proof of title defective, he is to deliver or mail to the Petitioner, or to his Solicitor or Agent, a memorandum of such finding, stating shortly therein what the defects are.

13. When the Referee finds that a good title is shown, he is to prepare the necessary advertisement and the same is to be published in the Official *Gazette* and in any other newspaper or newspapers in which the Referee thinks it proper to have the same inserted; and a copy of the advertisement is also to be put up on the door of the Court House of the County where the land lies, and in some conspicuous place in the Post Office which is situate nearest to the property the title of which is under investigation; and the Referee is to endorse on the advertisement so prepared by him the name or names of the newspaper or newspapers in which the same is to be published, and the number of insertions to be given therein respectively, and the period (not less than four weeks) for which the notice is to be continued at the Court House and Post Office respectively.

14. Any notice of the application to be served or mailed under the 14th section of the Act, is to be prepared by the Referee; and directions are in like manner to be given by him as to the persons to be served with such notice, and as to the mode of serving the same.

15. The Inspectors and Toronto Referees are from time to time to confer with one of the Judges in respect of matters before such Inspectors and Toronto Referees, as there shall be occasion.

16. When any person has shown himself, in the opinion of a local Master, to be entitled to a Certificate or Conveyance under the Act, and has published and given all the notices required, the Master is to write at the foot of the petition, and sign, a memorandum to the effect following: "I am of opinion that the Petitioner is entitled to a certificate of Title

(*or conveyance*) as prayed" (*or* subject to the following incumbrances, &c., *as the case may be*); and is to transmit the Petition (if by mail, the postage being prepaid), with the deeds, evidence, and other papers before him in reference thereto, to the Inspector of Titles with whom the Petition was entered; and the Inspector is to examine the same carefully, and should he find any defect in the evidence of title, or in the proceedings, he is, by correspondence or otherwise, to point the same out to the Petitioner, or his Solicitor, or to the Master, as the case may be, in order that the defect may be remedied before a Judge is attended with the Petition and papers for approval.

17. When the Inspector, or other Referee (not being a local Master), finds that the Petitioner has shown himself entitled to a Certificate of Title, or a Conveyance under the Act, and has published and has given all the notices required, the Inspector, or Referee (not being a local Master), is to prepare the Certificate of Title, or Conveyance, and is to engross the same in duplicate, one on parchment, and one on paper; and is to sign the same respectively at the foot or in the margin thereof; and is to attend one of the Judges therewith, and with the deeds, evidence, and other papers before him in reference thereto; and on the Certificate or Conveyance being signed by the Judge, the Inspector or other Referee aforesaid, as the case may be, is to transmit or deliver the same to the Registrar, to be signed and registered by him; and the Registrar is to deliver or transmit the same, when so signed and registered, to the Petitioner, his Solicitor, or Agent, for Registration in the proper County.

18. When a Certificate of Title or Conveyance under the Act has been granted, the Inspector or Referee may, without further order, deliver, on demand, to the party entitled thereto, or his Solicitor, all deeds and other evidences given, in the matter of the title; and is to take his receipt therefor.

19. Each of the Inspectors and other Toronto Referees is to keep a book, and to preserve therein a copy of all his letters under these Orders, and is to prepare monthly, for the information of the Profession, a memorandum of points of practice decided in matters under the Act.

20. The fees of Solicitors and Counsel, and the fees payable by stamps, for proceedings under the said Act, are respectively, to be the same as for like proceedings in other cases.

21. The Referee is, in lieu of all other fees, to be entitled to a fee of fifty cents for every deed in the chain of title, other than satisfied mortgages; and Referees who prepare the Certificate or Conveyance, are to have a fee of $1 for drawing and engrossing the same in duplicate. Besides these fees, the Referee is to have the same fees in respect of proceedings occasioned by any defects in the proof of title, which shall be mentioned in the Referee's memorandum referred to in the 11th of these Orders, as are payable to the Master in respect of similar proceedings in suits. No further or other fee is to be payable to the Referee in respect of any of the proceedings by or before him under the said Act in an uncontested case.

22. In a contested case, the Referee is, in addition, to be entitled, in respect of the proceedings occasioned by the contest, to the same fees therefor as are payable to him for the like proceedings in suits.

23. The fee of the Inspector of Titles on entering the Petition with him is $8, and no further fee is to be paid him for correspondence, examination of the title, drawing and engrossing certificate or conveyance, or for any other matter or thing done under the petition.

24. The Applicant or his Solicitor is to pay, or prepay, as the case may be, all postages and other expenses of transmitting letters or papers.

25. Petitions under the 35th Section of the Act are to be filed and proceeded with in the same manner (as nearly as may be) as petitions for an indefeasible title; and the fees of Officers, Solicitors, and Counsel, are to be the same as in respect of the like proceedings in suits.

26. The orders of the 19th of September, 1865, are hereby rescinded.

P. M. Vankoughnet, C.
J. G. Spragge, V. C.
O. Mowat, V. C.

SELECTIONS.

SEALS.

The preparation of an argument in regard to an instrument, which, it was contended, was not a deed, because the seal was made by an impression upon the paper without any wax or similar substance, has led the writer into an investigation in reference to the origin and history of seals as a mode authenticating documents, which may interest the readers of the *American Law Review*.*

Some high authorities seem to sustain the position that such an impression alone is not sufficient; but a careful examination of their language shows, that it was sometimes used, not so much with reference to the substance upon which the impression was made as to some other element of the act, while in other cases it may be suspected that subsequent writers have been misled by disregrding this distinction.

Chancellor Kent (4 Comm. 452, 9th ed.) says, "The common law intended by a seal an impression upon wax or wafer, or some other tenacious substance capable of being impressed." This language does not literally exclude the idea of an impression on the paper alone; but his decision in *Warren* v. *Lynch*, 5 Johns. 239, although not decisive, tends to

*The following pages are, however, rather a *cento* than an essay,—not so much an attempt at an exhaustive discussion of the subject as a collection of materials for that purpose.

that construction. He cites Co. Inst. 169; Perkins, § 134; Bro. Tit. Fatis, 17, 30; *Lightfoot & Butler's Case*, 2 Leon. 21. The distinguishing element of my Lord Coke's definition (8 Inst. 169) is the *making an impression* as a symbol of authentication. "The deed, charter, or writing," he says, "must be *sealed*; that is, *have some impression* upon the wax, for sigillum est cera *impressa*, quia ce a, *sine impressione*, non est sigillum.

And in none of these authorities is it decided that a seal can legally be impressed upon only one material. In Perkins, § 134 Bro. Fatis, 17, 30, and *Lightfoot's Case*, 2 Leon. 21, the subject considered was the use of one or more seals; and the point decided or stated is, that it is a sufficient sealing if several parties make their respective *impressions* with one seal or on one piece of wax, clearly implying, not only that the subject of *impressions* and not materials, was that before the court, but that the substantial element of sealing was considered to be the *sigillum print*, or *impression*.

And it is believed, that, upon a careful examination of the adjudged cases, cause will be found to agree with President Pendleton in *Jones* v. *Longwood*, 1 Wash. (Va.) 42, where he said, "Nor is there any adjudged case recollected which determines that a seal must be necessarily something impressed on wax," rather than with Chancellor Kent (*pace tanti viri*); and to accept the proposition, that the impression of a seal on the paper of a deed alone, without any wax, wafer, gum, paste, mucilage, gluten, or other paper, is a good, legal, and sufficient seal by the common law.

It has been so held by the supreme court of New Hampshire in *Carter* v. *Burley*, 9 N.H. 558, and *Allen* v. *Sullivan R. R. Co.* 32 N.H. 446. In the former case (1838), Parker, C.J., said, "In this case, the protest is by a notary, under what purports to be an official seal. It is not a mere scrawl, but a distinct impression upon the paper of the protest, showing the character of the notarial seal. Nothing would have been added to its character by wafer or wax; and, as this is not an uncommon mode of affixing official seals, we are of opinion that it is sufficient. It is to be presumed, from the production of the instrument itself, that it was duly affixed, according to the laws of Pennsylvania, until there is something to impeach it:" In the latter (1855), the subject was discussed with much learning by Bell, J., and the same decision made in regard to the impression of a seal of a railroad corporation on the paper of an instrument issued by them as a bond. The learned judge remarked: "It seems to us, then, that there is nothing necessary to constitute a seal but some material of a suitable character to receive an impression, and an impression bearing the character of a seal upon it."

Without accumulating quotations from authorities accessible to our readers, it may be added that similar decisions have been made by the chancellor of New Jersey in *Corrigan* v. *Trenton Delaware Falls Co.* 1 Halst. Ch. 52; by the supreme court of Vermont in *Beardsley* v. *Knight*, 4 Vt. 471, 479, and *Bank of Manchester* v. *Solson*, 13 Vt. 334; by Mr. Justice McLean, in the circuit court of the United States, in *Follett* v. *Rose*, 3 McLean, 332, 335; by the supreme court of the United States in *Pillow* v. *Roberts*, 13 How. 472; and even in New York (where it has been otherwise held in cases apparently not much considered), in the case of *Curtis* v. *Learitt*, Rosevelt, J., of the supreme court of that State, 17 Barb. 309, 318, and Comstock, J., of the court of appeals, 15 N.Y. Rep. 90, considered such a seal good at common law. So also did the superior court of the city of New York in *Ross* v. *Bedell*, 4 Deur, 462.

In Great Britain, it has been so held by the High Court of Chancery in *Sprange* v. *Barnard*, 2 Bro. C.C. 585 (1789), where a wife having power to dispose of certain property by her will, "by *her signed, sealed*," &c., made two testamentary papers, one on unstamped paper and only signed, the other on stamped paper; viz., paper on which the stamp was impressed in the manner now under consideration, and "fixed the two papers together with a wafer:" and the court (Sir Richard Pepper Arden)* said, "I think the stamp equivalent to a seal, *without having recourse to the wafer*,† which annexed the stamped paper to the former."

And in the Queen's Bench, in *Regina* v. *St. Paul*, 7 Q.B. (Ad. & El. N.S.) 232 (1845), where the seal was made by impressing two *marks in ink merely by means of* wooden blocks, "the court thought it unnecessary to hear any argument" in favor of this as a valid seal (p. 235). And (per Lord Denman, C.J.) said, "We do not wish to encourage the slightest doubt on this last point."

So far as the Massachusetts cases are concerned, the exact point has never been decided.

In *Commonwealth* v. *Griffith*, 2 Pick. 11 (1823), Parker, C.J., merely says (p. 18), "We do not decide whether a scrawl is a seal, though probably it would not be so considered in this State;" but Merrick said, *arguendo*, "Frequently impressions are made only on the paper itself;" and Wilde, J., remarked, "In the district court in Maine, a stamp on the paper has been held to be a seal" (p. 13).

In *Bradford* v. *Randall*, 5 Pick. 495 (1827), Morton, J., by implication, expresses the opinion, that an impression upon paper is sufficient; for, he says, "A seal is an impression upon wax or wafer or other tenacious substance. The impression may as well be made by annexing a piece of paper as by

* Lord St. Leonards (Sugden on Powers, and *infra*) attributes this opinion to Lord Kenyon; but on the 4th of June, 1788, Kenon was appointed Chief Justice of the K.B., and Arden Master of the Rolls (Foss. Tabulæ. Curiales, 80, 81), while this opinion is given under date of May 4, 1789.

† Italics are used in this as in other quotations herein made, whether in the original or not.

stamping some figure or device *upon it.*" And again, "So it will be sufficient if one acknowledge an *impression* already made to be his seal."

In *Tusker* v. *Bartlett*, 5 Cush. 359 (1850), the seal objected to and held good "was of paper *with an impression upon it*, apparently spread with gum on its under side and affixed to the deed by moistening the gum, without the addition of any wafer or wax;" and Wilde, J., doubtless bearing in mind the decision and rule which he cited in *Commonwealth* v. *Griffith*, 2 Pick. 11, said delivering the opinion of the court, "Anciently, a seal was defined to be an impression on wax; but it has long been held that a seal by a wafer, or other tenacious substance upon which an impression is or may be made, is a valid seal; and such is the seal objected to, upon which an impression not only may be, but was *actually made.*"

Note here that *the impression* which Wilde, J., declared made a good seal was an impression on paper, not the gum under it; and cetainly an impression on the paper on which the deed is written, made at the time and as part of its execution, is as valid as one previously made on another piece affixed to it.

The case of *Bates* v. *Boston & New York Central R. R. Co.* 10 Allen, 251 (1865), decides only that "the mere printing of a *fac-simile* of the seal, at the same time and by the same agency as the printing of the certificates to be afterwards signed by the president and treasurer," while "as to the seal, nothing was left to be done by the officers of the corporation, who alone were authorized to affix the corporate seal," was not a valid seal. We do not controvert the correctness of this decision; but the court did not decide, or undertake to decide, the point now raised, and left it fully open for mature consideration upon further argument and authority.

These are all the cases known to us in the State of Massachusetts.

There is also the high authority of Lord St. Leonards, that sealing by an impression on paper is good at common law. Sugden on Powers (8th Lond. ed.) p. 232, c. 7, § 9. See also Matthews on Presumption, &c., p. [36] 39.

It seems to us, moreover, that a philological and historical examination of the question leads to the gratifying conclusion, that the common law, in this as in other matters, did not "stick in the bark" or wax, but recognized a substantial and intelligible principle and distinction; viz., that the distinctive element of sealing is the solemn and formal authentication of an instrument by the impression of some permanent symbol or token besides the signature, and has never selected or prescribed any single material on which that symbol must be impressed.

It may not be uninteresting, without attempting to pursue the subject through all history, to recur to some of the most ancient illustrations of a similiar custom. Lord Coke and the writers of his age would hardly have rejected the authority of Job (xxxviii. 14), where we find the words, "It is turned as clay to the seal."

Impressions of seals upon clay have been discovered, which are thought to be of great antiquity.* Mr. Layard, in his "Discoveries in the Ruins of Nineveh and Babylon" (Part I.), refers to such instances.

"Other corroborative evidence," he says (p. 153), "as to the identity of the king who built the palace of Kouyunjik with Sennacherib, is scarcely less remarkable. In a chamber or passage in the south-west corner of his edifice were found a large number of pieces of fine clay, bearing the impressions of seals,† which there is no doubt had been affixed, like modern official seals of wax, to documents written on leather, papyrus, or parchment. Such documents, with seals in clay still attached, have been discovered in Egypt, and specimens are preserved in the British Museum. The writings themselves had been consumed by the fire which destroyed the building, or had perished from decay. In the stamped clay, however, may still be seen the holes for the string, or strips of skin, by which the seal was fastened: in some instances, the ashes of the string itself remain,‡ with the marks of the fingers and thumb."

