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THE CODE OF CIVIL PROCEDURE.

In some respects, it must be conceded that we are not a backward people in this country, and the interest manifested in the revision and consolidation of our laws is one of them. We have had our Statutes revised, and we have had them consolidated, and now, while the subject of codification is still only on the *tapis* in England, we in Lower Canada possess two codes—the Civil Code, and the Code of Civil Procedure. That which England, with her illustrious jurists and eminent text-writers, has never accomplished, and still doubts the possibility of accomplishing, her enterprising colony has brought to pass. The Civil Code will soon be law from Gaspé to Ottawa, and the Code of Civil Procedure is, while we write, rapidly passing through Committee of the House.

The advantage of having a Code, even an indifferent Code, cannot be disputed, and although many will probably be of opinion that our Code, considering the time and money that have been expended on it, is not so immaculate as could be desired, yet its simple existence, as a cleared spot in the midst of a tangled thicket, must be a source of relief and satisfaction.

It is not our intention, however, at present, to enter into any discussion respecting Codes, but rather to refer to the action taken by the Montreal bar, with respect to the Code of Civil Procedure, which must naturally attract the special attention of practitioners.

At one of the meetings held in June, to consider the proposed changes to the Act respecting the Bar, it was suggested by Mr. Ritchie, that it was time, then or never, to pay some attention to the Code of Procedure, a matter of much greater importance than that which was then being considered. Parliament was in Session, and the draft of the Code was rapidly passing through committee. He suggested, therefore, that a committee should be immediately named to take the draft of the proposed code into consideration, and see what amendments were desirable. The Committee named was composed of Messrs. Ritchie, Robertson, Q.C., Doutre, Q.C., Jette, and Bethune, Q.C., and although the time was short, and the weather none of the coolest, these gentlemen prepared a report, with annexed schedules of amendments, which evinces close examination and acute reflection. Besides the points which we have been able to notice below, the committee suggested a large number of minor alterations and verbal changes, most of which at once command the approval of the reader. A meeting of the bar was called to consider the report on the 19th of July, but it being vacation, and the notice short, there was not a *quorum* present, and the suggestions were merely submitted in an informal manner, the proposed amendments for the most part being acquiesced in by those present. The members of the bar present at this meeting were Messrs. Robertson, Q.C., batonnier, Mackay, Ritchie, Torrance, Doutre, Q.C., Jette, Archambault, Pagnuelo, Kirby, and the Secretary, Mr. Snowdon.

The Report was as follows:

"The Committee named to consider what amendments are required in the proposed Code of Civil Procedure, beg leave to report that they have gone through the articles contained in the Report of the Commissioners, and the amendments suggested by the Committee are embodied in the Schedules A and B hereunto annexed. The amendments proposed to articles 45, 254, 262, 351, 352, 355, 356 and 357, are only concurred in by a minority of the Committee.

The principal changes recommended by the Committee are the following:

Art. 32. That parties bringing actions of damages *in formâ pauperis* shall be liable to *contrainte* for the costs awarded to the opposite party.

90. That in case of default of defendant in *saisie-arrêt* after judgment, judgment may be rendered in vacation.

150. That in pleading, no replication be required.

210—222. That the articulation of facts be abolished.

311—312. That the number of Commissioners named to execute a *Commission Rogatoire* be reduced.

That the delays in term and vacation be uniform. That a uniform delay of *eight* days be substituted for the delays of five, six, ten, fifteen days, mentioned in articles 551, 649, 652, 720, 760, 932, 1063, 1070, 1112, 1120, 1139, and 1142.

538. That a legal tender may be made in Bank notes or accepted cheques, if not objected to at the time of tender.

699. That in cases of Sheriff's sale, the Registrar's certificate be obtained immediately after the seizure.

1050. That in cases over $100, the Superior Court have concurrent jurisdiction with the Circuit Court, the delays and proceedings for appeal, and fees, being the same as at present.

Many other amendments suggested, some of which are of considerable importance, will be found in the Schedules."

We proceed to notice some of the more important suggestions contained in the Schedules, A and B.

Art. 2. It is suggested that when the Queen's birth-day falls on a Sunday or holiday, the next following juridical day should be non-juridical, and thus a holiday be always secured.

