

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, May 19, 1882.

DORION, C.J., MONK, RAMSAY, CROSS, & BABY, J.J.
THAYER et al., plffs. in error v. THE QUEEN, deft.
in error.

*Writ of error—On what questions it may be allowed
—Conspiracy to defraud.*

The plaintiffs in error had been convicted on an indictment for conspiracy to defraud.

RAMSAY, J. This case comes before us on a writ of error. It nowhere appears what errors are complained of. It seems to have entirely escaped attention that since the 32 & 33 Vic., cap. 29, sec. 80, "no writ of error shall be allowed in any criminal case unless it be founded on some question of law which could not have been reserved, or which the Judge presiding at the trial refused to reserve for the consideration of the Court having jurisdiction in such cases." We have nothing to show that the learned Judge sitting on the Crown case refused to reserve the alleged errors, and certainly they were subject to reservation. It is possible that we may have to make some rules to regularize proceedings in error, which are assuming an importance they formerly had not in our practice.

The errors insisted on at the argument were:—1st, That the false pretences are not set up. 2nd, that the overt acts only disclose a civil trespass, and consequently that they cannot support an indictment for conspiracy. The argument as to the first point is that on the indictment for obtaining money or goods by false pretences, the pretences must be set up, and that as the form of indictment for conspiracy sets up false pretences they should also be particularly set forth. The indictment for conspiracy differs essentially from that for obtaining by false pretences. The offence of conspiracy is complete by the combination and agreement, although no step be taken in execution of the conspiracy. The indictment, therefore, is complete without stating any overt act. But it is urged that the overt acts being laid, they must disclose an offence. It seems to me that this proposition is untenable. The gist of the offence is the combination to defraud, and if that combination exists, it may be evidenced by acts each

of which is innocent when taken by itself. This is a question for the jury and cannot come up in error. I am to quash the proceedings in error.

His Honor remarked in conclusion, that Mr. Justice Monk took no part in this judgment, as he sat in the Court below. This was decided in *Reg. v. Dougall*.

DORION, C. J., observed that it was also so decided in *Defoy & Reg.* Article 1158 of the Code of Procedure declares that any judge who sat in the Court below at the rendering of the judgment appealed from is incompetent to sit in appeal or error upon the same.

Conviction affirmed.

Carrier, Q.C., for plaintiffs in error.

Kerr, Q.C., for the Crown.

SUPERIOR COURT.

MONTREAL, April 29, 1882.

Before JOHNSON, J.

THE BANK OF MONTREAL, Petr., HOPKINS, Respdt.
and SIMPSON, Respdt.

Gift by contract of marriage—Acceptance.

PER CURIAM. This is a reference made by the Bank under the 25th section of the Banking Act of 1871, to ascertain from this court which of the two respondents, who both claim a transmission of some stock, is entitled to get it.

Mr. Hopkins is executor of the will of the late Margaret Rowand Mackay, and Mr. Simpson is tutor to the property of the children born of her marriage of the late Hon. James Mackay. The marriage took place in 1859—after the execution of a written contract between the parties—at what was then the Red River settlement (now Manitoba), and by this contract the wife's property was to remain her separate estate under her own personal control, as if no marriage existed, and to secure her money—(consisting of about £11,000 bequeathed to her by her father and her sister),—to her children after her death, she created a trust of the principal, now represented by these shares, in such manner that her surviving children should be entitled to it in equal shares, at her death, as their own absolute property. There were three children born of the marriage. The shares now in question were acquired with her money, and stood in her name until they were transmitted to the name of Mr. Hopkins as the sole