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DELAYS FOR SERVICE.

In the last two issues of this work, there have been notes of two judgments laying down opposite rules as to delays running upon holidays. In *Boulerisse* v. *Hebert*, ante, p. 196, Judge Belanger held that an ejectment suit may be served upon Saturday returnable Monday; while in *Darby* v. *Bombardier*, p. 202, Judge Dunkin held precisely the reverse. This question was settled by the Court of Appeal (June '77) in the case of *Preston* v. *Paxton*. Judge Papineau having held that a notice of motion given on Saturday for Tuesday was insufficient, Monday being a legal holiday, the defendant moved for leave to appeal from this judgment. The Court of Appeal intimated that the interlocutory judgment was wrong, and allowed the appeal, but the plaintiff having thereupon desisted from the judgment, there remained only the question of costs. Judge Belanger's judgment was, therefore, correct, and we may add that a decision was given last week in the same sense by Mr. Justice Mackay.

ATTORNEY AND CLIENT.

In the case of *Dorion & Brown*, a note of which appears in this issue, the Court of Appeal has pronounced an opinion of great importance to the bar. It is to be regretted, probably, that there was not greater unanimity on the part of the Bench. As the matter stands, a general principle has been enunciated in which two of the honorable members of the Court were unable to concur, and though the judgment of the Court below has been affirmed, it is upon a different ground from that assigned by the Judge who tried the case. Under these circumstances, there will probably be a disposition on the part of other Judges not to stretch the rule laid down by the appellate tribunal beyond the strict limits to which it may fairly be confined.

The facts may be taken from the appellant's own statement, which was substantially accepted by the majority of the Court as conclusive against him. The appellant Brown, an old man nearly 70 years of age, had an action, *in formâ pauperis*, pending in 1874 against his son for an alimentary allowance. The suit apparently was not regarded as very promising, and it was being allowed to sleep. Then Brown applied to Mr. Dorion, who did not feel sanguine of success, but finally agreed to take up the case, provided the plaintiff would consent to make over to him all the arrears of alimentary pension which might be due up to the date of the judgment. The promise was given, the case was then prosecuted successfully, and judgment was rendered in favor of the plaintiff for $200 per annum, the arrears of which amounted to $566. Mr. Dorion obtained a notarial transfer of these arrears, of which, however, he handed his client $100, leaving his gains by the case, in addition to taxed costs, at the figure of $466,—less some small sums said to have handed to his client by way of charity during the progress of the suit. Mr. Brown afterwards became dissatisfied that his lawyer should have retained so large a sum, and finally brought an action for the recovery of $466, balance of the arrears. The Court below, apparently, was very far from taking the view of the relation between attorney and client which has been enunciated by the Court of Appeal. Mr. Justice Papineau, who sat in the case, maintained Mr. Brown's claim for the $466, but his Honor did so upon the ground that this old man had been taken by surprise, and had not understood perfectly the purport of the document which was presented for his signature. This is clear from the following extract from the judgment:

"Considérant qu'il n'est pas prouvé que le défendeur eut fait connaitre au demandeur, avant de lui faire signer le dit transport, que les dits arrérages étaient de $566.78;

"Considérant qu'il n'est pas prouvé que le demandeur, étant alors dans l'indigence à la connaissance personelle du défendeur, ait jamais consenti à donner à ce dernier tout le montant des arrérages lui appartenant en vertu du dit jugement, pour l'indemniser du trouble et des risques susdits encourus par lui durant le dit procès;

"Considérant qu'en l'absence de preuve d'un don ou d'une promesse expresse par écrit à cet effet, un si pauvre homme n'est pas présumé avoir consenti librement à donner une si forte somme à son avocat en sus des frais ordinaires réglés par le tarif pour avoir gagné son procès;" &c.

The last clause of this extract from the judgment seems to indicate that Mr. Justice

Papineau agrees with Justices Monk and Tessier, that such an agreement is not illegal, and, if proved in this case, would have been sanctioned by him.