Art. 32. With reference to actions *in formâ pauperis*, it is proposed to add that "any party prosecuting an action of damages *in formâ pauperis*, shall be liable to *contrainte par corps* for costs awarded to the opposite party." This is of course intended to prevent the institution of vexatious actions of damages by those who have nothing to lose. Mr. MACKAY suggested at the meeting that this might be carried even further, and all *mendiants* bringing actions of damages or petitory actions, subjected to *contrainte*, if unable to pay the costs when their action is dismissed.

Art. 56. The second clause reads thus: "In the absence of a regular domicile, service may be made upon the defendant at his office or place of business, if he has one." It was suggested that this should be made to read as follows: "In the case of a trader, service may be made upon the defendant at his office or place of business."

Art. 84. With respect to service at the prothonotary's office of orders, rules, notices and other proceedings, upon parties who leave Lower Canada after the commencement of the suit, or have no domicile therein, it is proposed that interrogatories *sur faits et articles* and the *serment décisoire* be excepted. There have been judicial decisions already to this effect; the Statute as it stands being evidently unjust to parties at a distance suing in our Courts.

Art. 90. It is proposed to add: "In cases of *saisie-arrêt* after judgment, if the defendant makes default, judgment may be forthwith rendered against the garnishee for the amount by him declared to be due."

Art. 145. It is proposed to expunge this article which reads thus: "No general denial can have any effect, and every fact alleged, the reality or truth of which is not specifically denied, is held to be admitted."

Art. 210—223. The committee recommend that the entire chapter relating to articulations of facts be struck out, these papers being found practically useless.

Art. 235. It is recommended that the expense of interrogatories upon articulated facts be borne by the losing party.

Art. 254. The suggestion is made here that any party to a suit may offer his own testimony. [Mr. ANGUS MORRISON, we observe, has introduced a bill respecting evidence at *nisi prius*, in Upper Canada, which is a step in the same direction.]

Art. 275 restricts cross-examination to the "facts referred to in the examination in chief." It is proposed to extend it to facts "in issue in the cause."

Art. 351, 352. It was suggested by the minority of the committee, including Mr. RITCHIE, that a trial by jury should be allowed in all cases where the amount demanded exceeds $400.

Art. 355, 356, 357. The minority of the committee recommended that these articles should be struck out, and the following substituted: "The verdict of the jury shall be general, unless the parties agree that special facts be submitted to the jury."

Art. 406. This was altered to read as fol-

lows: "The plaintiff first states his case to the jury, and adduces his evidence. The defendant next states the grounds of his defence, and adduces the proof in support thereof, *and addresses the jury upon the whole case.* The plaintiff is afterwards entitled to reply, and he may, if new facts have been brought out by the defendant, adduce evidence in rebuttal, *in which case the defendant addresses the jury, and the plaintiff replies after the adduction of such evidence in rebuttal.*"

Art. 464. It is recommended, Mr. DOUTRE dissenting, that this article shall read thus: "Peremption is granted without costs," instead of leaving it discretionary with the Court to condemn the plaintiff to pay all costs, as the article now stands.

Art. 484. The Codification Commissioners suggest, in order, as they say, to settle a doubtful point, that distraction of costs can only be demanded before judgment. The Montreal Committee recommend that this be struck out, and that the following be substituted: "Such distraction cannot be demanded later than the juridical day following the judgment." It is the practice in the Court of Appeals not to ask for distraction till after judgment.

Art. 538. The Committee proposed to add the following to the clauses relating to tenders: "but a tender in current notes of any Bank chartered in this Province, or a cheque accepted by such Bank, shall be held valid, unless it be at the time of such tender objected to as not made in current coin."

Art. 543. It is here suggested that if a party, to whom a tender is made in Court, wishes to withdraw the moneys paid in, without prejudicing his claim to the remainder, he shall be obliged to leave an amount, or percentage, to answer the costs that may be awarded to the opposite party.

Art. 601. The Committee recommend that moneys seized or levied, after deducting the duties thereon and taxed costs, must be returned into Court by the Sheriff.

Art. 668. It was proposed to insert the following after this article respecting bids at Sheriff's Sales: "The creditor may also declare in the obligation consented in his favor, what amount, in case of Sheriff's sale or confirmation of title, he is willing to give for the property hypothecated, or for any part of it, and in such case the Registrar shall note such declaration in his certificate, and it shall avail as a bid, and need not be supported by affidavit." This is intended to be of service to the holder of a mortgage who may be absent; but some doubt as to its expediency was expressed at the meeting of the bar.

