SUPERIOR COURT.

MONTREAL, November 25, 1882.

Before TORRANCE, J.

GANNON *et al.* v. WRIGHT.

Capias—Affidavit.

An affidavit for capias, alleging in the alternative that the defendant is secreting or is on the point of secreting his property and effects, &c., is insufficient.

The demand was for the price of goods sold, amounting to $101. The plaintiff accompanied the demand by a writ of *saisie-arrêt* before judgment.

The defendant presented a petition that the seizure made be vacated for insufficiency in the affidavit.

PER CURIAM. The following words in the affidavit are complained of: "Que le déposant est informé d'une manière croyable par Louis DesRosiers, commis de Montréal, que le défendeur cache, recele et dissipe ses biens, *ou* est sur le point de cacher, receler et dissiper ses biens," &c. The defendant complains of this statement as being in the alternative and wanting in positiveness and certainty, as required in an affidavit. It is an elementary rule in pleading, that a pleading shall not be in the alternative;—Stephen on Pleading, p. 415 of Edition of 1838; and the rule is as important for an affidavit on which an exceedingly harsh proceeding is founded. The Court has already decided this point in *Ostell* v. *Peloquin*, 20 L. C. Jur. 48, and *Macmaster* v. *Robertson*, 21 L. C. Jur. 161. The petition of defendant is granted.

A. Mathieu, for plaintiff.

Macmaster, Hutchinson & Weir for defendant.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 20, 1882.

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

DESROCHES et al. (defts. below), Appellants, and GAUTHIER (plff. below), Respondent.

Negligence—Damages.

Where the damage results from an accident, without fault on either side, the loss is borne by the party who suffers it; and when the suffering party alone is in fault, the loss is borne by him. So, where a laborer employed in discharging railway iron through the hatch of a vessel, by his imprudence and disregard of orders, caused the breaking of a chain which was sufficiently strong for the purpose for which it was used, it was held that the damage which he suffered must be borne by himself alone.

This was a case arising out of an accident which occurred while the cargo of the "South Tyne," consisting of railway iron, was being discharged in the port of Montreal in May, 1880. The appellants are stevedores, and were employed in the unloading of the vessel. Gauthier, the respondent, and a fellow-workman named Archambault, were engaged by them, and while the unloading was proceeding during the night, one of the chains by which the rails were raised through the hatch gave way, and the rails fell upon the respondent and his fellow-workman, breaking a leg of each. Gauthier sued for $2,000 damages, and by the judgment of the Court below he was allowed $400. The appeal was by the defendants from this judgment.

The contention of the appellants was that the accident occurred through the negligence of Gauthier in not paying attention to the warnings of the foreman, Piché. The latter observed that the rails were not kept clear of the beam as they were about being raised by chains through the hatch, and seeing the danger he warned the workmen to push the rails out further or an accident would happen. These admonitions were disregarded, and the respondent thereby caused the misfortune that had befallen him. The judge in the Court below had held that employers are bound by law to protect their workmen even against their imprudence, but it was submitted that this was a doctrine which could not be entertained.

RAMSAY, J. This is an action of damages for the alleged negligence of the appellants, stevedores, brought by a laborer who had his leg broken (necessitating amputation), in unloading a ship. The particular negligence insisted upon is that there were two of the chains used in drawing up the cargo, railway iron, smaller than the others; that these smaller chains were unfit for the service, and that the accident happened by the breaking of one of them.

The plea is that defendants had used due care and diligence; that the chains were quite sufficient for the work, and that the plaintiff had, at any rate, contributed to the accident by his own negligence, and that, therefore, the defendants are not liable.