And again (p. 156 n.): "Not to instance the clay seals found attached to the rolls of papyrus, containing letters written in the time of the Ptolemies and Romans, there are in the British Museum seals bearing the name of Shashank or Shishak (No. 5585), of Amasis II., of the twenty-sixth dynasty (No. 5584), and of Nafuarut or Nepherophis, of the twenty-ninth dynasty (No. 5585). Such seals were therefore affixed by the Egyptians to public documents, and it was in accordance with this principle, common to the two monarchies, that the seal of the Egyptian king has been found in Assyria."

So (p. 159,) "It would seem, that, a peace having been concluded between the Egyptians and one of the Assyrian monarchs, probably Sennacherib, the royal signets of the two kings, thus found together, were attached to the treaty, which was deposited amongst the archives of the kingdom. Whilst the document itself, written upon parchment or papyrus, has completely perished, this singular proof of the alliance, if not actual meeting, of the two monarchs, is still preserved amidst the remains of the State papers of the Assyrian Empire."

The reader who has seen an English patent, with its pendent seal, or the cumbrous attachments of treaties, will be struck with this

* Smith's Dict. of the Bible, verb. Clay and Seal.

† Resembling the γῆ σημαντρίς (the sealing earth) of the Greeks.

‡ M. Botta also found at Khorsabad the ashes of string in lumps of clay impressed with a seal, without being aware o their origin.

evidence of the antiquity of the custom thus preserved; and the citations which follow furnish evidence of its connection, by a chain of legal and political usage, with the present time.

Sigillum is the original word now translated into seal, and the word used by ancient writers, among them Lord Coke, whose authority is often cited and relied upon in reference to this point.

Sigillum, *signum*, and *signaculum* mean a mark, figure, or impression, on whatever material substance. Leverett's Latin Lexicon defines *sigillum*, the diminutive of *signum*, as "a little image or figure," while *signum* is said to mean "a mark or sign," and, as a derivative or secondary meaning, "the impression of a seal, seal." And, in the large Lexicon Totius Latinitatis of Facciolatus and Forcellinus, the following definition is given: "De imagine, quæ annulo signatorio in cera *aliave materia* imprimitur, obsignandis litteris, amphoris, scriniis," &c.

It does not seem necessary to inquire when traces of a custom of such early origin can first be found in the Middle Ages. The pendent seals already mentioned were thus used; and in the Glossary of Du Cange (Didot's ed. 1846, with additions by different hands, here referred to without distinction), we find it stated in reference to these: "Pensilium sigillorum, non nuperum sed perantiquum usum fuisse, licet colligere et iis quæ de Bullis observavimus, ubi *plumbeas et aureas* Bullas primitus, filo aut serico tabulis appensas, docuimus." "Sed," it is added, "quando *ceera* istiusmodi sigilla perinde literis appendi cœperint non plane constat." "Dubius hæret ipsemet. Cangius." In one place he speaks of the twelfth century: in another he says they were used in France about the ninth or tenth; while it is stated that the use of seals of any kind was entirely unknown in England in the beginning of the eleventh century (verb. *Sigillum*, p. 241).

On the continent, gold, silver, and lead were used. Sometimes lead was used "*loco ceræ*," or with wax, and wax with gold, "ut si aureum subriperetur remaneret alterum."*

Du Cange says, "Certe bullas aureas Imperatores Francicos et Germanicos non appendisse constat, nisi iis tabulis, quæ et majoris essent mementi et Privilegia Ecclesiarum continerent, cum cætera aut *plumbeis*, vel *cereis* munita conspiciantur."†

But not only were golden, silver, and leaden seals used by continental monarchs, but as lately as the time of Henry the Eighth it appears that an impression on gold was used to authenticate an English treaty:—

"Prætera in Chartophylacio Regis Christianissimi asservatur Epistola Leolini Nortwalliæ Principis ad regem Philippum VI. scripta, qua recepisse se agnoscit illius literas, aureo sigillo sigillatas, in quibus inita inter Franciæ Regnum et Walliæ Principatum fœdera continebantur. Denique Spelmannus scribit a se visam Bullam auream Francisci I. Regis Franciæ, appensam fœderi, quod cum Henrico VIII. Anglorum Rege pepigit in cujus anticæ circulo versus hic describitur: Plurima servantur fœdere cuncta fide. Id ipsum de Bulla aurea Henrici istius pariter fœderis Diplomati appensa testatur Peirescius in Adversoriis MSS., quam se vidisse testatur in Archivo Regio, et majoris esse formæ, ac pondo 10, aureorum Hispanicorum, in qua efficta sunt regni Anglici insignia cum corona regia epanoclista et periscelide."*

And, according to Matthew Paris, golden seals were used by "Reges Angliæ."

The very Bull from which the Sovereign of England derives the title of "Defender of the Faith" is authenticated by a golden seal:—

"At Spelmannus refert, Clementis VII. Regi Angliæ contulit, appensan esse Bullam auream."†

Lead was in more common use for the papal bulls, so called from the bulla or seal appended. Du Cange quotes the following from "Carmen de curia Romana," v. 985:—

"Non auro, non argento, sacra Bulla refulget,
Insignit chartas *Plumbea* forma sacras "‡

The following quotation, given by him from an ancient charter, *ann.* 1223, may indicate that wax was, if there was a distinction, less regarded than lead:—

"Si aliquis voluerit sigillum *plumbeum* Dom. Comitis super aliquo contractu vel negotio roborando, fiat inde petenti copia, et det 3 sol. et nil amplius ab eo inde exigatur. *Si vero voluerit cereum* sigillum, det 12. den. tantum."§

He records one instance (in 1229) of a stone seal, where the writer says, "Tale sigillum quod habeo penes me, sigillum licet *lapideum*, ubi est nomen meum impressum, præsenti scripto apposui."‖

And an instance is given by another authority where "a short blackhafted knife" was appended, used—as we read the author—as and for the seal, not to make an impression.¶

According to some authorities, or Saxon ancestors, before the Norman Conquest, sometimes authenticated document with gold crosses or seals of lead, without wax, attached by a string.

Madox says:—

"In the *Saxon* times before the Reign of King *Edward* the Cofessour, the Usage in This Kingdom was (for aught I know) to Ratify their Charters by Subsigning their Names with Holy Crosses. This was done both by the Parties and the Witnesses The manner of

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*Du Cange, Cowel, } verb. *Bulla*, *Sigillum*. Tomlin's Jacob's, verb. Bull and Seal.

†Verb. Bulla.

*Ib., p. 802. †Du Cange, verb. Bulla. p. 804.

‡Du Cange, Bulla, 204. §Ib., 805.

‖Verb. Sigillum, 246. ¶Termes de Ley, 151.

**Haydn's Dict. of Dates, verb. Seal. Cowel, verb. *Sigillum*.

doing it may not be Here specify'd. There are many instances thereof to be seen in the *Monasticon Anglicanum* Some in This Volume and many in Charters and Chartularies. This Usage is taken notice of by *Ingulf;* who has been so often cited by Others upon This Subject that I need not trouble the Reader with a repetition of his words. And it is generally thought that K. *Edward* the Confessour First brought into This Kingdom the way of affixing to Charters a Seal of Wax: That having been in *Normandy* at the Court of his Cousin the Duke of That Countrey he learned several *Norman* Usages and after his Return introduced Some of them in This Kingdom, particularly This of Ratifying Charters by a Seal of Wax. Against Which opinion I have at present nothing of weight to oppose. A Learned Lawyer (whom I mention with great respect) says 'The Sealing of Charters and Deeds is Much more Ancient than some out of Error have imagined, For the Charter of K. *Edwyn* Brother of K. *Edgar* bearing date A.D. 956, made of the Land called *Feclva* in the Isle of *Ely* was not only sealed with his own Seal (which appeareth in these words, *Ego Edwinus* &c., *meum Donum proprio Sigillo confirmavi;* but also the Bishop of *Winchester* put to his Seal *Ego Elfwinus Winton, Ecclesiæ Divinus Speculator proprium Sigillum Impressi.* And the Charter of K. *Offa* whereby he gave the Peter-pence hath yet remain under Seal' But let this matter be a little considered. It is true that the word *Sigillum* occurs in *Latin* Charters of the Times before the Conquest. But if it be likewise true that the word *Sigillum* was in those Times often used in the Same sense with the word *Signum* (as Sir *H. Spelman* and others have observed): Then perhaps no great Stress can be laid upon the words of Subgisnation to K. *Edwy's* Charter, This is not all. Surely the word *Sigillum* did not always Signify a Seal of wax. For instance. There is a Charter of this K. *Ædwie* dated A.D. 955, granting to the Monastery at *Bath* 30 Manses, &c. *at Dyddanhame,* Subsigned, *Ego Ædwig Rex Anglorum indeclinabiliter concessi* ×, *Ego Eadgar ejusdem Regis Frater celeriter consensi* ×, *Ego Odo Archiepiscopus cum Signo Sanctæ Crucis impressi* × *Ego Ælfsinus Præsul Sigillum agyæ Crucis impressi* × &c. There is the same Subsignation in another Charter of This K. *Edwie.* So also a Charter of K. *Æthelstan* made to the Monks of *Bath* of Land in *Prisctun* and *Æsctun,* dat. A.D. 931, is Subsigned *Ego Æthelstan Rex totius Britanniæ Præfatum Donationem cum Sigillo Sanctæ, Crucis confirmavi* × &c. So a Charter of K. *Edmund* made to his Theigne *Ethelmoth,* dat. A.D. 941, is Subsigned, *Ego Eadmundus Rex Anglorum præfatum Donationem cum Sigillo sanctæ* × *confirmavi.* As to K. *Offa's* Charter of the Peter-pence if it be meant that That yet remains under a Seal of Wax; In case that Learned gentleman had informed us Where it might be seen It would perhaps appear to be either a great Rarity or a Counfeit. In effect I conceive it may be taken for granted that from the time of the *Norman* conquest, Seals came to be generally used in This Kingdom. Then Charters were Ratify'd or rendered authentique by affixing to them a Seal of Wax. Which Custom has been used in *England* ever since, But so, as that for a good while after the Conquest, the Usage of Subsigning with Crosses which was sometimes retained (in case the Charters which lead us to This supposition are Genuine). King *W.* the 1st Subsigns with the Cross: He Seals and uses the Cross too, and the Witnesses Cross. King *W.* the 2nd uses the Seal of the Cross, and the Witnesses make Crosses. *William de Merley* (ante A.D. 1119), used the Cross. King *Henry* the 1st, and Witnesses use the Cross. And K. *Stephen* uses the Cross. But I think the more Usual way in Those times was to affix a Seal. The Seals respectively were in Wax of several colours either Red, Green, or Yellow: And for shape commonly either Round or Oval; But of Different Sizes. These of Ecclesiastical persons were, I think, usually Oblong or Oval; though not always so. The Seal was wont to be affixt to a Label of Parchment fastened to the Fold at the bottom of the Charter, Or else to a silk String (either White, Red, Green, or Mixt, as it happned) fasined in like manner to the Fold, Or else to a silver of Parchment cutt from the Bottom of the Charter and made pendulous."*

According to another learned author,—

"Before the Time of *William the Conqueror,* the *English* did not seal with Wax, but they usually made a golden Cross on the Parchment, and sometimes an Impression on a Piece of Lead, which hanged to the Grant with a string of Silk; and this was held a sufficient Confirmation of the Grant it self without Signing, or any Witnesses. *Ingulphus, page* 901, tells us, That *Chirographorum confectionem Anglicanam, quæ antea usque ad Edwardi Regis tempora fidelium præsentium subscriptionibus cum crucibus aureis aliisque sacris signaculis firma fuerunt; Normanni condemnantes Chirographa chartas vocabant & chartarum firmitates cum cerea impressione per uniuscujusque speciale* sigillum *sub instillatione trium aut quatuor testium astantium conficere constituebant.*

"The Colour of the Wax with which the King's Grants were sealed, was usually green, to signify *Rem in perpetuo vigore permansuram,* and the Impression in Lay-men's Seals was, a Man on Horseback with a Sword in his Hand, till the Year 1218: and then they began to engrave their Coat of Arms on their Seals; only the Archibishops and Bishops by a Decree of Cardinal *Otto,* who was Legate here in the Year 1237, were to have *Sigillium, puta nomen dignitatis officii, sue collegii & etiam illorum proprium nomen, qui dignitatis vel officii perpetui gaudent honore, insculptum*

* Madox's Formulare Anglicanum. Diss. XXIII. p. xxvi. See also Fortescue de Laudibus Legum Angliæ. Illustrated with the notes of Mr. Selden, chap. xxxii. p. 74, n.

notis & characteribus manifestis; sicque sigillum *authenticum habeatur.*"*

"And because we are about sealing and signing of deeds, it shall not be much amiss here to show you for antiquity's sake the manner of signing and subscribing deeds in our ancestors the Saxons' time, a fashion differing from that we use now, in this, that they to their deeds subscribed their names, (commonly adding the sign of the cross) and in the end did set down a great number of witnesses, not using at that time any kind of seal; and we at this day, for more surety, both subscribe our names, (though that is not very necessary) and put to our seals, and use the hlep of witnesses besides.

"That the former fashion continued absolute until the time of the conquest by the Normans, whose manners by little and little at the length prevailed amongst us; for the first sealed charter of England, is thought to be that of King Edward the Confessor to the abbey of Westminister, who being educated in Normandy, brought into the realm that and some other fashions with him. And after the coming of William the Conqueror, the Normans liking their own country custom (as naturally all nations do) rejected the manner that they found here, and retained their own, as Ingulphus the abbot of Croiland, who came in with the conquest, witnesses, saying 'The Normans do change the making of writings (which were wont to be firmed in England with crosses of gold, and other holy signs) into an impression of wax, and reject also the manner of the English.' Howbeit this was not done all once but it increased and came forward by certain degrees, so that first and for a season the king only or a few other of the nobility used to seal; then the noblemen, for the most part, and none other. Which thing a man may see in the history of Battle-Abby when Richard Lucie, chief justice of England, in the time of king Henry II. is reported to have blamed a mean subject, for that he used a private seal, whereas that pertained (as he said) to the king and nobility only."

* * * *

"Some other manners of sealing besides these have been heard of among us; as namely that of King Edward III. by which he gave to Norman the Hunter,

> The hop and the hop town,
> With all the bounds upside down;
> And in witness that it was sooth,
> He bit the wax with his fore tooth.