Art. 757. As to the time within which the Sheriff must pay over moneys, the Committee propose that he shall be bound to pay them immediately after the date of the judgment homologating a report of distribution, instead of at the expiration of fifteen days.

Art. 797. This article, the first respecting the issuing of the *capias*, has not been left in a very satisfactory state by the Codification Commissioners. No part of our statute law has given rise to more litigation than that stating the grounds for a *capias*, and yet the Codification Commissioners have framed the article thus: "When the amount claimed exceeds $40, the plaintiff may obtain, from the Prothonotary of the Superior Court, a writ of summons and arrest against the defendant, if the latter is about to leave immediately the Province of Canada, or if he *secretes* his property with intent to defraud his creditors." This can hardly be called English. The Committee have suggested that the clause be amended by reading "has secreted or is about to secrete" for "secretes."

Art. 863. "The plaintiff or the defendant may contest the declaration of the garnishee, upon leave of the Court to that effect." The Committee suggest that the words, "upon leave of the Court &c." be struck out, as the leave of the Court is not asked in such cases.

Art. 875. "If the things seized are of a perishable nature or liable to deteriorate during the pendency of the suit, the Court or Judge may order them to be sold and the proceeds of the sale to be deposited in the office of the prothonotary or clerk." The Committee recommend that this provision be made applicable to every kind of seizure.

Art. 890. "Actions to rescind a lease, or to recover damages resulting from the contravention of any of the stipulations of the lease, or the non-fulfilment of any of the obligations

which the law attaches to it, are instituted either in the Superior Court or in the Circuit Court, according to the value or the amount of the rent, or the amount of damages alleged; and the defendants are summoned as in ordinary suits." The Committee have suggested that this be amended by striking out "or the amount of the rent." There seems to be something strange in this article. Apparently an action to rescind the lease of a store rented at $1000 per annum, where there happened to be a small item of $20 damages claimed, would have to be brought in the Circuit Court, and the attorney's fee would be seven shillings and sixpence.

Art. 1050. The Committee suggest that the Circuit Court shall have jurisdiction concurrently with the Superior Court, in suits from $100 to $200.

Art. 1178. It is recommended that sureties in appeal shall be bound to justify their solvency upon real estate.

Schedule B, referred to in the report, contained some amendments suggested by Mr. DOUTRE and agreed to by the Committee. The principal points were as follow:

Art. 56. With respect to service: "The boarding-house of a person who is not a householder is considered as his domicile, and the employees of such house as members of his family."

Art. 264. In the Code this article reads: "Deaf mutes, who can read and write, may be admitted as witnesses, their oath and affirmation and their answers being written down by themselves." Mr. DOUTRE suggested the following addition, "and if they do not know how to read or write, they may be interrogated through a person knowing how to communicate with them by signs."

Art. 330. To the grounds here stated for recusing an expert it was proposed to add, "or having expressed beforehand an opinion upon the matter in dispute."

Art. 538. It was proposed to add to the list of exemptions from seizure "sums of money awarded as damages for personal wrongs."

The report, with annexed schedules, was transmitted the same day by Mr. SNOWDON, the Secretary, to Mr. CARTIER.

INSPECTION OF REGISTRY OFFICES.

A bill has been introduced by Mr. CARTIER, to provide a fund towards defraying expenses incurred for matters necessary to the efficiency of the Registry Laws of Lower Canada. The preamble sets out that it is expedient to create a fund for defraying the expenses incident to the inspection of the Registry Offices in Lower Canada, and to the making of the plans and books of reference required by chap. 37, C.S.L.C., respecting the registration of documents affecting real property.

The maximum rates to be imposed on registrations and searches, payable by stamps, are as follows:—

On every will, marriage contract or donation.....30 cents.

On every deed or instrument effecting or evidencing the sale, exchange, hypothecation or mortgage of real property, for a sum or consideration exceeding in value $400.....30 cents.

On every other deed or instrument..15 cents.

On every search, with or without certificate..... 5 cents.

Of course, a provision for the inspection of Registry offices is an excellent provision, if any attention is paid to the reports of the inspectors. But it is well known that a commissioner was appointed some years ago to visit the Montreal Registry office, and made a report exhibiting culpable negligence and carelessness on the part of the officials, and yet things remain as they were to this day.

