"right; I have not used what you describe, but "I have used something else."

There are two questions: Is the plaintiff the inventor? Has the defendant violated his right? On the first question the evidence is strongly against the plaintiff. There may be very little difference between the two things, one of which is claimed by the plaintiff as his invention, and the other by the defendant as having been used already a long time before the patent; but in these cases there must be something that calls forth the inventive faculty before it can be the subject of a patent right. It need not be an entire novelty, of course; it may be a new adaptation, perhaps, of a known principle; but here we see neither the one nor the other. We see the defendant using, for many years before this alleged invention, a kind of refrigerator made on the principle of causing a double current of air, by applying the laws of expansion by heat and contraction by cold. We see the plaintiff, years after this had been in use, getting a patent for substantially the same thing; the only difference between the two machines being that while both of them introduce a current of air which is cooled by contact with ice, one passes under the ice and the other over it. And we say it matters not whether the thing used by the defendant is very nearly the same, or even precisely the same as the plaintiff's so-called invention. He could not trammel the defendant's right to use what he had always used by petitioning for a patent and getting it, even with this immaterial variation. It appears from the plaintiff's factum that there has been at least one case, and perhaps more, in which the plaintiff has succeeded, but it does not appear that the same question was raised.

The judgment is confirmed in all respects.

Longpré & Co., for plaintiff.

Macmaster & Co., for defendant.

COURT OF REVIEW.

MONTREAL, May 31, 1881.

RAINVILLE, JETTÉ, BUCHANAN, JJ.

[From S. C., Montreal.

LORD et al. v. BERNIER et al.

Contract made by partner for benefit of firm—Action by firm.

Where a mortgage on a schooner was granted to one partner individually for the benefit of the firm, and by him transferred to the other partner, and the firm had possession of the vessel, an action by the firm for the freight earned by the vessel was held to be properly brought.

BUCHANAN, J. One Charlebois, owner of the schooner Francis, gave a mortgage thereon for $3,000, to James Lord, one of the plaintiffs, the defendant Bernier being then master of the vessel. About November 12th, 1875, James Lord on behalf of the plaintiffs, under this mortgage, took possession of the schooner, provided her with a new outfit for a voyage to Newfoundland, and found a cargo for her, and continued Bernier, as master at wages of $40 per month. The vessel sailed, and arrived at Newfoundland, and delivered her cargo, and Bernier received from the consignees of the freight about $680.

Some few days afterwards, Bernier, apparently without Lord's knowledge, rechartered the vessel for a voyage to England, and put another master in her, and he then received from the consignors of the new cargo about $1,150 on account of freight. With these sums (in excess of the money he expended) he obtained from the Union Bank of Newfoundland a draft on the Bank of Montreal for $1,400, and caused the same to be made payable to the order of his wife, and brought it home with him, and deposited it in the hands of Pacquet and Potvin, the other defendants. This draft, which, as the plaintiffs contend, represents the freight earned by the vessel, of which as mortgagees, they had taken possession, is their property, and they have attached it by process of revendication.

Two issues are raised; the first being that the plaintiffs have no right of action, because the mortgage in question never was the property of the co-partnership bringing the suit. On this head it is established that this mortgage was granted by Charlebois to Lord individually, and by him transferred to Munn, also individually, both these persons being plaintiffs and members of the co-partnership. Could this transaction, therefore, inure to the benefit of the plaintiff's firm so as to enable it to maintain a suit? The evidence goes to establish the fact that this firm usually took such mortgages in the name of an individual co-partner, and that the money advanced by Lord to Charlebois was part of the funds of the co-partnership.