The like to this was showed me by one of my friends in a loose paper, but not very anciently written, and therefore he willed me to esteem of it as I thought good. It was as follows:

> 'I William King,
> Give to the Plowden Royden,
> My hop and hoplands,
> With all the bounds up and down,
> From heaven to earth,
> From earth to hell,
> For thee and thine to dwell,
> From me and mine,
> To thee and thine,
> For a bow and a broad arrow,
> When I come to hunt upon Yarrow.
> In witness that this is sooth,
> I bite this wax with my tooth,
> In thepresence of Magge, Maud and Margery,
> And my third son Henry.'

Also that of Alberic de Vere, containing the donation of Hatfield, to which he affixed a short black-hafted knife, like an old half-penny whittle, instead of a seal; with divers such like."—*Termes de la Ley*, pp. 149–151.

By an authority cited in Du Cange states, that, after the coming-in of the Normans, the kings and chief men, "tam Reges quam alii domini et magnates," used waxen seals with a hair from the head or beard in the wax as a token; and an ancient document is mentioned, ending with words, "In hujus rei evidentiam, sigillum dentibus meis impresst, testh Murlele uxore mea."* This custom—probably of frequent use, as "That old rime—

> And in witness that this is sooth,
> I bite the wax with my wang tooth."†

seems to show—indicates that the substantial act of authentication was the impression.

The Normans having introduced the custom of sealing on wax, it became general; and the decisions in regard to seals by inference and allusion undoubtedly imply the habitual use of that material.‡ It was not, however, exclusively used as a solemn token of authentication; for it is said, that as late as the time time of Henry II., it was usual to seal all grants with the sign of the croes made in gold.§

We have already referred to the golden seal on a treaty between Philip VI. and the Prince of Wales, and another on a treaty between Henry VIII. of England and Francis I., bearing the arms (insignia) of the Kingdom of England.

But if the material upon which the impression is to be made is of such peculiar importance, it must be *non simile sed idem*,—

> "Nil majus generatur ipso,
> Nec viget quicquam simile, aut secundum."

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* Cowel's Law Dict. verb. Sigillum.

* Verb. *Sigillum*, 242

† Richardson Dict. verb. Wang.

We cannot but regret the inability of a learned friend, who writes the following note, to discover the source from which he derived the quotation given by him:—

"I have hunted in vain for the place that I saw the old rhymed deed I spoke of. That I did see it in some old law book when I was studying is certain. The two lines in which the grantee and his heirs are described have gone irrecoverably out of my memory. The rest I send you:—

> 'I John O'Gaunt
> Do give and grant
> . . . . . .
> Sutton and Putton
> Until the world's rotton.
> There is no seal within this roof,
> And so I seal it with my tooth.'

'And then,' said my author, 'followed the impression of the grantor's molar *in the parchment.*

‡ Fortescue, 72.

§ Tomilson's Jacob's, verb. Seal.

If the Norman custom establishes the American rule, an American conveyancer must use the "cera" of that age, and no inferior or different matter. This no one pretends to do. "Wax" is "an organic product of considerable importance, obtained from different sources, the chief of which is the beehive;" and "chemists are not agreed in their application of the term *wax* to various substances which possesses waxy properties."* "Wax," says Brande,† "is a common vegetable product, forming the varnish which coats the leaves of certain plants and trees. It is also found upon some berries, ...and it is an ingredient of the pollon of flowers."

But "the term *wax* applied 'sealing-wax' is a misnomer. No wax is used in its manufacture but *resin*, which is essentially different in properties; and there is no evidence of the use of common sealing wax‡ of earlier date than the sixteenth century." Before it was invented, a kind of bitumen was used for sealing letters "and called *terra sigillaris*. It was, according to Beckman, brought from Asia by the Romans, but was first known among the Egyptians. Pipe-clay was also used for seals, as was also a cement of pitch, wax, plaster, and fat."—"The large seals on public documents are however, really made of wax; and it was natural, on the introduction of the resinous compound for sealing, letters, to apply the term 'wax' to it, especially as the chemical distinctions between such substances as resin and wax could not at the time have been very well understood."

"The Great Seal of England....is said to be prepared by melting block white wax in about one-fourth of its weight of Venice turpentine. The wax of the Great Seal and Privy Seal of Scotland is made from resin and beeswax, coloured with vermillion."§

It will not be pretended that a piece of paper attached to a deed by a wafer is not a good seal.‖ But although wafers were made by pastry-cooks long before their application of the sealing of letters, according to Beckmann, the oldest seal with a red wafer is on a letter written by Dr. Krapf, at Spires, in 1624, to the Government at Bayreuth. Wheaten paste, "with the addition of colouring matter, and sometimes of a small quantity of white of egg and isinglass,"¶ first used for sealing letters in 1624, is not the "cera" or wax spoken of by my Lord Coke, who died in 1634,—by the Barons of the Exchequer, whom Leonard reports, or by Perkins.

We forbear to investigate the history and origin of mucilage, gummed seals and the like lest we should be thought to wax frivolous. But this historical and scientific evidence, that the seals of the present age are not the seals of the period when the custom of sealing was established by the Normans, reduces to an absurdity the position, that the material on which the impression may be made is an essential element of the form required, or that the common law attaches greater importance to a vegetable adhesive substance a compound of resin and vermillion, or a wheaten paste, than to a pulp or paste made by grinding rags or straw.

The Government of the Grand Duchy of Weimar, with a consistency with those who adhere with such tenacity to resin, wheaten paste, and mucilage would do well to intimate, forbade the use of wafers in law matters in 1716, but, with a growing wisdom, abolished this order in 1742.*

To sum up the historical argument, then, it appears that originally the Saxon conveyancers authenticated deeds by signatures, marks, golden crosses, and sometimes pendent seals of lead; that the Normans introduced the custom of sealing with wax, properly so called, which became general or universal, although we find that a golden seal was used on a treaty by Henry VIII.; that, after the introduction of sealing-wax, a material without a single constituent element of the Norman wax, this was also used; that, upon the invention of wafers, a third material, without a single constituent element, either of wax proper or sealing-wax, was adopted; and finally, that still another material, viz., pieces of paper, with glutinous or adhesive matter upon them, has been used in modern times indiscriminately with wax, sealing-wax, and wafers. There is no statute prescribing the use of any one of these materials, or allowing the substitutions or changes recognized by usage; and while the earlier authorities and decisions show the customary use of some material capable of receiving and retaining an impression and attached to the document in some mode, no one, in terms, prescribes the use of one material rather than an another. He must be a most tenaceous adherent of a fancied necessity who objects to a new mode of sealing by impressions on paper, differing in no substantial element in form required from prior customs, and no more from the mode last introduced and adopted than that differs from those which, by repeated changes, have been successively recognized.

Why, indeed, is not paper alone with an impression upon it, as well as a wafer or paper upon a wafer, or paper with an impression upon it and with gum on its under side, equivalent to wax? Like a wafer, it is a tenacious material made adhesive by moisture,† which re- which retains the impression then made; and what conceivable distinction in substance is there between a seal made, as in *Tasker* v.

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*Tomlison's Useful Arts, verb. Wax.

†Encyc. of Science, verb. Wax.

‡By the context, this appears to refer to letters.

§Tomilson, verb. Sealing-wax,

‖A deed must be signed and sealed; but a deficiency of penmanship and sealing wax may be got over by a cross and a wafer, which are sufficient for legal purposes."—The *Comic Blackstone*, c. xvii. p. 133. And see *Davidson* v. *Cooper*, 11 M. & W. 778.

¶Tomilson verb. Wafer.

*Tomlinson.

†Testibu pueris in schola.

Bartlett and *Bradford* v. *Randall*, by an impression on paper afterwards attached to the deed, and the same impression made on the paper of the deed at the time of its execution? Both are impressions on paper attached to the deed. In the first case, the paper is attached to that on which the deed is written after the manufacture thereof; in the other case, it is attached to the paper on which the deed is written as a portion of the same at the time of its manufacture; while in the latter the impression or act of sealing is contemporaneous with the execution of the deed.—*Am. L. Rev.*

THE OLD SYSTEM AT NISI PRIUS AND THE NEW.

Much has been written lately about the function of the judge in the trial of cases at Nisi Prius, and the extent to which he ought to interfere in the examination of witnesses, and other details of the trial. These discussions have been suggested by one or two recent "scenes," as they are commonly called, *anglice*, quarrels, between judge and advocate; and therefore, not unnaturally, the whole matter has been treated as if it concerned only the idiosyncracies of particular judges or advocates, and as if those idiosyncracies were the sole cause of certain modern practices, which most of the writers have united in condemning. If we thought the subject had no other interest than this, we should not meddle with it; but in our judgment the matter is one of far wider importance, and deserves to be treated far more comprehensively. The details which have been so much discussed are, in fact, only symptoms of a revolution which has long been in progress in the whole system of conducting trials at Nisi Prius.

The normal system of trying causes at Nisi Prius, as it is described in all the books, and recognized in countless acts of parliament and elsewhere, is a complete system, founded on a definite theory, and perfectly harmonious in all its parts. Cases are tried before a double tribunal, a judge and a jury; the one to decide issues of law, the other to decide issues of fact. In questions of law the jury have no right to interfere; with questions of fact the judge has nothing to do, except to keep order in court while the jury are trying them. In determining what issues of fact shall be brought before the jury, the judge has no voice. The parties may, by their pleadings, raise what question they please, and in what form they please. What they choose to raise, the judge cannot keep from the jury; what they have not raised, the judge cannot originate. And when the case comes for trial, it is for the parties, represented by their counsel, to decide how they shall present their case to the jury who are to try it; what facts shall be told, what witnesses called, and what kept back; what points insisted on, and what abandoned. The judge sits in the ring as a mere referee, to see that both parties fight fair. It is true that he may have, incidentally, to decide questions of law as they arise from time to time, and to exercise the power of the court in granting or refusing applications to his discretion; applications to amend the pleadings, to adjourn the trial, to recall witnesses, and the like. It is true too, that, when the case is closed, he will have to recapitulate the evidence to the jury; and, in order that he may do so correctly, he is at liberty to put such questions to the witnesses as seem necessary to him. But otherwise he is as much a stranger to the trial as any spectator in the court. In harmony with this are two characteristic features of our system of procedure—the cross-examination of witnesses, and our strict rules of evidence. Witnesses are cross-examined not by the judge, or to satisfy the mind of the judge, but by the hostile counsel, from instructions of which the judge knows nothing, and for purposes which the judge may never understand; the object of the whole being to produce an impression on the minds of the jury. So as to our peculiar and strict rules of evidence; their necessity, as every authority states it, arises from this very method. The issues having to be decided by an unskilled tribunal, and the control of the cause being in the hands, not of an impartial judge, but of the parties themselves, it is absolutely necessary to define, with minute accuracy, what they may bring before the jury, and what they may not. The judge enforces these rules, but he has no discretion whatever as to what shall be admitted and what shall not.

There can be no question that such is, in theory, the mode of trying issues of fact, according to the law of England. It is plain that, owing to the constant appeals to him in his judicial capacity to decide points incidentally arising, the judge could never be anything like a cypher in court; and, apart from his strictly official authority, the influence of a wise and able man in such a position, both with counsel and jury, must of course be immense. But we believe that until lately the two fundamental principles, that the jury alone are the judges of fact, and that the parties alone have the control and conduct of the cause, were very generally observed. Judges and counsel alike were scrupulous in sifting law from fact, and assigning each to the proper jurisdiction. The judge habitually abstained from taking any part in the case, except such as belonged to him as judge of the law and referee in the contest. And causes were ordinarily tried out in due form; addresses to the jury, examination, cross-examination, summing up and verdict following one another in the regular and unbroken sequence contemplated by law. And this is an admirable mode of trial; indeed, we believe that in the long run it is the only system by which justice can be done before such a tribunal. The tribunal being one wholly untrained in judicial inquiry, this system provides that the case in court

shall be conducted by men who thoroughly know the case behind, and know what it is desirable to bring forward, and what it is not, and who are chosen for their special skill in presenting facts to the minds of a jury; and thus it secures a thorough investigation of the case. Moreover, it peculiarly guards the dignity of the judge. The judge reigns, but does not rule; he is first in dignity, but not first in power; he presides over the inquiry, but has no voice in its result. This is a somewhat delicate position, when filled by a man of energy, and in the presence of zealous counsel, who have nothing but the verdict of the jury in view; and it is obvious that a strict adherence to the order of proceedings, and a strict observance by each party—judge, jury and counsel—of the province which theoretically belongs to each, is the surest way to avoid any collision or misunderstanding between them.

But this regular and formal mode of trying out cases has one drawback—it is not always the quickest mode. Counsel may waste time by tedious speeches, or needless elaboration of evidence, or vague, fishing cross-examination; the judge may often see a short cut over a stile much shorter than the high road, some mode of getting at the facts quicker than the regular one, some way of disposing of the case without trying it out; and the one object in all our courts now is to save time. They are burdened with arrears, the judges are pushing a Sisyphus' load up hill. There are, of course, differences between judges. They, like other men, are not all equal in self-control, in patience, in temper, in discretion, and some have shown themselves grievously deficient in these qualities. But the main cause of the great change which has taken place, is the desire to get through the work as quickly as possible. The result is, that instead of cases being for the most part tried out in all form, like a game of chess, as they once were in England, and as they still generally are in Ireland, it is not one case in ten that is tried at all; they are forced to a compromise, or a reference, or something to drive them out of court. If a case is tried, it is commonly tried in a rough-and-ready fashion; the one object is to get the two stories known, and the facts on the judge's notes, as fast as possible, regularly, irregularly—any how. As for the solemn order of procedure, the sifting of law from fact, and distinguishing the functions of the judge, jury and counsel in the old-fashioned way, there is no time for all that Cross-examination, which, to be of any real use, must be slow, cautious, tentative—must win, if at all, not by assault, but by the patient and covert labour of the engineer, and must therefore occupy time, is being practically abandoned.

No one familiar with Nisi Prius trials will think that we have exaggerated the change which has taken place and is still going on in the conduct of business.