It may also be worth noticing that a duty of five cents is imposed on all searches. This seems an inconvenient tax, and, moreover, introduces a stamp of a denomination not before used, and to prevent the use of which, Court-house fees of five cents, fifteen cents, and so on, were increased by five cents, so that no stamp of a less denomination than ten cents might be required.

NOTARIAL DEEDS NOT COUNTERSIGNED.

Mr. LAJOIE has introduced a bill for the purpose of rendering valid certain deeds passed

before notaries now deceased. The principal clause, as amended, reads as follows:—

1. Every notarial deed found in the greffe of any notary deceased before the passing of this act, purporting to have been made before two notaries, but not countersigned by the second notary, *and also every deed purporting to have been made before two notaries, found in the greffe of any notary now living, and which should have been countersigned by a deceased notary, and which shall be found not to have been signed by such deceased notary, before the passing of this act*, except wills and codicils, *are and* shall be as valid to all intents and purposes whatsoever as if they had been countersigned by the second notary during his life; provided always that nothing therein contained shall prejudicially affect any rights already acquired by third persons in virtue of the laws in force at the time of the passing of this Act.

THE OTTAWA DISTRICT.

Mr. WRIGHT, of Ottawa, has called the attention of the House to the petition of *P. Aylen* and others, of the District of Ottawa, praying for an investigation into the conduct and acts of the Hon. *Aimé Lafontaine*, Judge of the Superior Court for that district. The facts openly asserted in the House on the 24th July, are of the most disgraceful nature, and we intend to take an early opportunity of adverting again both to this matter, and to a motion made by Mr. CAUCHON respecting leaves of absence granted to Judges.

MODE OF CONDUCTING EXECUTIONS.

Mr. MORRIS, following the lead taken in England, has introduced a bill to prevent the execution, in public, of the sentence of death. This Act provides that executions shall take place within the walls, or enclosed yard, of the jail; that the jail physician and the jailor, and other employees to the number of six, together with twelve persons of respectability resident within the district, shall be present. The moment of execution is to be publicly signified by the tolling of a bell, and the hoisting of a black flag; and immediately after the execution the sheriff is to empanel a jury of from six to twelve persons present thereat, who, upon their oaths, on view of the body, shall enquire and find whether the sentence was duly carried into execution.

It is not to be expected that the Act will pass this Session. The abolition of a long-established usage requires much consideration, but we are inclined to think that this is an innovation which will be assented to by a large majority of the public, and especially by those who are the opponents of capital punishment.

THE UPPER CANADA LAW LIST.

Mr. ROBBANS, of Toronto, has just issued the fifth edition of his Law List, containing the names of the officers of the various Courts, County and Judicial officers, coroners, commissioners, and the names of practising barristers and attorneys throughout the Upper Province, very carefully classified and arranged. From the last mentioned list, it is evident that the public have no reason to complain of the paucity of their legal advisers, there being about 130 firms and single practitioners in Toronto, and about 540 located in the other cities and villages of the Upper Province. Thus Barrie, the population of which is set down at 3000, is favoured with the presence of eleven lawyers; Bothwell, population 1000, counts eight; Oil Springs, population 3,500, counts fourteen; Welland, population 1000, contains six, and so on.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH—APPEAL SIDE—CROWN CASES.

June 9.

REGINA *v.* DAOUST.

New Trial in Cases of Felony.

The prisoner was convicted by the jury on an indictment for feloniously forging an endorsement of a promissory note. At a subsequent trial for feloniously forging an endorsement of another promissory note, he was acquitted, new evidence of a favourable

nature having been adduced. The judge who presided at both of these trials, granted a motion for a new trial. At the next term, when the day for trial was about to be fixed, another judge was presiding, and he reserved the point, under C. S. L. C., cap. 77, sec. 57, as to whether a new trial could be legally had :—

Held, that the question was properly reserved under the statute.

Held, also, that a new trial after conviction of a felony cannot be legally had.

Semble, that the proper course to be taken by the defendant was to apply for a pardon; but that the court would not pronounce any opinion upon this part of the case reserved, leaving the Crown Officer at liberty to take such steps as he should think proper.

The following case was stated by Mr. Justice Aylwin for the opinion of the judges, under C. S. L. C., cap. 77, sec. 57. (See 1 L. C. Law Journal, p. 70.)