Now let us see what the majority of the Court have decided. The judgment is this: that an attorney cannot stipulate for a share of what may be recovered by the suit. The Chief Justice remarked that this was not the case of an attorney stipulating for a fee, but stipulating for a share in the proceeds of the suit, and that such a bargain was utterly illegal. Where the client is possessed of means, the distinction is obvious, because the attorney's remuneration is not dependent on his success. But where the client is confessedly a pauper, the distinction, it must be admitted, is not so palpable. Suppose Mr. Dorion had said to his client, "you must agree to pay me $400 for my services, or I will have nothing to do with the case." He would have been perfectly aware that the payment of this sum, in the case of a septuagenarian pauper, would depend on the success of the suit. We do not suppose, however, that the majority of the Court intended to go further than to stamp with illegality all bargains by which attorneys are to have a share in the proceeds of suits. That, it will be admitted, is not going very far. Were it otherwise, attorneys might be the real plaintiffs in half the suits before the Courts, just as much as if their names appeared on the record, and the privileges of the profession would be at an end. One of the consequences, it may be remarked, which must follow from such a state of things would be the disqualification of Judges in all cases in which relatives within the degree of cousin-german were engaged as attorneys.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, June 14, 1879.

HAMILTON (plaintiff below), appellant; and WALL (defendant below), respondent.

Servitude—Title establishing.

MONK, J. (*diss.*) It appeared that Hamilton, the plaintiff in the case, in 1875, sold a property in St. Antoine Suburbs to one Perrault. The deed passed was an ordinary deed of sale, but it contained a clause in the following terms:—"Il est encore entendu, que toute bâtisse qu'érigera le dit acquéreur sur le dit terrain sera en ligne avec celle du dit vendeur." The respondent, Wall, having purchased the property from Perrault, commenced to build a dwelling 12 feet 6 inches in front of the line of Hamilton's building. The latter remonstrated, and the present action was instituted. His Honor thought a clause, to create a servitude, must be very clear and definite, and that the words in the deed cited above had not that effect. He therefore considered that the action was properly dismissed by the judgment of the Court below.

TESSIER, J. The Court was called upon to say whether this clause in the deed of sale was to have any effect or not. According to the pretension of the respondent, the clause had no effect at all. His Honor believed there could be no doubt as to the intention of the parties, and that a servitude was created on the land.

DORION, C. J., referred to a case decided by the *Cour de Cassation* in France, A.D. 1825, in which a servitude was held to exist under analogous circumstances.

RAMSAY, J., thought it desirable that a servitude should be set forth more particularly than this. The words of the deed were very meagre. But there are no sacramental words for the establishment of a servitude, and it was for the Court to decide what the parties intended. The words in the deed must have a meaning, and the intention evidently was that no buildings were to project beyond the line of the vendor's building. The proprietor, in selling the land, wished the line to be kept as it was.

CROSS, J., concurred with some hesitation in the judgment of this Court, and, for his own part, would like to see the law established differently from what it was. He would like to see the servitude established on the land, and not by a personal convention. The law, however, was clear, and warranted the judgment about to be rendered.

Judgment reversed.

Judah, Wurtele & Branchaud for appellant.

Bethune & Bethune for respondent.

PAQUETTE (plaintiff below), appellant; and GUERTIN et vir (defendants below), respondents.

Wife séparée de biens—Liability as to goods sold to her husband.

DORION, C. J. The female respondent was sued as *separée de biens* and as the keeper of an inn, for $192.55 for goods sold and delivered. The plea was that it was the female respondent's husband who purchased the goods, and that the wife never authorized the purchases. The goods were charged to the husband. The court would follow the rule laid down in *Hudon & Marceau*, recently decided by this court, (23 L. C. J. 45), that where the goods are charged by the seller to the husband, and credit is given to him, his wife separated as to property will not be held liable. It must be clearly proved that the wife in her own name bought and obtained credit, in order to make her liable. The judgment dismissing the action must, therefore, be confirmed.

Duhamel, Pagnuelo & Rainville for appellant.

R. DesRivières for respondent.

WILSON (*mis en cause* in the Court below), appellant, and RAFTER (plaintiff below), respondent.

