NOTES OF CASES.

COURT OF QUEEN'S BENCH.

DORION, C. J., RAMSAY, TESSIER, CROSS and BABY, JJ.

MONTREAL, September 24, 1883.

THE CANADA GUARANTEE CO. (deft. in the Court below) Appellant, and MCNICHOLLS, es qual. (plff. below), Respondent.

Surety, Liability of—Insolvent Act—Official Assignee appointed Assignee by Creditors—Default.

Where an official assignee has taken possession of an insolvent estate in that capacity, and subsequently the creditors have appointed him assignee to the estate, and while acting as assignee of the creditors he makes default to account for moneys of the estate, the creditors have recourse against the surety who guaranteed the due performance of his duties as official assignee.

The appeal was from a judgment of the Superior Court, condemning the Company appellant as sureties on a bond given by Alphonse Doutre, formerly official assignee. The bond guaranteed the due performance of the duties of Doutre as official assignee. In 1876 one George L. Perry was put into insolvency by a writ of compulsory litigation, and Doutre took possession of the estate as official assignee. Subsequently, at a meeting of the creditors duly called, Doutre was appointed assignee to the estate by the creditors. Doutre died in 1879, and the present respondent was appointed assignee in his place. It was ascertained that Doutre was indebted to the estate of Perry in the sum of $364.42. The present action was instituted on the bond to recover that amount from the sureties. The Court below sustained the action. (See 4 Legal News, p. 78, for judgment of the Superior Court.)

J. C. Hatton, for the appellants, contended that by the terms of the contract, the sureties ceased to be liable when Doutre was appointed assignee by the creditors. The bond was given for the due performance of his duties as official assignee, and there was a formal admission of record that the default complained of occurred while Doutre was acting as creditors' assignee. It followed that no complaint was made of his conduct while acting as official assignee, and the sureties on his bond as official assignee, therefore, could not be held liable. Under the Insolvent Act, official assignees were obliged to give security to Her Majesty, and the bond sued on was a bond of this nature. By section 29 of the Insolvent Act, the creditors might appoint an assignee who could be required to give security for the due performance of his duties to such an amount as might be fixed by the creditors at the meeting. Here the creditors had thought proper to appoint as assignee the same person who had possession of the estate previously as official assignee, but they had neglected to require him to give security, as provided by the Act; and they now attempted to get their recourse on the bond which applied solely to his acts as official assignee. This would be an extension of the obligation of the surety without his consent or acquiescence, which was entirely without any justification under our law. The Court below had followed the decision of Johnson, J., in *Delisle et al.*, v. *Letourneux*, 3 Legal News, p. 207, but the learned judge, as far as his individual opinion was concerned, appeared to be in favor of the appellants' pretension. And since the rendering of the judgment appealed from, a third judge of the same Court (Mr. Justice Jetté), in *Dansereau* v. *Letourneux*, 5 Legal News, p. 339, had ruled expressly in favor of the appellants' pretension, and there had been no appeal from his honor's judgment. In Ontario there had been a decision by Chief Justice Hagarty, in a case of *Miller* v. *Canada Guarantee Company*, in which the point adjudged was precisely the same. Chief Justice Hagarty ruled that the suretiship continued only so long as the assignee is acting by virtue of his original appointment. This ruling had been acquiesced in, not having been moved against, and the opinion of the Chief Justice was evidently considered sound, for the question had not been raised in any subsequent case. The attention of the Court was also directed to a manifest error in the judgment, by which a sum of costs never paid by the plaintiff was included in the condemnation. In any case the judgment must be modified to this extent.

Laflamme, Q.C., for respondent, submitted that the bond was given for the benefit of the creditors of "any estate" which might come into the possession of the assignee under the