"Upon an indictment for feloniously forging a certain endorsement of a promissory note, for the payment of the sum of $300, with intent to defraud, and with a similar count, charging the defendant with uttering the said endorsement with intent to defraud, he was, on the 30th of March last, tried before the Honorable Mr. Justice Mondelet, at this court in Montreal, and found guilty.

On the 20th of April last, upon a motion, founded upon two affidavits (of which motion and affidavits, together with the indictment, copies are annexed), the learned judge ordered that the verdict should be set aside, and awarded a new trial.

On the 25th September last, Mr. *Ramsay*, on behalf of the Crown, moved that a day for the trial should be fixed. Whereupon, being of opinion that I had no authority to take a second trial, after the former verdict of guilty, I directed that the opinion of the Court of Queen's Bench, in Appeal, should be asked: first, whether a second trial can be legally had; and, secondly, as to the course to be pursued, should there be no authority to take the new trial.

I have now respectfully to ask the opinion of this court, in respect of the premises, and have directed the defendant to be admitted to bail until the first day of the approaching term in appeal.

Montreal, 25th September, 1865."

MONDELET, J.—At the March Term, 1865, of the Court of Queen's Bench, at which I presided, Daoust was tried on an indictment for forgery of an endorsation on a promissory note. From the evidence adduced at the trial there seemed no doubt, and I charged the jury, as I never shrink from doing where my conviction is strong, to return a verdict of guilty, and the jury did so. The most important evidence was that of Desforges, who stated that he had never authorized the prisoner to sign his name. The prisoner was subsequently put upon his trial for forging the same name on another note, and this time the jury found a verdict in his favour, new evidence having been adduced, tending to show that the prisoner had been authorized by Desforges to sign the name. The prisoner now stood between two fires—between a verdict of guilty and a verdict of not guilty. Towards the end of the term, Mr. *Ouimet*, the prisoner's counsel, moved for a new trial on the first indictment, in order that the witness Legault, who testified that Desforges had authorized the prisoner to sign his name, might be heard. Mr. *Johnson*, who then represented the Attorney-General, said that, under the circumstances, he did not think proper to oppose the granting of a new trial. I, having presided at both trials, and being *au fait* with the circumstances of both, having no possible doubt that Daoust either believed himself authorized, or was really authorized to sign the name of Desforges, considered it not only justice, but an imperative duty, to grant a new trial. I wish to be clearly understood on this point. I did this, first, because an imperative sense of justice urged me to it; and, secondly, because I believed the court had the power to do it. In the following (September) Term, Mr. Justice Aylwin, who was then presiding, reserved the case for the consideration of the full bench.

It will be understood that my conviction must be very strong when I still adhere to it, though I find four judges, for whose abilities I entertain such profound respect, differing from me in opinion. I start from this point: That the Court of Queen's Bench has the power to remedy any evil that comes before it, provided there be no law to the contrary. Starting from this point, I put the

following question :—When the first new trial in a case of misdemeanor was had in England, was there any law that authorized the Court of Queen's Bench to grant it? I believe I am safe in saying that there was none. There being, then, no law, there must have been some principle, and, in my humble opinion, it must have consisted in this unlimited power inherent in the Court of Queen's Bench, to do what it considered necessary in the interests of justice. If these premises are well founded, I proceed to ask, as the Court granted a new trial in a case of misdemeanor for the first time, from the conviction that it had the right and the power to do so, why should it not grant a new trial in cases of felony? Why remedy a small evil, while it left the subject convicted of felony, no recourse? For there is no writ of error where it is a mere question of evidence. I say, then, that if the Court of Queen's Bench has the right to order a new trial in a case of misdemeanor of small importance, it has the right to order it in the more serious case of a felony. It is said that the Courts would constantly be assailed with applications, if new trials were allowed for felonies. But surely that is no reason for refusing to give an innocent man an opportunity of establishing his innocence. Then again, in civil cases, new trials are constantly granted; nor is the trouble imposed on the judges any consideration for refusing them.

But, it is urged, the Courts in England have always refused to grant a new trial in cases of felony. I must say, that in my opinion, this is no reason for continuing to refuse it. Many things have been for centuries refused, and then the old practice has been departed from. Is it not true, for instance, that in all Courts, counsel were prohibited from putting a question in cross-examination that did not proceed from the examination-in-chief? I remember the time myself. So at one time it was asserted that a jury could never be discharged after retiring to deliberate upon their verdict, nor could meat or drink be provided them, till they were agreed.