We believe this to be a most serious evil; for we hold that cases before a judge and jury can only be fairly tried in the old strict fashion, all parties adhering to their several functions. But we are not much inclined to blame judges or counsel for the pass that things have come to; they have only acted on the belief that it is better to settle many cases somehow than a few cases well. The remedy must come from the Legislature. In the first place, whether by adding to the number of judges, or by redistributing their work, or both, more judges for Nisi Prius must be provided. In the second place, trial before a jury is by far the slowest of all possible modes of trial, and is by no means in all cases the most suitable. It would be an enormous saving of time, and in the opinion of many a great improvement also in the administration of justice, if many cases now tried before judge and jury were tried before a judge alone. Instead of, as now, trial by jury being in all cases the rule, with only a power to try before a judge by consent, it may well be questioned whether, in many large classes of cases, the trial should not be before a judge, unless either party specially applied for a jury. This system works admirably in the Divorce Court, and in the County Courts. At any rate it would be a less evil to change the tribunal at once, than, as at present, to retain the tribunal and abandon the procedure which can alone make that tribunal a safe one. —*Solicitor's Journal.*

UPPER CANADA REPORTS.

PRACTICE COURT.

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

Adshead v. Grant.

29, 30 *Vic. cap.* 53, *sec.* 98—*Seizure under fi. fa. goods—Claim by Collector for taxes—Priority.*

A sheriff returned to a *ven. ex.* and *fi. fa.* residue against goods, that he had made $50, out of which he had paid a collector of taxes $48 39, claimed for taxes due by defendant at the time of the seizure under the writ, on land upon which the goods were, and of which the sheriff had notice prior to the sale, and that he had retained balance towards his fees, &c. No distress had been made by the collector. *Held*, that the sheriff must, nevertheless, account to the execution creditor for the $50, because a distress by the collector is a necessary antecedent to obtaining the benefit of the statute.

[P. C., E. T., 1867.]

E Martin, last term, obtained a rule on the sheriff of the United Counties of Prescott and Russell, to show cause why his return to the writ of *venditioni exponas* for part, and *alias fieri facias* for residue, should not be quashed, because it contradicted the return made by him to the previous writ of *fieri facias* against goods, and contradicts also the said writ of *venditioni exponas* and *fieri facias* for residue, and because the return complained of was vague and uncertain, and did not show under what writ the goods were seized and sold, or what goods were sold; and why he should not make a proper return; or why he should not pay the plaintiff, or bring into court the sum of fifty dollars mentioned in the return,

or so much thereof as should remain after deducting his fees, but without deducting the taxes mentioned in the return; or why, if the taxes should properly be deducted, he should not p y to the plaintiff or bring into court the balan , after payment of the taxes and sheriff's fees, and amend the return made by him as aforesaid according to the facts; and why he should not pay the costs of this application

The return to the original *fi. fa.* against goods was, "Goods on hand to the value of $20, and *nulla bona* as to the residue;" and the return to the second writ was, "I have caused to be made of the goods $50, out of which I have paid to the collector of taxes for the municipality of Longueuil, in which the said goods and chattels were at the time of the seizure and sale thereof by me, the sum of $48 39, claimed by him for taxes of the lands and premises whereon the said goods were taken in execution, and of which I had notice from him prior to the sale—due by the defendant to the municipality at the time of the seizure—and I have retained the sum of $1 60, the residue thereof, towards my own fees; and that the defendant has no other goods, &c., whereof, &c."

H. Cameron, during this term, showed cause. He filed the affidavit of the sheriff, which stated the delivery of the original *fi. fa.* to him on or about the 27th November, 1866, endorsed to levy $1,926 34 for debt, and $63 50 for costs, besides interest, sheriff's fees, &c; a seizure made of certain goods, and a return of the same being on hand to the value of $20; the delivery of the *ven. ex.* and *fi. fa.* for residue to him on the 17th December, under which he sold the goods so seized for $50; the seizure of the goods on land of the defendant in the town of L'Orignal; the notice by the collector of the township of Longueuil to the sheriff, that the taxes for the past year, charged on the land, amounting to $48 39, were due, and that he required payment of the same to be made or secured to him out of the proceeds of the goods before the removal of the same from the land; the giving of the undertaking by the sheriff to pay the taxes, and the sale of the goods for $50; and his belief that this amount was rightly paid by him for taxes, and that his return is correct; and the conclusion was, "And I am advised and believe that the right of the collector [of the township] to be paid the said taxes arises under the English statute 43 Geo. III. cap. 99, sec. 37, and the Canadian statute 29 & 30 Vic. cap. 53, sec. 98, the said defendant being a non-resident owner of lands."

Martin supported the rule. What the collector did was not a seizure by him: Arch. Pr. 2 edn. 619; *Nash* v. *Dickenson*, L. R. 2 C. P. 252, and the collector could not take goods in the custody of the law.

Adam Wilson, J.—The affidavit is very obscurely worded. It is stated that the lands on which the goods were seized by the sheriff is situate in the town of L'Orignal, and again that it is situate in the township of Longueuil; and that the defendant does not reside on the land, but two or three miles distant from it; and from this it is desired, in connection with the last paragraph of the affidavit, that it should be assumed the defendant was a non-resident owner of the land, and, as such non-resident he had required his name to be entered on the roll, under the 29 & 30 Vic. cap. 53, sec. 98, or the prior act of the Consolidated Statutes for Upper Canada, cap. 55, sec. 97; and that (assuming the roll to have been given to the collector) the collector had duly made a demand on the defendant for payment of the taxes, so as to be entitled to distrain.

I cannot take all this for granted. But even if it were true, I am not of opinion that the collector has the right to forbid the removal of the goods by the sheriff, who acts under an execution. The statute enables the collector to "make distress of any goods and chattels which he may find upon the land;" and *if he make distress*, then "no claim of property, lien or privilege shall be available to prevent the sale, or the payment of the taxes and costs out of the proceeds thereof;" under which latter words it is very probable the distress by the collector would supersede, to the extent of the taxes, the prior seizure of the sheriff under the execution; but the mere notice by the collector is not to have this effect.

In the case of landlords, under the 8 Anne, cap. 14, the provision is very different: it is, that "no goods on any land leased for life, &c, shall be liable to be taken by virtue of an execution on any pretence whatsoever, unless the party at whose suit the execution is sued out shall, before the removal of the goods from the premises by virtue of the execution, pay to the landlord all such sums as are due for rent for the premises at the time of taking such goods by virtue of the execution, provided the arrears do not exceed one year's rent, &c."

In the absence of a *distress* by the collector, I must, even if the return were sufficient in other respects, direct the sheriff to return and account to the execution creditor for the $50 produced by the sale of the goods.

Rule absolute.

COMMON LAW CHAMBERS.

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

Herr v. Douglass.

Irregularity or nullity—Waiver—Laches in taking out and serving order—Delay in application to set aside judgment—Second application on same or different grounds.

The defendant on 26th March, 1866, signed judgment of *non pros* against plaintiff for costs for not proceeding to trial pursuant to a notice for that purpose. Plaintiff on 3rd April, 1866, obtained a summons to set the judgment aside, which was made absolute on 16th June, but the order was not taken out until 22nd October following, nor served until the 29th. This order was afterwards set aside by the full court as having been waived by delay, whether the judgment was void or only irregular.

The plaintiff obtained a second summons to set aside the judgment, &c., upon the ground that there was nothing to warrant the defendant in entering it; but *held*

1. That the objection to the signing of the judgment could be waived and that therefore the judgment could not be considered as a nullity.
2. That the judgment must be viewed as entered on 26th March, 1866, of which plaintiff had immediate notice, and that the lapse of time in making this application, was a waiver of any irregularity in or objection to the judgment.
3. That even if the judgment were void, and the plaintiff not concluded by his laches, his once obtaining an order to set aside the judgment, which order he virtually abandons, precludes him from again applying—and *semble*, that parties should not be harassed with repeated applications on the same grounds; and if on different grounds, known at

the time of the first application, such grounds cannot be urged on a subsequent application.

4. That when there is a doubt as to whether a proceeding is irregular or a nullity, the defect is to be viewed as an irregularity — the tendency of the cases being to consider defects merely as irregularities.

[Chambers, May 23, 1867.]

Ejectment summons was issued on the 23rd September, 1865, and was served on defendant on the 25th September.

The affidavit of plaintiff shewed that at the time the writ was served, defendant desired that no further proceedings should be taken towards recovering possession of the lands, and that no more costs should be put on him, and agreed, if plaintiff would do so, that he, defendant, would voluntarily leave the premises; and it was then agreed that plaintiff should go no further in the action, and the defendant promised in consideration thereof that he would not defend the suit, and would leave voluntarily within about three months. About the 10th of October defendant did leave the premises, and, as the plaintiff was informed, went to the United States; it being distinctly understood between defendant and plaintiff, that all the proceedings in the suit should cease on both sides, and that within the time aforesaid defendant should yield up possession.

It appeared from the affidavit of Mr. Moore, acting for the plaintiff's attorney, that judgment for not proceeding to trial pursuant to twenty days notice was signed against the plaintiff on the 26th March, 1866, and that execution for costs was issued on the same day; that before judgment was entered he twice notified the partner of the defendant's attorney that application would be made to set the judgment aside if entered, on the ground that it had been agreed between the plaintiff and defendant, that defendant should leave the premises voluntarily, and in consideration thereof, all further proceedings should be stayed.

Mr Gwynne, by his affidavit dated 16th March, 1867, stated that on the 3rd April, 1866, he obtained a summons calling on defendant to shew cause why the judgment entered by the defendant should not be set aside with costs, on grounds disclosed in papers and affidavits then filed, which summons was enlarged from time to time until the 16th of June last, when it was finally argued before Mr Justice Hagarty, who in the latter end of June delivered judgment, directing an order to issue setting aside the judgment with costs. Through inadvertence the order was not taken out until 22nd October, when the judge signed it as of the 16th June, and it was served on 29th October. Mr. Gwynne in his affidavit also referred to the judgment as having been entered without any authority of law whatever to justify the entry thereof; and he had no idea that the not taking out and serving the order would be considered an abandonment of the order. That in Michaelmas Term an application was made to set aside the order, on the ground, amongst others, that the said order, even if properly made, had lapsed and been abandoned by reason of the delay and laches of the plaintiff in issuing and serving the same, and in the sittings for judgment after Hilary Term last past the court caused a rule to issue discharging the order of the 16th of June, solely on the strict rule of practice, that the laches which had occurred in taking out and serving the order did constitute an abandonment thereof. After stating that there was no intention of abandoning the order of Mr. Justice Hagarty, and that the delay in taking it out occurred from inadvertence, and that plaintiff was proceeding against defendant as an overholding tenant, the affidavit concluded to the following effect: "the ground on which the judgment is sought to be set aside, is, that the writ of summons was issued and served and appearance thereon entered in the vacation before Michaelmas Term, 1865, and that defendant's attorney, about the 26th March, 1866, entered judgment professedly under sanction of the 227th section of the C. L. P. Act, but in reality without the warrant or sanction of any law to justify the entering thereof, and that therefore the said judgment is not merely irregular as being entered in contravention of the practice of the court, but is a nullity, as being unsanctioned by the authority of any law."

Upon shewing the above facts, the plaintiff obtained a summons on 16th March, 1867, calling on the defendant to shew cause why the judgment entered in this cause upon the 26th day of March 1866, and the execution issued thereupon, and all proceedings had thereunder, should not be set aside with costs, upon the ground that the said writ having been issued and served and appearance thereto filed in the vacation before Michaelmas Term, there was no authority or warrant in law justifying the entering of the said judgment and issuing execution thereon.

Robert A. Harrison showed cause.

Gwynne, Q C., contra.

The cases cited are referred to in the judgment of—

Richards, C.J.—The papers filed do not shew very distinctly the ground on which the judgment was entered. The only clear reference to it being in Mr. Gwynne's affidavit, wherein he states that the judgment was entered professedly under sanction of the 227th section of the Common Law Procedure Act. No copy of the judgment roll or other papers shewing how or for what the judgment was entered, have been filed on this application. Nor does it appear on what ground the order of Mr. Justice Hagarty, setting aside the judgment, was made. The affidavits referred to on that application, would rather point out that the proceeding was objected to as being against good faith, as the entry of the judgment was contrary to defendant's agreement set forth in the affidavits.

There is sometimes a difficulty in distinguishing between a nullity and an irregularity. Macnamara in his book on nullities, at page 3, says of a nullity, "Perhaps it may be defined as a proceeding that is taken, (1) without any foundation, (2) or that is essentially defective, (3) or that is expressly declared to be a nullity by a statute." As illustrating the first ground, he refers to signing of judgment before appearance entered. That, according to the old practice, was wholly unwarranted, as there was no person before the court against whom the judgment could be signed, and thus the whole foundation of the proceedings was wanting. As to the second ground, pleas without counsel's signa-

ture and sham pleas might be treated as nullities. The third branch, when process was served on Sunday, or directed against the goods or person of an embassador, the same is declared void by statute. And also when a proceeding is expressly directed to be taken by statute, its omission amounts to a nullity—as under the statute Westminster 2nd, where a *fi. fa.* could not issue on a judgment under certain circumstances without a *sci. fa.* to revive it, *Garratt* v. *Hooper*, 1 Dowl. 28, and when a plea in abatement was filed without an affidavit verifying the truth of it contrary to the statute 4 & 5 Anu, cap. 16, sec. 11. In these cases the proceedings were held to be nullities and could not be waived.

I think the principle applicable to this case resembles that established in the case *Alsager* v. *Crisp*, 9 Dowl. 353. In reference to that case Mr. Macnamara says at page 5, "so when a step is perfectly well taken according to the supposition on which it is founded, but which supposition is not correct, it is only an irregular proceeding; as where plaintiff erroneously supposing that defendant had not entered an appearance, entered one for him, and then acting on the hypothesis, served notice of filed declaration on defendant himself in the country, though defendant had appeared by attorney, such service was holden not a nullity but an irregularity, and per Williams, J., "I cannot assent to that view of the subject (that it was null) because everything was done perfectly well on one supposition, that the appearance had not already been entered by the defendant. It was a step wholly appropriate to proceedings in a cause when the facts would have allowed it." It seems to me to consider this other than irregularity would be contrary to the principles laid down by Williams, J. The doctrines laid down in *Holmes* v. *Russell*, 9 Dowl. 487, and acted on in other cases, also sustain the view that the defect in this proceeding is an irregularity and not a nullity. In that case Coleridge, J., said, if the objection can be waived, it is not a nullity, but an irregularity. Now the statute (Common Law Procedure Act) does not *forbid* the entering of the judgment of *non pros.*, except in a particular way, as it seems to do the issuing of the *fi. fa.* without a *sci. fa.* to revive a judgment. Another statute also forbids the serving a plea in abatement without an affidavit verifying the same. The section of the Common Law Procedure Act expressly authorises the entering of such a judgment. Of course it points out the proceedings which should be had in the cause before the entering of the judgment, which I assume were not all taken here any more than in the case of *Alsager* v. *Crisp*, or in *Holmes* v. *Russell*. But assuming that the issue had been joined in time to have made the giving the notice a proper one at the time it was given, the notice itself and the subsequent entry of judgment, I presume, were perfectly regular, and to use the language of Williams, J., the entry of the judgment "was a step wholly appropriate to proceedings in a cause where the facts would have allowed it."