Saisie-gagerie par droit de suite—Service on mis en cause.

The case came up on an appeal from a judgment overruling an exception to the form filed by the appellant, and maintaining the action of respondent, *saisie-gagerie par droit de suite*, for arrears of rent. The appellant was made *mis en cause* under Art. 873 C. P., he being the occupant of the premises to which a portion of the effects seized had been removed. The appellant filed an exception *à la forme*, objecting that he was described by his initials only, "A. A. Wilson;" and that he was not mentioned in the declaration at all.

Respondent answered on the first point, that Wilson signed the *procès verbal* of seizure by the name of A. A. Wilson; and as to service, the respondent contended that no service of either the writ or declaration was required by law, in so far as the *mis en cause* was concerned, because he was not "the new iessor," who alone under 873 C. P. is entitled to service. Here the *mis en cause* claimed to have purchased the goods from the defendant, and his name and addition were set forth in the writ though not mentioned in the declaration.

MONK, J. The Court saw no reason to disturb the judgment overruling the exception, and it would be confirmed.

Longpré & Dugas for appellant.

J. J. Curran, Q. C., for respondent.

MCARTHUR et al. (defendants below), appellants; and MULHOLLAND es qual. (plaintiff below), respondent.

Insolvent Act, s. 134—Recovery of monies paid by insolvent within thirty days before assignment.

DORION, C. J. The appeal was from a judgment maintaining an action brought by the respondent, as assignee of the insolvent firm of A. J. Cleghorn & Co., to recover for the benefit of the creditors, a sum of $149.86. The plaintiff relied upon Sect. 134 of the Insolvent Act of 1875, which provides that every payment made within thirty days before a demand of assignment, by a debtor unable to meet his engagements in full, to a person knowing such inability or having probable cause for believing the same to exist, shall be void, and the amount paid may be recovered back by suit, for the benefit of the estate. The only conditions imposed by this section were, first, inability by the debtor to meet his engagements; and, secondly, knowledge by the creditor of this fact. The Court below held these facts to be established, and maintained the action. From that judgment an appeal had been instituted, and it was contended that the payment had been made without fraud, and therefore could not be set aside. The Court here was of opinion that the judgment below adjudicated rightly upon the question raised. It was the policy of the law that the whole estate should be divided equally between the creditors, and, therefore, money paid to a person who had reason to doubt the solvency of his debtor, within thirty days before assignment, was to be brought back. A great many authorities had been cited under the English statute, but that did not contain the same clause as ours. In Ontario, there had been decisions in accordance with the ruling in this

case. Clarke says the section of our Act is materially different from the English Act, and the decisions on the latter Act will not apply. "It is not necessary that the payment should "be made with a view of giving a preference, "nor is it necessary that the creditor should "obtain an unjust preference by the payment, "nor is the element of fraud necessary. If the "payment is made within the thirty days, and "the debtor is then unable to meet his engage- "ments to the knowledge of the creditor, or if "the latter has probable cause to believe such "inability, the payment will be void without "anything further being shown"; and this was in accordance with the observations of Wilson, J., in *Churcher* v. *Johnston*; and of Lord Westbury, 4 Moore's P.C. cases, p. 222, on a similar enactment of the Legislature of Jamaica. The judgment would therefore be confirmed.

Doutre, Branchaud & McCord for appellants.

Abbott, Tait, Wotherspoon, & Abbott for respondent.

BEATTIE (defendant below), appellant; and WORKMAN (plaintiff below), respondent.

Guarantee—Acceptance.

MONK, J., (*diss.*) The action was brought against Beattie in the court below, to render an account, and the present appeal was from two judgments, one ordering an account, and the second setting aside the account rendered. The facts of the case were somewhat peculiar. In 1872, a man named Beattie was receiving a large quantity of leather from Hale, a tanner, and being interested in the success of Hale's business, he, by letter, in consideration of respondent indorsing Hale's note for $2,000, agreed to hold any surplus from the sale of the leather to the extent of $2,000, for respondent's account, against the note. Respondent was thereby induced, as he alleged, to indorse a a note for $2,200, which he had to take up. He then brought this action, setting up the letter, and claiming an account of the leather. His Honor considered that the letter was a mere offer, and unless accepted by the party to whom it was addressed, imposed no liability on the writer. The indorsement was not for $2,000 as specified in the letter, but for $2,200.