It is said that a man who has been convicted must go to the Executive and ask for a pardon. Now, I do not relish the idea that an innocent man must go upon his knees before the Governor-General, or the Attorney-General, and ask for a pardon. Besides, is there not something incongruous in a man saying, "I am innocent, but I want a pardon." There is another case to be mentioned. It might happen in times of high political excitement, such as I hope will never prevail in this country, that the Government might be desirous of getting rid of a formidable opponent, and if a conviction had been obtained against him, would not be inclined to grant a pardon. In Upper Canada a law exists allowing the Court to grant a new trial in cases of felony. Why have we not that law here? I answer, because the Judges have the power to grant a new trial without any special statute. I believe they did not require a statute in Upper Canada; but the people asked for a statute, thinking, perhaps, that the Judges might hesitate about granting a new trial.

MEREDITH, J.—The first point to be considered in this case, is as to whether the main question snbmitted to us, is one which, under the statute, could be reserved for our opinion.

Upon this subject there has been much difference of opinion upon the Bench in England, and as all the arguments on the one side and on the other, with respect to what questions may be reserved, will be found in the well known case of the Queen *v.* Miller,* I shall limit myself to a brief statement of the reasons which induce me to think that the question reserved *is* one which we have power to consider. The words of the law are very general. "The Court before which the case has been tried may, *in its discretion*, reserve *any question of law* which has arisen *on the trial* for the consideration of the said Court of Queen's Bench on the appeal side thereof." There can be no doubt that the question: Can there be a new trial in a case of felony, is "a question of law;" and I think that question may be said to have arisen "on the trial," because, to repeat the words made use of by Baron Rolfe (now Lord Cranworth) in the case of the Queen *v.* Martin,† "the word 'trial' ought to be taken in a liberal sense, and

*Dearsley & Bell, p. 468.
† 3 Cox C.C. p. 451.

includes all the proceedings in the Court below." In the case just cited, the Court for Crown Cases Reserved, composed of Wilde, Chief Justice, Wightman and Cresswell, Justices, and Rolfe and Platt, Barons, unanimously held: that a question of law raised by motion in arrest of judgment, *after the conviction* of the prisoner, may be reserved under the 11th and 12th Victoria, c. 78; that being the English act establishing a Court for Crown Cases Reserved.*

The first question submitted to us by the learned judge is, whether a second trial can be legally had in the present case, it being a case of felony, and I think that this highly important question, may, at this day, be answered in very nearly the same words used by Chitty half a century ago, namely: "in a case of felony or treason it seems to me completely settled that no new trial can be granted."† There is, it is true, one case, the Queen *v.* Scaife, in which a new trial was granted in a case of felony.

I have looked into several reports of this case,‡ and they all concur in showing that it was argued and decided exclusively on the ground that certain illegal evidence had been received; and not one word was said about the difficulty of allowing a new trial in a case of felony, until all the judges had given their reasons in support of the judgment. But then Mr. Dearsley, the counsel for the prisoner, "suggested that there was a difficulty in ascertaining what rule should be drawn, no precedent having been found for a new trial in a case of felony." To which Lord Campbell answered: "That might have been an argument against our hearing the motion." Now it seems to me that if it might have been an argument against the hearing of the motion, it might also have been an argument for the reconsideration of the judgment.

It may here be observed that the case just cited had been removed by *certiorari* from the Quarter Sessions to the Court of Queen's Bench, and it appears that where this is done, according to English practice, "the charge is dealt with *at the Civil side of the Court*, and is subject to all the incidents of a civil cause." * Mr. Dearsley who, from what I have already said, appears to have been the counsel for the prisoner, refers to this case in his small work called "Criminal Process," and, after saying "all the authorities in the books go to show that in cases of felony or treason, no new trial can in any case be granted," adds, "though this position is for the most part correct, it must be received with some qualification." He, then, referring to the decision of the Queen and Scaife, says: "And the principle seems to be this; that where such a case is removed into the Court of Queen's Bench, and is sent down to be tried at *nisi prius*, all the incidents of a trial at *nisi prius* attach to it."