The case of *Holmes* v. *Russell*, 9 Dowl. 487, already referred to. seems to me to have been a stronger one against the judgment than this. There the defendant was an accommodation endorser of a bill of exchange, the time of the payment of the bill had passed and he presumed it was paid. No knowledg of any of the proceedings by the plaintiff was conveyed to the defendant until execution was levied on his goods. He did not however apply promptly after that to set aside the proceedings. It was urged on his behalf that the proceedings were a nullity and there could be no laches. The judge held that he could have waived the irregularity—saying, suppose he had notice that the appearance had been entered for him and had taken the declaration out of the office and pleaded, he then could not have objected that there was a defective service of the writ. The objection might therefore be waived.

Now in the case before us, if the plaintiff had applied to the court to obtain an enlargement of the time for going to trial on entering into the peremptory undertaking, and failing to bring had again enlarged the time for going to trial and the case down pursuant to his undertaking, he had failed to take the case down pursuant to the second undertaking, if defendant then obtained a rule for judgment as in case of a nonsuit it cannot be seriously urged that plaintiff could fall back on the objection, that giving the notice to bring down the case to trial in the first instance, was a nullity, and that any judgment or proceeding following that, though perfectly regular in itself, was tainted with the original defect so as to be entirely void. I think the authorities shew that in this case the objection could be waived, and if so, it cannot be considered a nullity.

The modern rule seems to be that whenever there is any doubt upon the matter, it will be safer to treat the defect as an irregularity rather than as a nullity. From the decisions and rules of the court, it may be gathered that there is an evident tendency amongst the judges to consider defects merely as irregularities.

I have looked at the cases referred to by Mr. Gwynne, and I do not think they would warrant me in deciding in his favour. The most recent one, of *Brooks* v. *Hodgkinson*, 4 H. & N. 716, merely affirms in effect that a proceeding taken contrary to the express provisions of an act of Parliament is a nullity, such (as in that case) arresting the defendant, where the sum recovered did not exceed £20; when the statute 7 & 8 Vic. cap. 96, sec. 57, expressly declared that no person should be taken in execution on such a judgment. The language of Watson, B., was quite appropriate: "The writ is not merely irregular, but absolutely void, because it has issued *contrary* to law." I have already stated that I do not see that the Common Law Procedure Act says that no such judgment as has been had in this cause shall be entered. It makes provision for the entry of such judgments, and the real cause of complaint is, that the plaintiff made a mistake in supposing that the proper time had arrived for giving the notice from which the judgment was to follow.

In *Dickinson* v. *Eyre* 7 Dowl 721, the entry of judgment in an interpleader proceeding as a judgment obtained in the ordinary way was held to be a nullity, because no such proceeding was known by the practice of the court or authorized by the statute.

Doe McMillan v. *Brock*, 1 U. C. Q. B. 482.—The effect of this decision, as I understand it, is, that where a rule *nisi* for judgment as in case

of a nonsuit is discharged on the peremptory undertaking, on payment of costs, the giving of notice of trial without the payment of the costs, may be treated as a nullity. But if a trial had been had, damages assessed, and judgment entered, I do not think the defendant could have delayed making his application for several terms to set aside the judgment against him, and then have expected to succeed on the ground that the notice of trial was a nullity.

In *Forrester* v. *Graham*, 2 O S. 369, when the writ was not returned, nor an affidavit of service filed, the learned Chief Justice, Sir J. B. Robinson, considered the common bail and declaration filed a nullity. The late Sir J. B. Macaulay said the first common bail was *irregularly* filed.

Bank of Upper Canada v. *Vanvoehis*, 2 Prac. Reports, 382, 384, I decided on the authority of *Holmes* v. *Russell*, 9 Dowl. 487, that when defendant was served with a specially endorsed writ, to which he entered an appearance, yet plaintiff signed judgment against him without serving a declaration and issued execution thereon, I could not consider the proceeding a nullity. The defendant not having applied to set aside the proceedings in a reasonable time after having had notice of the execution against him, could not succeed in setting aside the judgment.

Kerr et al. v. *Bowie*, 3 U. C. L. J. 150: An application to set aside a judgment because it was not properly signed, the writ not being a specially endorsed writ, nor a case in which it could be so endorsed and judgment signed. As the writ was not produced nor a copy of it, Sir J. B. Robinson refused to make the order sought for, saying, if the case was not one for a specially endorsed writ the application to set aside the judgment should have been made sooner.

I must view this case as one in which the judgment was entered on 26th March, 1866. The plaintiff became aware of that fact a few days after, if not on the day on which the judgment was entered, and he now applies, on the 16th March, 1867, to set aside this judgment. Unless the signing of the judgment is to be considered as a mere nullity there is no occasion for my interfering. I have not been able to bring my mind to the conclusion, that the entering of this judgment is a nullity, and therefore the summons must be discharged.

But even if the plaintiff's application could be sustained on the ground on which he has put it, and that he is not now concluded by his own laches as to the time of making the application, the facts disclosed by the affidavits shew that he has already made one application to a judge in Chambers and obtained an order to set aside this judgment, but has not acted on that order. Any excuse that he might have to urge for not taking out the order was no doubt brought before the court in opposing the application to set aside the order, and if the court would not recognize the excuse as sufficient to sustain the order, I do not see how I can properly hold that the same ground being now put before me would authorize me to act as if the plaintiff was not to be held bound by the fact of omitting to take out his order, so as to require me to hold him to have elected to take that course.

Having once applied to a Judge in Chambers, and obtained an order setting aside this judgment, it does not seem to me to be consistent with the practice of the court to permit him to harass the defendant with repeated applications to the same end. I should feel inclined to hold that on this ground also the application must fail.

As I have already remarked, it does not very clearly appear on what ground the first application was made—if on the same as that now presented, then permitting the repetition of the application on the same grounds would hardly be consistent with the practice of the court; if not on the same grounds, and these grounds were then known to the plaintiff, but he deliberately chose not to act on them, then he is equally in fault. *Leggo* v. *Young et al.*, 17 C. B. 549, is an authority on this latter point. On the whole I think this summons must be discharged with costs.

Summons discharged.

ENGLISH REPORTS.

Kearney v. Tottenham.

New assignment—Joint trespass—Assault and imprisonment.

A. and B. were charged jointly and in one count with assault, battery, and imprisonment of the defendant. A. pleaded a justification as a justice of the peace. Trespasses, including an assault, battery, and imprisonment, were proved to have been done by A. and B. jointly, and afterwards on the same day another imprisonment, but without an actual battery, done by A. alone, to which last the justification alone applied.

Held (reversing the decree of the Court of Common Pleas), that no new assignment by the plaintiff was necessary, and that the judge was right in telling the jury to confine their attention to the joint trespass only.

[Ex. Ch. (Ir.) June 30; July 1. 15 W. R. 1020]

This case came before the Court upon appeal from the decision of the Court of Common Pleas. It was an action of trespass, in which Rose Kearney was plaintiff, and Arthur Loftus Tottenham and Phelim McGowan were defendants. The summons and plaint consisted of one count, namely, that the defendants assaulted and beat the plaintiff, and gave her into the custody of a policeman, and caused her to be imprisoned in a police barrack, to the plaintiff's damage. The defendant, Arthur Loftus Tottenham, pleaded, first, that he did not commit the trespasses in the plaint mentioned, or any of them as alleged; and, secondly, that the alleged trespasses were committed after the passing of Act 12 Vict., for the protection of justices in Ireland from vexatious actions, and that the defendant was at the time of the committing of the alleged trespasses a justice of the peace for the county of Leitrim, and that the alleged trespasses were committed by him in the execution of his office, and averred that more than six months had elapsed between the committing of these acts and the bringing of the action. He also pleaded a similar plea averring the absence of the statutory notice of action.

The defendant M'Gowan pleaded that he did not commit the trespasses in the plaint mentioned, or any of them as alleged.

Upon these defences the following issues were taken:—1st. Whether the defendants or either of them committed the trespasses in the plaint complained of, or any of them as alleged. 2nd. Whether the said alleged trespasses or any of them was committed by the defendant Arthur

Loftus Tottenham in the execution of his office as justice of the peace as in 2nd and 3rd pleas alleged.

The facts proved at the trial were as follows: The plaintiff, Rose Kearney, was tenant of a house and yard to the defendant Tottenham. The defendant M'Gowan was Tottenham's bailiff, and as such came to the plaintiff's house on the 25th of August, 1863, and said he was authorized to open a pass in the plaintiff's wall and through her yard for a person who lived in the next house. She refused to permit him to do so, and went to Tottenham to complain. Tottenham desired her to permit the pass to be made, or he would send her away. After this interview M'Gowan and another person came and attempted to throw down the wall, whereupon the plaintiff resisted them, and in doing so was assaulted and beaten by M'Gowan. The police then arrived, and on being shown a letter by M'Gowan they arrested the plaintiff and took her to the barrack, where she was confined for three hours. After this time had elapsed, she was taken before Tottenham in his magisterial capacity and committed to prison again. A letter of authority from Tottenham to M'Gowan to throw down the wall, and the record of a former action of *quare clausum fregit* for the same trespasses, in which damages had been recovered by the plaintiff from the same defendants, were read on behalf of the plaintiff.

Evidence on behalf of the defendant having been given, the learned judge directed the jury to leave out of their consideration everything that happened after and including the arrest of the plaintiff by the police, who had arrested her in execution of what they considered their duty, without the direction of the defendants, and that if they believed that the plaintiff was assaulted and beaten before that time by M'Gowan, they were to find for the plaintiff against both defendants, the defendant Tottenham being responsible for the acts of McGowan.

Counsel for the defendant Tottenham called on the learned judge to direct the jury that if they believed the defendant, in the execution of his duty as a justice of the peace, committed the plaintiff to prison, the plaintiff not having new assigned, they should find for the defendant. The judge having refused to do so, the jury found for the plaintiff in both issues.

The Court of Common Pleas having granted a conditional order for a new trial, which was made absolute in Trinity Term, 1865, the plaintiff now appealed from that decision.

The question for the Court of Appeal was whether the direction of the learned judge was right, or whether, under the circumstances, it was necessary for the plaintiff to have new assigned.

Dowse, Q. C., and *J. P. Hamilton*, for the plaintiff. 1. A new assignment is made unnecessary here by the Common Law Procedure Act, 1853. Formerly a new assignment was necessary in cases where it is no longer so, because the replication *de injuria* only put in issue the substance of the plea and not the identity of the trespasser. But the object of the Common Law Procedure Act was to prevent further pleading after the defence, and, therefore, by the issue i here tendered the identity of the trespassers in issue. The defendant accepted the issue that the very same trespasses complained of were done by him as a justice of the peace. 2. But even under the old law no new assignment would be necessary. If the declaration was perfectly general, and two trespasses were proved, both answering to the description of the trespasses in the declaration, then a new assignment was necessary; but here the plaint is specific in this: that a joint trespass is alleged, and an assault, battery, and imprisonment described. Here there are not two trespasses proved which answer to the description of those in the plaint. The trespasses which the defendant justifies as a magistrate are not joint-trespasses, but single and committed by himself alone. And the trespasses so proved do not include a battery, which is here alleged. The defendant has not proved a battery which needed this justification, and to which it was applicable. If we had new assigned here we must have admitted a battery justified, and a joint-trespass justified; and we could not prove another battery and another joint-trespass, as there was only one. Defendant might have asked for particulars of the trespasses if he had any doubt: *Nicholl* v. *Glennie*, 1 M. & S. 588; *Greene* v. *Jones*, 1 Wm. Saund. 299b; *Barnes* v. *Hunt*, 11 East. 451; *Freeman* v. *Crofts*, 4 M. & W. 4; *Hall* v. *Middleton*, 4 Ad. & El. 107; *Cocker* v. *Crompton*, 1 B. & C. 489; *Cheasley* v. *Barnes*, 10 East, 80; *Moses* v. *Levi*, 4 Q. B. 413; *Rogers* v. *Spence*, 12 Cl. & Finn. 719; *Atkinson* v. *Matthews*, 2 T. R. 176; *Oakley* v. *Davis*, 16 East, 82.

Armstrong, *Serj.*, and *Carson*, for the defendant.—The fact of two defendants being sued does not specify the trespass in any way, because each is entitled to regard himself as the defendant in a separate action with a separate summons and plaint, charging him individually with the trespasses complained of And the fact that there is only one battery proved does not alter the case, as every imprisonment imports a battery: *Phillips* v. *Howgate*, 5 B & Ald. 220. Imprisonment is the gist of the action. [Pigot, C. B.—If you had pleaded only to the imprisonment, your plea would be bad.] But if an imprisonment only were proved the plaintiff would recover. There is a distinct action for assault and battery, and there might have been a count for it here. But the question of false imprisonment is put on the record by charging assault, battery, and false imprisonment. The defendant has proved and justified and imprisonment which imports an assault and battery, and, as there is no new assignment, was entitled to a verdict: *Bannister* v. *Fisher*, 1 Taunt. 357. The identity of the trespasser is not in issue here. Nothing is in issue except the doing as a magistrate.

Cur. adv. vult.

July 1.—Fitzgerald, B., delivered the judgment of the Court.—I have been unexpectedly called upon to deliver judgment in this case, but I think I can state in a few words the reasons for our decision, which is that the decision of the Court of Common Pleas should be reversed. The case was in effect this. Two distinct imprisonments of the plaintiff by the defendant were proved to have been made upon the same day, one a joint imprisonment by the two defen-

dants, and the other an imprisonment by the defendant Tottenham alone. It may be taken that the defendant Tottenham had an excuse for one of the imprisonments, namely, that in which he alone was concerned. But the plaintiff went against the two trespassers for the joint imprisonment, as she had a right to do, and the defendant has proved a justification applicable only to the trespass in which he, and he alone, was concerned, and he then says the plaintiff should have pleaded the joint trespass by way of new assignment. The short answer to that is, that she could not have reassigned without admitting a justification to a joint imprisonment by both defendants, and charging a second joint imprisonment as unjustifiable. But at the trial she would be met with the fact that there were not two joint imprisonments upon the same day.

Re Allin's Legacy.

Presumption of death—Advertisement—Inquiry— Form of order.