DORION, C. J. The letter was not an ordinary guarantee, because Beattie contracted no liability, except to the extent of agreeing to retain in his hands the monies which should come into his hands to the extent of $2,000. It was plain that Workman indorsed the note on this guarantee. It was true that the note was made for $2,200 instead of for $2,000, but this did not make any differance. Because Workman did a little more than Beattie asked was no reason why the former should not recover to the extent of $2,000. The judgment of the court below should, therefore, be confirmed.

RAMSAY, J. The question was whether there was a substantial compliance with the condition. The law does not require a literal compliance. His Honor believed that there was a substantial compliance when Workman endorsed the note.

TESSIER, J., remarked that the authorities cited by the appellant would be applicable where there was an absolute guarantee for the sum specified.

Judgment confirmed.

Kerr & Carter for appellant.

Abbott, Tait, Wotherspoon & Abbott for respondent.

NOTE:—The judgment of the lower Court was also confirmed the same day (June 14), in *Beard & Hart;* and *Allan & Carbray*, but the cases do not require any notice here, being simply questions of fact.

MONTREAL, June 20, 1879.

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

THE QUEEN v. BISSONETTE.

Indictment—Amendment—Verdict.

RAMSAY, J. The defendant was indicted under section 25, 32 & 33 Vic., cap. 20, for that she, on the 5th day of January, 1879, then being the mistress of a certain girl called Marie, her servant, her maiden name being unknown, of the age of eight years, did unlawfully and maliciously do grievous bodily harm to the said Marie, whereby the health of the said Marie was permanently injured. At the trial it was proved that the child's name was Marie Vincent, and that she was not the servant of the defendant. In face of this evidence, the offence, as

laid, could not be proved, and motion to amend being made, the learned Chief Justice ordered the indictment to be amended by striking out the words "then being mistress of," and "her servant, her maiden name being unknown," and by adding after the name "Marie" the name of "Vincent" in the three places where the name "Marie" occurs. The trial proceeded on the indictment so amended, and the prisoner was found guilty of a common assault. The prisoner was sentenced to three months' imprisonment, but in passing sentence the learned Chief Justice reserved these two questions: first, whether the amendment was justifiable; second, whether the verdict for assault ought to be maintained.

