judgment of the court below? If we sent a *certiorari* to the prothonotary, except in appeal, it would be his duty to refuse to deliver up his record, and he would be properly punished by the Superior Court if he dispossessed himself of it. Were we to come to any other decision than this, the most extreme confusion would be the result, and the great judicial proceedings of the country would be considerably embarrassed. Nor can the petitioner suffer by this decision, for he is not deprived of his recourse to his regular judges, and from them to us by appeal, if they do him wrong. 792, C. C. P.

I have only to add that doubtless there are cases where a prisoner might be released where it was clear that, although the proceedings purported to be in the Superior Court, they were clearly *coram non judice;* but there is no pretence that such is the case here.

We are therefore of opinion that the writ must be refused.

DORION, C. J., differed, mainly on the ground, that here it appeared that the petitioner could not get his release without paying some $39 more than he owed. His honor was therefore of opinion that the writ should issue.

Petition rejected.

J. Palliser, for Petitioner.

E. Lef. de Bellefeuille, contra.

COURT OF QUEEN'S BENCH.

MONTREAL, January 19, 1882.

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

ARCHAMBAULT et al. (defts. below), Appellants, & LAMERE et al. (plffs. below), Respondents.

Fire Insurance—Hypothecary Creditor.

A creditor who has insured the property hypothecated for the security of his debt, and who is partly paid by the insurance company, cannot recover from his debtor more than the balance due, together with the premiums paid by him and interest thereon.

RAMSAY, J. Two questions of law arise on this appeal. The first is whether a creditor who insures the property hypothecated for his debt, and who is paid by the insurance company, can still recover from his debtor. I understand that under the English law he can, that the insurance is considered as a contract between the insurer and the insured, with which the debtor has no concern. Under the principles of our law, it would be impossible to arrive at such a conclusion. We start from a rule of the civil law to which I know of no exception: "*Bona fides non patitur ut bis idem exigatur.*" Now this clearly does not simply mean that the creditor cannot ask his debtor to pay him twice. Such a rule would be trivial. What is intended is, that by no arrangement can a creditor in effect be allowed to recover twice. If A lend money to B, and C pays the debt, A cannot recover from B. This rule stands entirely independent of any question of subrogation. The insurance company, which pays, is precisely in the position of C, and it does not alter the rule of law that A has paid for this security conditionally. The English rule may perhaps be due to their idea of privity of contract; but we have no such term in our law. Of course, we have the idea. It must be common to all systems; but, I am inclined to think that its application in England materially differs from ours. "Lien" (*vinculum juris*) and "consent" express our idea. In obligations proceeding from contracts there may be "lien" or a legal relation created between the contracting parties and others not parties to the contract. There are examples of this. Our old law furnishes little authority directly as to insurance, but the principles are unquestionable, and the modern writers and jurisprudence have not hesitated to decide that the creditor paid by means of an insurance, made by him for his own convenience, cannot recover afterwards from his debtor.

But, it is said, Pratt has not been paid, and so his estate may recover. That is unquestionable as a general proposition. The payment to Galarneau is not necessarily a payment to Pratt. But it appears by the evidence that Galarneau was the general agent of Pratt in his lifetime, with regard to this transaction, and his executor after Pratt's death. He got the insurance, and it was his duty forthwith to have paid Pratt or his estate. If he did not do so, Pratt either permitted him to keep the money in order to charge the appellant, or Galarneau was unfaithful to his principal. In either case it is for Pratt to bear the loss, or to recover from Galarneau. It would be an intolerable injustice to allow Galarneau, who had prevented his