Where a man entitled to a legacy had not been heard of for fifteen years, and was supposed to have gone to Australia, where he had been inquired (but not advertised) for without success.

The Court refused to transfer the principal to petitioners claiming to be his legal personal representatives but directed an inquiry.

[V. C. M., June 15. 15 W. R. 1164]

William Allin of Holsworthy, Devon, died in April, 1851, having by his will bequeathed a sum of £1,500 to his son L. D. Allin, and J. C. Browne, upon trust after the decease of an annuitant (who afterwards died in 1865), to divide that principal in the following manner:—£800 to be divided in specified sums, between his several daughters and another, and £700 to L. D Allin

L D. Allin not having been heard of for fifteen years, and his legacy having been paid into court by J. C. Browne, the remaining trustee, the brothers and sisters, as his next-of-kin, now asked to have the legacy transferred to them.

An affidavit made by J. C. Browne stated that in 1852 he received letters from L. D. Allin, dated from specified addresses in London; that in the same year he made inquiries at the last known address of the said L. D. Allin, and was informed that he had left for Australia; that in November, 1853, he was informed by a Holsworthy man that he had seen L. D. Allin in Fleet-street about twelve months before; that in 1853, 1854, and 1855, he had caused further inquiries to be made for L D Allin in London, but could only learn that he was believed to have sailed for Australia: that in 1858 he himself visited Australia, and while there made inquiries for L. D. Allin, but could learn nothing of him, and that he had never heard of him since, and save as aforesaid had no knowledge whether he was dead or alive, or, if dead, whether he had left any will, or any wife or children. No administration had been taken out to L. D. Allin's estate, and it did not appear that any advertisement had been issued for L. D. Allin in Australia or elsewhere.

Kingdon, for the brothers and sisters of L. D. Allin, asked to have the fund transferred to them,

Clarence, for J. C. Browne, the trustee, did not oppose, but suggested whether advertisements should not first be inserted in Australian papers.

[Malins, V.C.—Can I make the order asked for while no advertisements have been issued in Australia. Is there any case to warrant my going so far?]

Kingdon cited *Dunn* v. *Snowdon*, 11 W. R. 160, 2 Dr. & Sm. 201; *Lord Woodhouselee* v. *Dalrymple*, *re Beamish*, 9 W. R. 475, 564, *Re Milehams Trusts*, 15 Beav. 507; *Dowley* v. *Winfield* 14 Sim. 277; *Lambe* v. *Orton*, 8 W. R. 111, and remarked that in the Court of Probate advertisements are not in all cases required; Coote's Practice, 172, and see *In the goods of W. T. Norris*, 6 W. R. 261, 1 Sw. & Tr. 7.

Malins, V.C.—None of the Chancery cases go the length of disposing of the principal, when as yet no advertisements have been issued.

An order was then taken for an inquiry whether L. D. Allin were living or dead, and if dead, when he died, and whether he left any and what will, and whether he was ever married and if so, to whom, and whether there were any children of the said marriage, and who was or were his legal personal representatives.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

Turner and others, Devisees of John Scott v. John W. Scott.

Deed or Will—Construction.

Where one J. S., living on his farm, made what he called "this indenture" to his son J. W. S., upon consideration of natural love and affection; and "also that the said J. W. S hath this day agreed to live with the said J. S. and labor and assist him in working the land hereinafter described, and to maintain P. S., the wife of the said J. S., if she survives him, during her natural life;" conveying the said farm by metes and bounds to him in fee simple. "excepting and reserving nevertheless the entire use and possession of said premises unto the said J. S. and his assigns, for and during the term of his natural life, and this conveyance in no way to take effect until after the decease of the said J. S, the grantor," the habendum being to have and to hold the premises "after the decease of said J S." to him, the said J. W. S., his heirs and assigns, &c.

Held, that the instrument is to be considered as a will, not as a deed, and was therefore revocable

[July 15th, 1867.]

The opinion of the Court was delivered at Philadelphia, January 14th, 1867, by

Woodward, C. J.—

The great question in the case, and the only one we shall discuss is, whether the indenture of 22nd November 1849 by John Scott to his son John W. Scott conveying the farm in dispute, was a deed or a will. Not whether the parties called it a deed, nor whether it contained the customary words of a deed, but whether according to the intentions expressed upon the face of the instrument it can in law have the effect and operation of a deed. This is our question, and it is important to place before our minds in a very distinct light, the instrument to be interpreted.

John Scott, an old man living on his farm, made what he called "this indenture" to his son John W. Scott, at the above mentioned date, upon a consideration of natural love and affection; and also that the said John W. Scott hath this day agreed to live with the said John Scott, and labor for and assist him in working the land hereinafter described; and to maintain Patience

Scott, the wife of the said John Scott, if she survives him, during her natural life," conveying the said farm by metes and bounds, to him, in fee simple, "excepting and reserving, nevertheless, the entire use and possession of said premises unto the said John Scott and his assigns, for and during the term of his natural life; and this conveyance in no way to take effect until after the decease of the said John Scott, the grantor." The *habendum* was to have and to hold the premises "after the decease of said John Scott," to him, the said J. W. Scott, his heirs and assigns, &c.

After the father and son commenced their joint possession under this deed, they quarrelled, and the father turned the son out by action of ejectment, and kept the sole possession in himself till he died, his wife Patience having died before him. Before his death, to wit, 26th February 1861, he made a formal will in which he revoked all former wills, and "particularly a certain will and testament (in form as a deed), recorded in the recorder's office of said county of Erie, in Deed-Book A. p. 716 witnessed by Marion Hutchinson and George H. Cutler; and I hereby give and assign as the reason of revoking and making void said will that my son John W. Scott and his wife have failed to treat me with filial affection, and to comply with the conditions upon which I made said will." He then goes on to devise the land in question to his daughters, Nancy Holliday, Anna Sanford, Parney P. Turner, and his son Abner Scott, the plaintiffs in this action.

These devisees succeeded to the possession but lost it by an action of ejectment brought against them by John W. Scott, and this is a second ejectment brought by them to regain the possession. If the deed of 22nd Nov. 1849 vested the title in John W. Scott, the subsequent will was inoperative of course, so far as concerned this land; but if the deed vested no present interest, and was intended to operate as a testament, it was very expressly revoked and repealed by the subsequent will, and plaintiff's devisees under this will have no title.

The testato. called and treated the deed as a will, but not until after he had quarrelled with his son and turned him out of possession. When he made the instrument he called it an indenture and permitted his son to record it as a deed. His treatment of it as a will therefore, proves nothing.

But what is the effect of the reservation clause above quoted? Undoubtedly, a life estate was reserved to the grantor, with the entire use and possession of the premises, and of course the instrument could not take effect as a "conveyance until after his death, and such was the declared intention.

The learned judge construed the latter clause of the reservation as a protection of the life estate; but it needed no protection, for it remained in the grantor, being excepted out of the grant as fully as it was capable of existing. But if these pregnant words were added with some such mistaken notion of the parties, and it is quite possible they were, they are an emphatic declaration that no interest should be considered as presently conveyed to interfere with the life estate; whilst the *habendum* is equally express that the estate intended to be conveyed to John W. Scott should commence at the death of the grantor. Without straining or unduly emphasizing any of these words, it is impossible to doubt that, if any effect whatever is to be given to them they limited the fee to take effect in *futuro*. At common law this can only be done when a particular estate to take effect presently, is *granted*, not *reserved*, to support the fee. If the question was upon John W. Scott's title under the deed, without any subsequent will in the case, and we should be obliged to say that as an attempt to create a freehold in *futuro* without the grant of a particular estate to support it, the deed was void, we might perhaps support it as a covenant to stand seized to his use. I say *perhaps*, because the case has not been fully considered in that aspect, and the reason why we do not so contemplate it is, that there being a subsequent will, it becomes a mere question of interpretation whether the former instrument was testamentary in its character or not. If it was testamentary, then it ought not to be construed as a covenant to stand seized, there being a later will. Had there been no later will, the deed, though testamentary, might perhaps have been supported as such a covenant.

We come, then, to the real question, was the deed essentially a testamentary instrument?

Swineburn defines a testament to be a just sentence of our will touching that we would have done after our death. And because—"some there be who do censure this excellent definition to be defective, though unworthily," he makes a full exposition of the meaning of every word in the definition. The only distinction he makes between a testament and a will is the distinction between *justa sententia* and *legitima dispositio*. But the essence of both is that it is a disposition to take effect after death and this is adopted by Judge Redfield, the latest comentator, in his work on the law of Wills, p. 5.

In the case of *Habergham* v. *Vincent*, 2 Vesey, p. 204, the question was whether two instruments, one in form a will, and the other in form a deed, did not together constitute a will, and the case was greatly considered. It was first argued before Lord Thurlow, who took a long time to consider of it, and then directed a case to be stated for the opinion of the court of King's Bench. In consequence of too short a statement in sending this case to law, the second instrument was there considered a deed, and the other questions were ruled accordingly. Afterward, when the case came before Lord Chancellor Lowborough, he said he felt so strongly that this instrument (the deed), was to be construed as testamentary that he must have the assistance of two of the judges to sit with him at the argument; and accordingly, Mr. Justice Buller and Mr. Justice Wilson, in accordance with a custom which sometimes is practised in the high Court of Chancery, sat with the Chancellor and delivered separate though concurring opinions. Mr. Justice Buller in his opinion said:—"When this case was argued in the King's Bench no one of the cases quoted here by the Attorney General was mentioned or alluded to. I freely confess," he added, "they did not occur to me. But those cases have established that an instrument in any form whether a deed poll or indenture, if the

the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law, and in equity; and in one of them there were express words of immediate grant, and a consideration to support it as a will."

To the same effect were the other opinions in this case. The cases to which Justice Buller alluded as cited by the Attorney General (Sir John Scott), were West's case, Moore 177, where it is laid down that if there is a letter expressing the disposition as to land it is sufficient:—*Green* v *Proude* 1 Mod. 117, where, though the instrument was sealed and delivered as a deed it was held to be a will. *Maltham* v. *The Duke of Devonshire*, 1 P. Will. 529 where a will directed the executors to pay £3,000 as the testator should afterwards appoint. He afterwards made a deed of appointment which was taken as part of the will.

I refer also to cases cited in note Q of 1 Williams on Evidence, p. 61; Rowan's Appeal, 1 C. 293.

But it is supposed the covenant of general warranty in the deed estops the plaintiffs. Undoubtedly the covenant of general warranty protects the consideration, and as that was in the form of services to be rendered, John W. Scott will be entitled to his action for damages *if he rendered those services.* This question has not been investigated in the present action; but if the old man turned the son out of possession of the premises, and took exclusive possession to himself and died in such exclusive possession, it is not very likely that a breach of covenant will be enforced against his personal representatives, which was not thought worth asserting against the old man himself.

But, however this may be, we see nothing in the covenant of warranty to change our construction of the operative words of the grant. As these words were expressly limited to take effect only after the death of the grantor, they were necessarily revocable words. The doctrine of the cases is that, whatever the form of the instrument, if it vest no present interest but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. If they have used language which the law holds to be testamentary, their intention is to be gathered from the legal import of the words they have employed;—for all parties must be judged by the legal meaning of their words.

The revocable words of the first instrument having been revoked by the subsequent will, the estate must go to the devisees, and John W. Scott if entitled to any redress, must seek it by a personal action against the legal representatives of the decedent.

The judgment is reversed, and a *venire facias de novo* is awarded.

Agnew, J.

I dissent from the opinion just read.

The late Chief Justice Gibson, in dealing with the principle which rules this case, said in *Hileman* v. *Bowsbaugh* 1 Harris, 344,—"it is decisive against the testamentary character of the instrument that it is not absolutely a will. It must be exclusively so or it is a deed; for there is no middle ground.

Then, what have we? A deed in form—in all its parts and circumstances without the slightest cast of a will. Form, it is true, will not prevail against actual intent; but it is the evidence of intention, and casts the proof of actual intent on those who oppose it. But here both form and intention coincide, as the instrument clearly shows. The writing is not only styled an indenture, grants, bargains and sells an estate for a valuable as well as a good consideration; was sealed and delivered in the presence of witnesses, and was duly recorded as a deed in two months from its date,—but the valuable portion of the consideration was an immediate agreement of the grantee to live with the grantor in his lifetime, and to labor for and assist him in working his farm (the granted premises), and also to maintain the grantor's wife during her lifetime, in case she survived him. How can this portion of the deed be construed as a will? and how can revocability be affirmed of such an instrument? which according to the English decisions, by its acceptance, made this agreement a covenant on part of the grantee on which the action of covenant will lie, and in our state according to the decisions only varies the liability to assumpsit instead of covenant, when the instrument is not sealed by the grantee. It is no answer to say that the grantee did not perform the present service to which the deed bound him. That may be a good defence in equity to the covenant to stand seized, created by the deed, and therefore allow ground for a recision but it does not alter the nature of the writing. As a test of its true character let us suppose John W. Scott had lived with and labored for his father as stipulated in the consideration of the deed, will any one say that the instrument under which the services was performed though in form an indenture could be revoked as a will? Clearly not. It undoubtedly had the force of a power of attorney coupled with an interest, which though revocable as an instrument becomes irrevocable by the interest coupled with it. Indeed, it was more,—for it contained a covenant for title. On the performance of the stipulated service it took effect, and would be no longer within the grantor's control. Having received the consideration, or being in its continued receipt, his covenants in the instrument bound him, one of which was the express covenant to warrant and defend the estate and premises granted to John W. Scott and his heirs and assigns, against the grantor and his heirs, and all others, subject to (and this is the only exception in the covenant), the life estate reserved to the grantor. This is a clear covenant as to the remainder after the particular estate of the vendor had expired, and it was for a present and a valuable consideration in the labor and service to be performed. The language of the granting part of the deed is also a present conveyance of the land, and carries all within its terms, which, according to the established rule of interpretation, must be taken most strongly against the grantor.

The exception which follows the grant is therefore all that can avail him and what is it?

It is simply a reservation of the use and possession to the grantor and his assigns during his natural lifetime, and this exactly coincides with

the subsequent covenant of warranty. The words "and this conveyance in no way to take effect until after the decease of the said John Scott, the grantor," follow the exception, and acadded to it, and it is supposed they give charare teer to the instrument. But, while they limit th time when the deed is to take effect and raise a new question—whether the deed is a common law feoffment, or a covenant to stand seized to use, they in no wise impress upon the instrument the character of a will, or make it revocable by the act of the grantor alone. They do not release or discharge the grantee from his obligation to perform an immediate service, as the present consideration of the indenture; nor do they release the grantor from his covenant for title on the grantee's performance. But these are the very elements of contract, and not of voluntary devise. They take from the paper its title to be an absolute will, and draw it directly within the principle stated by the late C. J. Gibson.