There can be no doubt that the amendment of substituting the name when known for the words, "her maiden name being unknown," cannot be questioned. With regard to the other amendment it is urged that the amendment can only be made under the provisions of sec. 71, 32 & 33 Vic., cap. 29, and that that section does not authorize such an amendment as will alter the nature or quality of the offence. The section says that there may be amendment "in names, dates, places or other matters or circumstances therein mentioned not material to the merits of the case, and by the misstatement whereof the person on trial cannot be prejudiced in his defence on the merits." It will be at once conceded that the quality of the offence cannot be altered by the amendment; that is, that an offence found by the Grand Jury should not be changed from a felony to a misdemeanor, by an amendment. This is all that the case of *Reg.* v. *Wright* (2 F. & F., p. 320) lays down. But what we have to decide is, "what is material to the merits of the case." These are the words of our statute, and they follow words not to be found in the English Act. The 14 & 15 Vic., cap. 100 (Imp. Act) confines itself to an enumeration of the things which may be amended, the House of Lords having struck out these words in the Bill, "or any variance between such statement and the evidence offered in proof in any other matter or thing whatsoever," as being too general. In our statute (32 & 33 Vic., cap. 29, s. 71), after the enumeration there are the words "or other matters or circumstances therein mentioned." Any matter or circumstance then may be amended if it be not "material to the merits of the case," and if it be a misstatement "whereof the person on trial cannot be prejudiced in his defence on such merits." It must be obvious, I think, that the materiality must be as to the offence as amended. The statute cannot mean that what is material to the offence as first laid cannot be altered, because everything that needs amendment must be material to the offence as laid. What the statute really means, and what, I think, it clearly says, is that the amendment shall not place the accused in face of a new material fact. It appears to me, therefore, as beyond a doubt that the amendment, which merely strikes off from an indictment for assault and battery matter of aggravation is perfectly justifiable. The learned counsel for the prisoner has sent up a note of authorities in support of his pretensions. Two of the cases he cites (*Rex* v. *Deeley*, Moody, p. 303, and *Rex* v. *Owen*, ib. p. 118) are before the 14 & 15 Vic., cap. 100, and therefore do not apply. The case of *Reg.* v. *Bailey* (6 Cox, p. 29), decided by Mr. Greaves, turns entirely on the absence of general words in the English statute, remarked upon in *Reg.* v. *Wright*, above mentioned, and therefore is not in point. I think I might go further and say that the amendment was not absolutely necessary, and that both the offence as originally laid, and as laid after the amendment, being misdemeanors—that is, having the same quality—a verdict for the lesser misdemeanor might have been found rejecting the matter of aggravation—that is, the relation of master and servant. *The Queen* v. *Taylor* (L. R., 1 C. C. R., p. 194); *The Queen* v. *Guthrie* (L. R., 1 C. C. R., p. 241). See also 2 Russell, 789. This brings us to another point: On every indictment (even for felony by our Act), including an assault, a verdict may be found for assault. The jury have only found an assault in this case. They could have found an assault on indictment as first laid as well as on the amended indictment. It is clear, then, the accused has suffered no wrong. We are therefore of opinion that the conviction should be maintained.

Conviction maintained.

F. X. Archambault, Q.C., for the Crown.

Piché, Q.C., for the prisoner.

THE QUEEN v. DERRICK.

Trial for a felony—Jury allowed to disperse by consent before verdict—Mistrial.

RAMSAY, J. The prisoner was indicted for a felony (forgery). On the trial the evidence for the Crown being closed, the Court was about to adjourn until the following day, and the Court, with the consent of the counsel for the prisoner and the counsel for the Crown, allowed the jury to disperse till the following morning. At noon on the following day, the jury was again allowed to disperse during the short adjournment of the Court, with a like consent. The jury found the prisoner guilty and he was remanded till a future day for sentence. The entries in the register made no mention of the jury being thus allowed on one or two occasions to disperse. When the prisoner was brought up for sentence, two motions were made on his behalf. The first motion was to the effect that the entries in the register should be amended so as to show the fact that the jury had been allowed to disperse after being sworn and before verdict. The second motion was in arrest of judgment on account of the jury having been allowed to disperse in the way stated. The learned Judge who tried the prisoner reserved the case, and submits by his reserved case for the consideration of this Court what judgments ought to pass on these motions. The prisoner was remanded and no sentence passed. With regard to the first motion, this Court is of opinion that the prisoner is entitled to have the entries amended, so as to show that the jury did disperse after being sworn and before verdict. With regard to the second motion, this Court is of opinion that the jury having been allowed to disperse without rendering a verdict, their functions were at an end, and that when they rendered verdict against the prisoner they had no quality to do so. This matter was considered settled in Stone's case, 6 T. R., 527; but in any case, our act permitting the Court, in its discretion, to allow the jury to separate during the progress of the trial, in all criminal cases, *less than a felony*, implies authoritatively that in a felony such a permission cannot be granted. (32 and 33 Vic., c. 29, s. 57.) And the consent of the prisoner does not cover the irregularity. Being, as I have said, now a statutory prohibition with us, the dispersion of the jury renders the subsequent proceedings null, as though they were *coram non judice*. We, therefore, think that there has been a mistrial, and that the conviction was bad, but for a cause not depending upon the merits of the case. To avoid misconception the order will go that the prisoner be tried as if no trial had been had. (C. Sts. L. C., cap. 77, s. 63.)

F. X. Archambault, Q.C., for the Crown.

W. H. Kerr, Q.C., for the prisoner.

DORION, (deft. below), appellant; and BROWN (plff. below), respondent.

