

The declaration set out that on the 15th of November, 1863, the plaintiff was employed on one of the trains of the defendants, and while near Island Pond, the cars, owing to a switch being misplaced, took the wrong track and came into collision with another train. The iron railing at the end of the car, where the plaintiff was attending to his duty, was crushed in by the force of the collision, and the plaintiff had both his legs broken. The plaintiff further alleged, that the accident occurred through the negligence of the Company's servants in not attending to the switch, and that the car on which he was standing had been declared dangerous before the date of the accident. That he was confined to hospital, and up to 23d Sept., 1864, the Company paid him \$15 per month, being half his ordinary salary, but they had then discontinued this allowance. That he was only thirty years of age, and was disabled for life, and prevented from earning a subsistence.

The defendants pleaded, first, the prescription of six months, and that the accident took place on a line of railway within the United States. But the plea on which the case turned was that the plaintiff had no action against the Company, being an employee at the time, and the accident being occasioned by the negligence of a fellow-employee.

**MONK, J.** This is an action of damages. The plaintiff was a brakeman, and while the train was near Island Pond, a collision occurred in consequence of a switch having been misplaced. The plaintiff was taken to hospital, and while he remained there the Company continued to pay him half his wages. Finally, he left the hospital of his own accord, and brought the present action. The defendants have pleaded the six months' prescription, and that the accident took place in the United States. But the Court is disposed to decide the case upon the ground, also raised by the pleadings, that the plaintiff cannot recover damages from his employers, the accident having occurred through the negligence of a fellow servant. The plaintiff in entering the service of the Company took the risk of these accidents upon himself. This is the law in England and the United States, and the same rule has been laid down here.

*Médéric Lanctôt*, for the Plaintiff.

*Cartier & Pominville*, for the Defendants.

[NOTE.—Compare *Fuller v. Grand Trunk Railway Company*, 1 L. C. L. J. 68. Several recent decisions in England on the same question will be found in "The Law Reports" for 1866. See *ante*, pp. 135, 178. Ed.]

## COURT OF REVIEW.

Dec. 31, 1866.

**HART v. O'BRIEN.**

*Ejectment—Act respecting Lessors and Lessees—Occupation by servant.*

A gardener was engaged at \$30 per month, with the right of occupying a tenement free from rent as long as he should continue to hold the situation, on condition that he should be subject to dismissal at a month's notice. Being found incompetent, he received a month's notice to quit, and was then dismissed, but he refused to leave the tenement. An action being brought under the Lessors and Lessees' Act to eject him:—

*Held*, that the action was properly brought, the defendant being a lessee within the meaning of the Statute.

This was an ejectment case inscribed for Review, from the Circuit Court, Montreal. The action was instituted by the plaintiff under the Act respecting Lessors and Lessees, against the defendant, who had been his gardener, to eject him from the tenement he occupied, and which he refused to leave on being discharged. The declaration set up that at Montreal, on or about the 20th February, 1866, the defendant, representing himself to the plaintiff to be a skilful gardener, competent to perform all the functions of a first-class gardener, and especially to take care of and manage a green house, and the exotic and other plants and shrubs usually kept in green houses, was engaged at the rate of \$30 a month, and in further consideration that the plaintiff would let and lease to him, so long as he should remain in the plaintiff's employ as such gardener and no longer, a certain tenement and property of the plaintiff, to wit, a certain brick tenement two-stories high, forming part of the building containing the plaintiff's coach house and stables. That the defendant entered the service and employ of the plaintiff as aforesaid, subject to the said monthly engagement to be determined and ended at the end of any month at the option of the plaintiff, upon his giving defendant