The true point of the case is that the paper is a contract for acts to be done in the lifetime of the grantor, and is wholly inconsistent with the idea of mere testacy. The language of the late Chief Justice illustrates the point, and is therefore cited, and not because it contains a rule applicable to every case that can arise.

What, then was the true design of the instrument?

Clearly, it was on one side, to enable the father to have the labor and services of his son on his farm at home while he lived, retaining the right to its use and possession during his own lifetime, and to secure the maintenance of his wife after his death, if she survived him; and on the other hand, to secure the title to the son after his death, as a compensation for his labor and service. Did the son intend to perform his part of the indenture, and leave it optional with his father to retract and revoke his? Did the father intend to take the service of his son, and yet retain the power to disappoint him? No such design appears in the whole instrument; yet this is the burden of proof of an actual intent which the form of the instrument imports.

Certainly there was a bargain between these parties, as the intent of the writing clearly shows. It was for a valuable consideration, and though the writing may not operate as a common law feoffment because of the reserved life estate, yet it will operate as a covenant to stand to the use of the son, on his performing the services stipulated as the consideration. If he failed to perform it, equity may relieve the covenantor because of the failure of the consideration; but it cannot alter that which clearly was a bargain in terms and intent, and thus change the writing from a deed into a mere will.

I would therefore affirm the judgment of the court below.—*Pittsburgh Legal Journal.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR THE MONTHS OF NOVEMBER AND DECEMBER, 1866, AND JANUARY, 1867.

(*Continued from page* 165.)

New Trial.—*See* Libel, 2.

Nuisance.—*See* Master and Servant, 5.

Parties.—*See* Equity Pleading and Practice, 1. 2; Mortgage, 1; Solicitor, 1.

Partnership. — *See* Mortgage, 1; Practice, 2; Solicitor, 1.

Patent.

1. A. obtained a patent for improvements in the construction of ships. By his specification, he claimed as his invention (amongst others) 1, the construction of ships "with an iron frame combined with an external covering of timber;" "b, the consruction of iron frames adapted to an external covering of timber, as described." *Held*, that the term "iron frame" in the first claim was not confined to such an iron frame as that specified in the sixth claim; and that inasmuch as the use of iron and timber in the construction of ships was already known and used, and as the claim was only for the application of the same old invention, viz., planking with timber, which was formerly done on a wooden frame, to the same purpose on an iron frame, the patent could not be sustained. —*Jordan* v. *Moore*, Law Rep. 1 C. P. 624.

2. Time for applying for letters patent was extended where the delay was small and accidental.—*In re Hersee*, Law Rep. 1 Ch. 518.

Penalty.—*See* Mortgage, 2.

Perjury.

False swearing before a local marine board, acting under 17 & 18 Vic. c. 104, is perjury.—*The Queen* v. *Tomlinson*, Law Rep. 1 C. C. 49.

Pleading.—*See* Equity Pleading and Practice; Practice, 1, 3; Solicitor, 2.

Pledge.—*See* Bill of Lading.

Power.

1. Testatrix had, by her marriage settlement, power to appoint certain funds but it did not appear that she had any other property. By will, made before the Wills Act, not referring in terms to the power, she gave all her property and estate, of what nature, kind, quality soever the same might be, to her husband absolutely. *Held*, an execution of the power. — *Attorney General* v. *Wilkinson*, Law Rep. 2 Eq. 816.

2. Property was given by will on trust to A. for life; remainder to all or such one or more of the children or issue of the testator's deceased brother B., in such shares and in such manner as A. should appoint; and, in default of appointment to B.'s children equally. C., one of B.'s children, assigned "all his estate and effects" by deed under the Bankruptcy Act. 1861, but never obtained a discharge. After this, A. appointed the fund by will to B.'s children equally; and, as all B's children survived A., C. took the same share he would have taken in default of appointment. *Held*, that the deed did not pass after-acquired property; and that C.'s interest in default of appointment was defeated by the appointment, which gave him a new interest, liable to be defeated by lapse, and that therefore C.'s share did not pass under the deed.—*Vizard's Trusts*, Law Rep. 1 Ch. 588.

See Election, 3; Marshalling of Assets, 1.

Practice.

1. If an action is begun in the name of a dead man, his representatives cannot be substituted as plaintiffs.—*Clay* v. *Oxford*, Law Rep. 2 Ex. 54.

2. To an action on a bill of exchange, the defendant pleaded that he did not accept, and proved that the bill was accepted by his partner in the firm's name, and included a private debt of the partner, for which he had given his partner no authority to accept. The court amended the declaration by adding a count for the consideration, and ordered a verdict to be entered for the sum really due from the firm on terms. Whether the plea was proved, *quære*. *Ellston* v. *Deacon*, Law Rep. 2 C. P. 20.

3. An affidavit made in order to hold a defendant to bail, which states that the defendant "is indebted" to the plaintiff "for money lent and goods sold and delivered," without averring that the money was lent or the goods sold and delivered by the plaintiff to the defendant, is insufficient.—*Handley* v. *Franchi*, Law Rep. 2 Ex. 34.

4. A creditor may have a *scire facias* against a shareholder in a railway company, under 8 & 9 Vic. c. 16, sec. 36, though the sheriff's returns to abortive writs issued against the company have not been actually filed at the time of the motion; and, though notice to the party sought to be charged must be served personally, the rule *nisi* for the *scire facias* may be served on an attorney authorized to accept service for him. — *Ilfracombe Railway Co.* v. *Devon and Somerset Railway Co.*, Law Rep. 2 C. P. 15.

5. A plaintiff who recovers a debt not exceeding £20, though deprived of costs, is yet entitled to poundage fees and expenses of execution under 15 & 16 Vic. c. 76, sec. 123.—*Armitage* v. *Jessop*, Law Rep. 2 C. P. 12.

See Different Titles.

Principal and Agent.

The defendant employed an architect to prepare plans and a specification for a house, and to procure a builder to erect it. The architect took out the quantities, and represented to the plaintiff, a builder, that they were correct; the plaintiff thereon made a tender, which was accepted. The quantities proved incorrect, and the plaintiff expended much more material than he contemplated. *Held*, that there was no evidence that the architect acted as the defendant's agent in taking out the quantities, or that the defendant guaranteed their accuracy, and that, therefore, the plaintiff could recover only his contract price. — *Scrivener* v. *Pask*, Law Rep. 1 C. P. 715.

See Bill of Lading, 2; Contract, 1; Master and Servant; Ship, 2.

Probate Practice.

1. A will was opposed on a written statement, by an attesting witness, that it was not duly executed. The party opposing the will did not deliver notice of intention not to call witnesses till after he had delivered his plea. *Held*, that he had thereby lost the protection against costs given by contentious rule 41; and the court, thinking the statement unfairly obtained, condemned him in costs. — *Bone* v *Whittle*, Law Rep. 1 P. & D. 249.

2. The rule which protects one opposing a will against costs, if he gives notice that he merely insists on the will being proved in solemn form, and only intends to cross-examine the witness produced in support, does not apply to a case in which undue influence is pleaded.—*Ireland* v. *Rendall*, Law Rep. 1 P. & D. 194.

3. A next of kin, who had unsuccessfully pleaded undue influence, was yet not condemned in costs, the plea under the circumstances not being unreasonable. — *Smith* v. *Smith*, Law Rep. 1 P. & D. 239.

See Administration.

Production of Documents.

1. A case and opinion of counsel stated about a separate litigation on the same subject-matter as the present dispute, and, after it had arisen, is privileged from production, as is also a letter written between co-defendants about a matter in suit, with direction to forward it to their joint solicitor.—*Jenkins* v. *Bushby*, Law Rep. 2 Eq. 547.

2. If a defendant, after answer, has obtained an affidavit as to documents in the common

form, he may file a concise statement of specific matters of which he seeks discovery with interrogatories; and it will be no answer for the plaintiff to say, that some of such matters were comprised in or that they were all referred to in the answer, and that the first affidavit was sufficient; but a summons, taken out by the defendant for an affidavit of documents in the same form in which he has interrogated, will be dismissed as unnecessary. — *Newall* v. *Telegraph Construction Co.*, Law Rep. 2 Eq. 756.

3. To entitle to discovery under the Common Law Procedure Act, 1854, sec. 50, a party must show by affidavit that his adversary has some one document to the production of which he is entitled. — *Evans* v. *Louis*, Law Rep. 1 C. P. 656.

Promissory Note.—*See* Bills and Notes.

Railway. — *See* Dog, 2; Mortgage, 4; Ultra Vires; Vendor and Purchaser. 3.

Release.

If a release given by A. to B. extends in terms to money which B. has openly, but without justification, taken from A., A. cannot file a bill to compel B. to pay this money, though, when the release was given, A. was ignorant of B.'s fraud. A.'s remedy is to have the release set aside, and if, in consequence of dealings subsequent to the release, that cannot be done. A. is without relief in equity.—*Skilbeck* v. *Hilton*, Law Rep. 2 Eq. 587.

Res Adjudicata.—*See* Judgment.

Sale.—*See* Contract, 3; Vendor and Purchaser.

Separate Estate.

Testator gave real and personal estate to trustees in trust for his wife for life, and after her death for his daughter absolutely, and directed that the principal moneys, rents, issues, profits, interest, dividends, and proceeds which his wife and daughter, or either, should be entitled to, should be paid into their own hands as the same became due, and not by way of anticipation, and should be for their separate use and benefit; and for which moneys, rents, issues, profits, interest, dividends, or proceeds, the receipt alone of his wife and daughter, whether covert or sole, should be a discharge. *Held*, that the *corpus* of the real estate was not given to the separate use of the daughter.—*Troutbeck* v. *Boughey*, Law Rep. 2 Eq. 534.

Servant.—*See* Master and Servant.

Service of Process.—*See* Practice, 4.

Set-off.—*See* Assignment.

Settled Estate.

Four persons, entitled each to a fifth of a fund, became entitled in individual shares to the estate on which the fund was charged; the entire estate being subject to a mortgage. *Held*, that no one of the four could claim the right of having the whole fund divided, and thrown in fourths on the respective shares; so that, by paying the difference between what was chargeable on his share of the estate and what was due him in respect of his portion, his share might be cleared; but *held*, that such a proposal was a proper subject for arrangement in Chambers.—*Otway-Cave* v. *Otway*, Law Rep. 2 Eq. 725.

Shelley's Case, Rule in.—*See* Will, 14.

Ship.

1. The charterers put a cargo, consisting of casks of oil, wool, and rags, on board the vessel, and personally superintended the stowage of the cargo. The bill of lading of the oil contained this memorandum, "not accountable for leakage." On the voyage, the oil casks became heated by the action and contiguity of the wool and rags, and a very large portion of the oil was lost. In a suit by persons to whom the bill of lading had been transferred, *held*, that the memorandum covered not only ordinary leakage, but all leakage, in the absence of negligence, *Held*, further, that the ignorance of the shipowners as to the latent effect of heat in storing the oil with wool and rags, did not, in the circumstances of the shippers superintending the stowage, amount to such negligence as to make them liable—*Ohrloff* v. *Briscall*, Law Rep. 1 C. P. 231.

2. Goods were shipped under a bill of lading describing them as of certain weight, and making them deliverable to the consignees on payment of freight at a certain rate on the net weight delivered. On arrival, the agent appointed by the managing owner refused to deliver the goods, unless the consignees would pay according to the weight mentioned in the bill of lading, or (under an alleged custom) incur the expense of weighing at the ship's side or at a legal quay. The consignees paid under protest, and sued the defendant, a part owner, to recover back the excess. The jury having negatived the custom, *held*, that the defendant was liable, though he had neither interfered with nor assented to the appointment of the agent, and though none of the money had come to his hands.—*Coulthurst* v. *Sweet*, Law Rep. 1 C. P. 649.

See Award, 3; Bill of Lading; Charter Party; Freight.

Solicitor.

1. One of a firm of solicitors received from a client money, for which a receipt was given

in the firm's name, stating that part was in payment of costs due the firm, and the rest to make arrangements with the client's creditors. The solicitor misappropriated the money. *Held*, that the transaction with the client was within the scope of the partnership business; and that the partners were jointly and severally liable to make good the amount, but that all the partners were necessary parties to a suit in equity for that purpose.—*Atkinson* v. *Mackreth*, Law Rep. 2 Eq. 570.

2. If the defendant does not plead no signed bill delivered, an attorney may rely on a contract for a specific sum for business to be done, without producing a bill, or showing charges amounting to the sum.—*Garth* v. *Rutland*, Law Rep. 1 C. P. 642.

3. The attorney of a married woman retained in a divorce suit has a lien for his costs on her alimony in his hands.—*Ex parte Bremner*, Law Rep. 1 P. & D. 254.

See Production of Documents, 1; Trustee, 2.

Specific Performance. — *See* Discovery; Easement.

Stoppage in Transitu.

A French firm, M. & D., sold goods through their agent in England to S. & T., payable by bill at three months, and shipped the same. A bill of lading was delivered to S. & T., in exchange for their acceptance at three months. Afterwards, the bill of lading was redelivered to M. & D.'s agent to hold as security against the acceptance. T., a member of the firm of S. & T., subsequently obtained the bill of lading from M. & D.'s agent by a fraudulent misrepresentation, and indorsed and delivered it to P. for value, without notice of the fraud. *Held*, that M. & D.'s right of stoppage *in transitu* was gone.—*Pease* v. *Gloahec*, Law Rep. 1 P. C. 219.

Threat.

At the trial, before justices, of an information against A. & B., under 6 Geo. IV., c. 129, sec. 3, for unlawfully, by threats, endeavoring to force C. to limit the number of his apprentices, it appeared that C. was a master-builder, and A. and B. president and secretary of a bricklayers' association. C.'s men having left him, he wrote, three weeks after, to B., as secretary, asking why the men were taken from him, and what they required him to do. At a meeting of the association, at which A. & B. were present, a reply was sent stating a resolution, passed some time before, that no society bricklayer would work for B. till he parted with some of his apprentices. The justices convicted A. & B. *Held*, on a case stated, that as the justices had not stated that they had drawn the inference that sending the resolution was a threat, the court ought not to draw such inference from the evidence, and that the conviction ought not to stand. *Quære*, whether the combination of the men was illegal.—*Wood* v. *Bowron*, Law Rep. 2 Q. B. 21.

Trustee.