Attorney and Client—An attorney cannot stipulate for a share of the proceeds of the suit.

TESSIER, J., [*diss.*] said that the respondent Brown was engaged in a suit against his son for an alimentary allowance. The case had dragged for some time, and finally he employed the appellant, a lawyer, to go on with the suit, and judgment was rendered in favor of Brown for $200 a year, payable monthly. The appellant had stipulated that he was to receive the arrears of the pension for his trouble, and after judgment had been rendered he obtained from Brown a notarial transfer of the arrears, giving him at the time $100. Brown now sued Dorion to pay over the amount of these arrears, and he alleged, that when he made the transfer, he did not know the amount, and the transfer did not mention any sum; that there was fraud and false representation on the part of the appellant, and the transfer was a nullity. Dorion, in answer to that, said it was well understood that he was to get these arrears; that otherwise he would not have taken up the case; that it was a difficult one, and had become complicated by the evidence put in while it was in the hands of other lawyers. Issue being joined in this way, the question was whether Brown had proved fraud or false representations. On this point his Honor differed from the majority. There was no proof of fraud. The effect of the judgment in the Court below, which had maintained Brown's action, was to make Dorion pay, not only the balance of the money, but even $100 which he had paid Mr. Curran as a counsel fee, and

other sums which he had advanced to Brown. His Honor did not think it equitable to confirm this judgment.

MONK, J., [also *diss.*] entirely concurred with Mr. Justice Tessier. If he understood the judgment of the majority of the Court, it went upon this ground—that Dorion had no right to take this transfer of the whole amount of the arrears under the judgment which he obtained in the case. There was no disguising the fact that the transaction bore rather an unusual appearance. But the bargain was made in good faith. There was no fraud proved. Was this agreement on the part of the appellant a legal fraud? There was no doubt that a lawyer under such circumstances might have taken a retainer for any amount. It came to be a question, then, whether a lawyer might take a transfer of the amount, or part of the amount, to be recovered by the suit. His Honor was not aware that there was any law against it. There was nothing to characterize it as a fraud. After the judgment Brown asked Dorion for $100 out of the money, and Dorion gave him that amount, stating, however, that he was in no way bound to do so. Brown at that time knew exactly how the matter stood.

SIR A. A. DORION, C.J. The case was no doubt of very great importance to the members of the bar, and in this view its importance was much greater than the amount of money at stake. The question was not whether a barrister practising before the Court could stipulate for a fee, however exorbitant, from his client. That was not the question at all. The question was whether a barrister can make an agreement with his client by which he is to share and divide the proceeds of the law suit which he undertakes to conduct. If a lawyer may do that, it may be said that nothing else was done here. It was admitted that the fee was enormous. Here was a pauper, 70 years of age, suing to get an annual life rent for his subsistence from his son. He gets a judgment for $16 a month, and his lawyer retains $566 for his services. But it was not a question of amount. The question was this: When the appellant undertook this suit, did he make a bargain with his client that he was to get half, or a third, or the whole of the arrears? This was what the majority of the Court found had been done, and it could not be allowed. The transfer was made on the 16th of September, 1875, and it covered $566, the whole amount of the arrears. Dorion said the promise was made to him by Brown before he consented to take up the case. The position of the lawyer was, therefore, that he was to get a share of what was recovered. Are lawyers to be permitted to make a bargain that they shall have a share of the proceeds of the suits which they carry on? If this Court said that could be done here, this would be the only country where it could be done. There was such an offence as maintenance, and parties even not lawyers might commit a misdemeanor in so doing. If lawyers may make such bargains, the law would become a mere matter of contract, and the profession would have to abandon all its privileges. In other countries lawyers would be disbarred for entering into such an agreement. At the time the respondent took the transfer to receive the amount of the arrears, the money was either actually in his hands, or so situated that he could get it at any moment. The Court did not decide that a lawyer could not stipulate for a fee; but it must be for a specific sum; it could not be a share dependent on the success of the suit. As to the $100 that had been paid to Brown at the time of the transfer, that had been deducted by the Court below. The transfer being a nullity, the appellant was bound to return the whole of the amount except that. What the Court below refused to deduct was the money which had been given to Brown in small sums. According to the appellant's statement, these sums were a gift to the old man. The Court would add to the judgment a reservation of appellant's recourse for these sums if he could establish them satisfactorily. As to the $100 which appellant said he paid his partner, Mr. Curran, to argue the case, that was a charge which the Court could not sanction.

RAMSAY, J. The principle involved in this case was extremely simple, yet of great importance to the bar. It was necessary to their existence as a bar that the rule should be rigorously maintained, that a contract the consideration of which was maintenance will not be sanctioned by this Court. The appellant, being examined as a witness, admitted that the consideration of the contract was

maintenance of the suit in which he was engaged as lawyer. Such a bargain has never been maintained in England, and cannot be here. His Honor did not mean to imply that the appellant was guilty of fraud, but only that this contract, the consideration for which was maintenance, was against public policy, and incompatible with the existence of a respectable bar.

Judgment confirmed, MONK & TESSIER, JJ., dissenting.

W. Grenier, for appellant;

Barnard & Monk, counsel.

Archibald & McCormick, for respondent.

SUPERIOR COURT.

MONTREAL, May 14, 1879.

TORRANCE, J.

RHODES v. ROBINSON.

Capias—Form of Affidavit.

This case was before the Court on the merits of a petition to discharge the defendant, who was arrested last June for a debt due his landlady of $144. The affidavit on which the capias issued, alleged that the defendant was immediately about to depart from the Province with intent to defraud plaintiff, &c., having obtained a situation as surgeon on board a steamship bound for London, England. The last allegation of the affidavit was in these words: "that without the benefit of a Writ of Capias "ad Respondendum to seize and attach the "body of said defendant to abide the judgment "herein, the said plaintiff will be deprived of "her remedy," &c.

PER CURIAM. The counsel for the defendant has called the attention of the Court to the omission in the affidavit of the words, "and "that such departure will deprive the plaintiff "of his recourse against the defendant;" required by the C. C. P., 798. He also cites *Anderson* v. *Kirkby*, A. D. 1877, Montreal, in which case this objection was taken and the application was successful, and the judgment liberating the defendant was confirmed in Review, September, A. D., 1877. I have looked at the affidavit in that case and find in it another omission of a serious character, namely, in the reasons of belief that the defendant was immediately about to depart with intent to defraud. The reason was simply that deponent was informed by John Blakeney, that defendant, a resident of Montreal, is leaving this day for New York.

The affidavit in that case was in this respect different from the one now under consideration, and the reason there given for the belief was held insufficient to show intent to defraud. The reason for the belief in the present case, I hold to be sufficiently stated. There remains the question as to the omission of the words "that "such departure will deprive plaintiff of his "recourse, &c." Undoubtedly one of the motives of the judgment in the Kirkby case was that these words were omitted, but there was the additional motive that the intent to defraud by the departure was insufficiently shown, and I cannot say the two cases are therefore precisely parallel. But further, in the present case, though the affidavit does not follow the words of the article 798, it is a substantial compliance with form No. 42 in the appendix, to be used when a capias is asked for under C. C. P., 842, which authorizes a Commissioner of the Superior Court on such affidavit to grant a warrant of arrest. My attention has also been called to the case of *Dallimore* v. *Brooke*, reported in 6 Rev. Leg. 657, in which the Court of Appeals held that the affidavit for attachment was sufficient, as it followed the form No. 45, though it was not a strict compliance with the words of the Code. I think it therefore safer to hold that the affidavit being a substantial compliance with the form 42 attached to Articles 812 and 813, is a substantial compliance with the requirements of the law. At the same time I cannot help expressing my regret that the form given has not followed the words of the Code. It adds much to the uncertainty of the administration of Justice, as opinions will differ how far there has been a substantial compliance with the law.

Petition rejected.

M. Hutchinson, for defendant, petitioner.

F. O. Wood, for plaintiff contesting.