1. A trustee cannot exact any bonus in respect of great advantages accrued to the *cestuis que trustent* from services incident to the performance of duties imposed by the trust deed, and a settled account by a *cestui que trust*, allowing such bonus was set aside.—*Barrett* v. *Hartley*, Law Rep. 2 Eq. 789.

2. A solicitor, holding the deeds of an estate mortgaged to his client, deposited them with a banker, as security for money with which he bought an estate for himself. When the mortgage was paid, he used the mortgage money in repaying the banker's loan, but told his client that he had re-invested it in other good security. His client thereupon executed a reassignment of the mortgage; but the solicitor never re-invested the money, though he paid interest thereon till his death. *Held*, that the client had a lien on the estate bought by the solicitor. —*Hopper* v. *Conyers*, Law Rep. 2 Eq. 549.

3. A marriage settlement declared that money, then in the hands of the wife's brother, should be held by three trustees (one being the brother) on trust, to pay her, at her written request, the whole or any part absolutely, and, till such request, on trust, when and as the same should come into the trustees' hands, to invest the same, and pay the interest to the wife for life, for her separate use, and, after her death, as she should by will appoint; and, in default of appointment, to the husband. The money was allowed to remain thirteen years in the hands of the brother, who paid the husband the interest and part of the principal, with the wife's knowledge. On bill by the wife, after death of the husband and insolvency of the brother, against the three trustees, *held*, that the trustees were guilty of a breach of trust, but that the wife was debarred by acquiescence from claiming as against the two trustees who had neglected to call in the money.—*Jones* v. *Higgins*, Law Rep. 2 Eq. 538.

See Will, 4, 6; Mortgage, 3.

Ultra Vires.

Semble, that the directors of a railway company have no power to make a contract so as to give another railway company an interest in the traffic which may be carried on a line of railway which the directors' company may

thereafter be empowered by statute to construct.—*Midland Railway Co.* v. *London & N. W. Railway Co.*, Law Rep. 2 Eq. 524.

Vendor and Purchaser.

1. An estate being sold by the court at the suit of a mortgagee, with liberty to all parties to bid, the auctioneer stated that the sale was without reserve, but that the parties could bid. The plaintiff bid, and ran the purchaser up from £14,000 to £19,000, without any one else intervening. *Held*, this was no ground to discharge the purchaser.—*Dimmock* v. *Hallett*, Law Rep. 2 Ch. 21.

2. Particulars of sale described a farm, about a third of the estate, as late in the occupation of A., at the rent of £290. A. had occupied the farm at the yearly rent of £290; but the first quarter he paid only £1 rent, and left at the end of the fifth quarter, nearly a year and a half before the sale. Since then, the vendor had agreed to let the farm at £225, but the agreement had been rescinded; and the evidence showed that the farm would not let for nearly £290. *Held*, that the purchaser should be discharged.—*Dimmock* v. *Hallett*, Law Rep. 2 Ch. 21.

3. A railway company took land, made a railway thereon, and leased the railway to another company. Part of the purchase money being unpaid, on bill by the land-owner against both companies, it was ordered, on motion, that the first company should pay the money; and, in default, that both companies should be restrained from using the land (Turner, L. J., *dissenting*). — *Cosens* v. *Bagnor Railway Co.*, Law Rep. 1 Ch. 594.

See Covenant; Easement.

Vested Interest.

Gift by will of residue on trust to sell and invest, and pay "the said property and interest arising therefrom to A., on his attaining the age of twenty-four years: but, in case of his not attaining that age, or leaving male issue, I give the said properties" to other persons. *Held*, that A. took a vested interest, liable to be divested in the events mentioned.— *Hitter* v. *Bramridge*, Law Rep. 2 Eq. 736.

See Will, 9.

Watercourse.

The plaintiff was lessee of a mill on riparian land, not far from the stream. His lessor's grantor had in 1864, under a written agreement with A., the adjoining higher riparian owner, and subject to an annual payment, made a cut on A.'s land, and brought the water by it to the mill. The flow of water in the cut had ever since been used and enjoyed by the mill-owner, and the annual payment had been made. The defendant, a riparian owner above A., intercepted the water of the stream. In a suit by the plaintiff for damages, *Held*, that he could recover (*per* Pollock, C. B., and Channell, B.) on the ground that the stream had been divided into two courses, and that the plaintiff was a riparian proprietor in respect of the cut. *Per* Bramwell, B., on the ground that a riparian land-owner can grant to a non riparian land owner the flow of water from the stream to the latter's premises, to be used on the premises, and that the grantee may sue a higher riparian owner for disturbing his enjoyment of it).—*Nuttall* v. *Bracewell*, Law Rep. 2 Ex. 1.

Will.

1. A will ended in the middle of a third page, the lower half being blank, and the attestation clause and signatures being on the top of the fourth page. *Held*, that it was duly executed.—*Hunt* v. *Hunt*, Law Rep. 1 P. & D. 209.

2. A testator, by will made Sept. 15, 1865, bequeathed "such articles of plate as are contained in the inventory signed by me, and deposited herewith." The inventory was dated Sept. 21, 1865, and on that day the will and inventory were both deposited at the banker's. Subsequently, the testator made a codicil.—*Held*, that the inventory was entitled to probate by force of the codicil.—*Goods of Lady Truro*, Law Rep. 1 P. & D. 201.

3. Testator bequeathed the residue of his property, except such articles of "furniture, &c., as shall be ticketed or may be described in a paper in my own handwriting, to show my intention as regards the same." *Held*, that as the will did not describe the lists as then existing, parol evidence was inadmissible to prove that fact, and the lists should be excluded from probate. — *Goods of Sunderland*, Law Rep. 1 P. & D. 198.

4. A deceased executed, in the presence of two witnesses, three deeds of gift, conveying his property to trustees for his children's benefit, but directing that the deeds should not take effect till his death. Probate was granted of the deeds, as together containing the will of the deceased, to the trustees, as legatees in trust.—*Goods of Morgan*, Law Rep. 1 P. & D. 214.

5. The following paper: "I wish my sister to have my bank-book for her own use," attested by two witnesses, was *held* testamentary: the evidence showing that the deceased, at the time of its execution, meant it to take effect

after his death, and not as a present deed of gift.—*Cock* v. *Cooke*, Law Rep. 1 P. & D. 241.

6. Bequest of "my personal estate to my grandson, subject to the payment of debts, legacies, and to the trusts hereinafter contained, on trust to convert and to stand possessed of the said trust moneys," on trusts which did not exhaust the funds. The testator then appointed the grandson, with three other persons, executors. *Held*, that the grandson took the residue beneficially. — *Clarke* v. *Hilton*, Law Rep. 2 Eq. 810.

7. Gift by will to all the testator's nephews and nieces, the sons and daughters of his sister R., including who the illegitimate of the said R., equally. *Held*, a valid gift to the legitimate sons and daughters of R., exclusive of R.'s illegitimate children.—*Gill* v. *Bagshaw*, Law Rep. 2 Eq. 746.

8. Gift by will of real and personal estate to A., but if A. should die in B.'s lifetime, without leaving issue, then over. A. died in B.'s lifetime, leaving issue, who all died in B.'s lifetime. *Held*, that the gift over took effect.—*Jarman* v. *Vye*, Law Rep. 2 Eq. 784.

9. A. gave his estate to trustees in trust for his wife for life, and, "after her decease, to distribute and divide the whole amongst such of my four nephews and two nieces (naming them) as shall be living at the time of her decease; but if any or either of them should then be dead, leaving issue, such issue shall be entitled to their father's or mother's share." A nephew died in the lifetime of A.'s widow, leaving a daughter, who also died before the widow. *Held*, that this daughter, on her father's death, took a vested interest in the share which, if he had survived, he would have taken, and that her representative was entitled.—*Martin* v. *Holgate*, Law Rep. 1 H. L. 175.

10. Testator declared that his property should be inherited by his nephews A. and B. during their lives, and, after their death, that their eldest sons should inherit the same during their lives, and so on; the eldest son of each of the two families to inherit the same for ever. *Held*, that A. and B. took estates for life, remainder to their eldest son in tail.—*Forsbrook* v. *Forsbrook*, Law Rep. 2 Eq. 799.

11. A gift of the income of a fund during the life of A. to B., for his maintenance, is an absolute gift to B., his executors and administrators, during the life of A.—*Attwood* v. *Alford*, Law Rep. 2 Eq. 479.

12. A gift to the testator's sisters living at a particular time, or the issue of any or either then dead, is not a substitutionary but a substantive gift to the issue.—*Attwood* v. *Alford*, Law Rep. 2 Eq. 479.

13. A testator directed his personal estate to be invested, "and the interest divided half yearly between his four sons, and, at the decease of either without issue, such share to revert to the remainder then living, or their child or children." *Held*, that each son took an absolute interest in his share, subject to be divested if he died without leaving issue.—*Dowling* v. *Dowling*, Law Rep. 1 Ch. 612.

14. Devise of freehold estate to A., B., and C., in equal shares, during only their natural lives, "and, after their decease, I give the said freehold estate to the next lawful heir of A., all the said freehold estate for ever." *Held*, that the rule in Shelley's case applied, and that A. took a fee.—*Fuller* v. *Chamier*, Law Rep. 2 Eq. 682.

15. Testator purchased an estate called A. farm, in the parish of R., in the county of H. Afterwards, he acquired adjoining land in the parishes of S. and B., in the same county, which was thrown into and occupied with A. farm, and the whole thenceforth called A. farm. Later, by will, he devised his estate, consisting of A. farm, in the parish of R., in the county of H. *Held*, that the land in the parishes of S. & B. did not pass by the devise.—*Pedley* v. *Dodds*, Law Rep. 2 Eq. 819.

16. A testator made a will in 1864, revoking all former wills. This, in 1865, he destroyed, expressing at the time an intention to substitute for it an earlier will, which he held in his hand. The 1 Vic. c. 26, sec. 22, provides that a will once revoked shall not be republished by parol acts or declarations. *Held*, that the act of destruction was referable solely to the testator's intention to validate the earlier will; and that, the act being conditional and the condition unfulfilled, the destroyed will was not revoked. — *Powell* v. *Powell*, Law Rep. 1 P. & D. 209.

GENERAL CORRESPONDENCE.

TO THE EDITORS OF THE LAW JOURNAL.

Sale of interest in Crown Lands under fi. fa. —Tariff for guardians under Insolvent Act.

GENTLEMEN,—In your number of July, a barrister—Prescott," asks whether "the interest of a person in Crown Lands before patent issues, is saleable under *fi. fa.*? By reference to Chancery Reports, vol. xiii. page 802—1867—"*Yale* v. *Tollerton*," he will see that the Chancellor has decided that it is.

I wish to call your attention to the want of a tariff for guardians under the Insolvent Act; as the law now stands, when an assignee is appointed it sometimes happens that the guardian is deprived of all power of collecting from him, not only his equitable claim for his time and trouble, but even the money he has been compelled to advance in travelling to and fro, and having the property taken care of. Some such table as the following, would, I conceive, be equitable:

Taking care of assets—per day—where assets of estate $500 and less.....	$1 00
Over $500 and not over $1,000..	2 00
Over $1,000 and not over $5,000.	3 00
Over $5,000 and not over $10,000.	4 00
All over $10,000.....	5 00

All disbursements to be allowed in addition.

Taking into consideration the fact that the guardian has great responsibility in taking charge of the estate, I think the fees are not at all beyond what they should be.

Yours, &c.,

Brockville, Aug. 13, '67. St. Lawrence.

[1. That may be, but even so, is the Crown bound or would it recognise an assignment in such case?

2. Before committing ourselves to these figures, we should like to hear from others who are *au fait* with these matters. — Eds. L. J.]

Miss Longsworth's final appeal to the House of Lords was on Tuesday last dismissed. The Lord Chancellor delivered judgment at considerable length, Lord Cranworth signified his concurrance with the decision in fewer words, and Lord Colonsay did little more than barely express his acquiescence. Lord Westbury, who was present, said he had not intended to give any vote; he had been absent during the argument in consequence of a domestic affliction. He had, however, heard the appellants address, and would have striven to attend during the rest of the argument had he felt any reasonable ground for believing that the appeal could be sustained. Miss Longworth now petitions the House of Lords, stating the composition of the Court which sat on her appeal, and the withdrawal of Lord Westbury and proceeds to say that Lord Colonsay, having been one of the judges of the Court which gave the decision appealed from, ought not to have sat to hear an appeal from his own decision. There being but two other judges left, Miss Longworth submits that the Court was not properly constituted according to the practice and requirements of Parliament, and prays to have her appeal re-argued.

CHANCERY AUTUMN CIRCUITS—1867.

The Hon. Vice-Chancellor Spragge.

Toronto.....Tuesday .....3rd September.

EASTERN CIRCUIT.

The Hon. Vice-Chancellor Mowat.

Ottawa .....Friday .....13th September.
Cornwall.....Tuesday.....17th "
Brockville.....Tuesday.....24th "
Kingston.....Thursday....26th "
Belleville .....Tuesday..... 1st October.
Peterboro'.....Tuesday..... 8th "
Lindsay.....Thursday....10th "

WESTERN CIRCUIT.

The Hon. Vice-Chancellor Spragge.

Simcoe .....Tuesday.....24th September.
Woodstock .....Friday .....27th "
Goderich.....Thursday..... 3rd October.
Stratford .....Monday..... 7th "
Sarnia.....Thursday.....10th "
Sandwich.....Monday.....14th "
Chatham .....Thursday.....17th "
London .....Tuesday.....22nd "

HOME CIRCUIT.

The Hon. The Chancellor.

Owen Sound.....Thursday... 10th October.
Barrie.....Monday .....14th "
St. Catharines .....Friday .....18th "
Brantford.....Tuesday.....22nd "
Guelph .....Friday .....25th "
Hamilton.....Thursday....31st "
Whitby .....Friday ..... 8th November.
Cobourg .....Thursday....14th "

By the Court.

A. GRANT,
Registrar.

APPOINTMENTS TO OFFICE.

COUNTY JUDGES.

HERBERT STONE McDONALD, of Osgoode Hall, Esq., Barrister-at-Law, to be Deputy Judge of the County Court in and for the United Counties of Leeds and Grenville.—(Gazetted 24th August, 1867.)

SHERIFFS.

WILLIAM FERGUSON, Esq., to be Sheriff of the County of Frontenac, in the room of Thomas A. Corbett, Esquire, resigned.—(Gazetted 17th August, 1867.)

TO CORRESPONDENTS.

"St. Lawrence."—Under "General Correspondence."