This much is plain, that whatever may be the rule with respect to cases moved by *certiorari* into the Queen's Bench, it seems certain that the rule with respect to cases tried in the ordinary course of law was, when the criminal law of England was extended to this country, and still is, that there cannot be a new trial in cases of treason and felony.

Repeated attempts have been made in Parliament to change the law in this respect, and these attempts have invariably been resisted, not on the ground that the law was not as stated by those who sought a change, but, on the contrary, on the ground that the change proposed would not be an improvement. It is true that in Upper Canada the distinction between misdemeanours and crimes of greater magnitude has been done away with, in so far as regards the right to obtain a new trial; but this has been done by statute, and if legislation for that purpose was necessary in Upper Canada, it is still more necessary here; for it is plain that if an application for a new trial were allowed, it ought to be made to the Court

* See also the Queen *v.* Webb, 1st. Temple and Mew, p. 23; and 3 Cox. 183. But see also an Irish case, Reg. *v.* Byrne, 4 Cox. 248, and 1 Cox. 3.

† Chitty's Crim. Law, p. 654, where the author cites 6 T. R. 625, 638. 13th East. 416. See also Russell on Crimes, Ed. of 1843, Vol. II, p. 726, "where the defendant has been convicted on an indictment for felony there can be no new trial."

‡ The case is reported 2 Denison, C.C. p. 281, 17 Ad. & E., p. 239, 79 Vol. E. C. L. Rep. p. 237; and 5 Cox. C.C. p. 243.

* See discussion in House of Commons, Feb. 1860, on "Appeal in Criminal Cases Bill," Mr. McMahon's Speech.

of Queen's Bench sitting in appeal, held by at least four judges, and not to the Court of Queen's Bench on the Crown side, usually held by one judge.* And it is equally plain that under the existing law, such an application could not be made to the Court of Appeals. It is not for this Court to decide whether it is desirable to change our law, so as to admit of a new trial in cases of treason and felony.

I admit that it is difficult in theory to answer the arguments that have been urged for giving a party, in cases of the utmost moment, a right that is freely accorded to him in cases of much less importance; but no one who has had experience in the working of Criminal Courts, can fail to see that there are practical objections of great gravity against the making of the change proposed. The Imperial Parliament upon several occasions has been called upon to consider this subject, and the opinions of almost all the judges were obtained in relation to it.† And we know that the bill which was introduced by Mr. McMahon, in 1860, for the establishment of a Court of Criminal Appeals, the main object of which was to give a new trial in cases of treason, was not allowed to be read a second time, and was rejected without a division, and that the same fate attended a bill introduced by Mr. Butt, for the same purpose, in 1861. Another bill was, I believe, introduced in 1864. But all that I know about it is, that in England the law on this subject still remains unchanged. Our law on this subject is the law of England, and in the absence of Provincial Legislation, I think it would be nothing short of a usurpation on our part, were we to attempt to exercise a power which the Imperial Parliament has deliberately and repeatedly refused to grant to any Court in England. For these reasons I am of opinion that the first question submitted to us by the learned Judge ought to be answered in the negative.

The second question proposed, is as to the course to be pursued should there be no authority to take the new trial.

This, it seems to me, I say it with all deference, is a question to be determined by the learned Crown prosecutor, and were we to answer it, I apprehend we would, in effect, offer that learned officer advice for which he has not asked, and by which he might not deem it consistent with his duty to be guided. I, therefore, submit that it will be well for us to abstain, for the present, from the expression of any opinion upon the second question submitted.

DRUMMOND, J., after mentioning that he had himself, while at the bar, moved for a new trial in cases of felony, on several occasions, but without success, observed: The law is fixed by the practice of the Courts. If we are to adopt the principle laid down by Mr. Justice Mondelet—that we have no criminal law but what is contained in the Statutes, and that each judge, where there is no Statute, can wield unlimited power—we may as well close our Courts of Justice. The administration of criminal law would become utterly impossible. The criminal law in this country is the law and the practice of the Courts as it existed in England at the time it was transplanted into this country. Whatever respect I may have for modern judges, if they depart from what was the law at the time it was transplanted into this

* *Vide* Regina *v.* Bruce, 10 L. C. Rep. 117.

† Sir Cornwall Lewis, the Secretary for State for the Home Department, in the course of his answer to Mr. McMahon, who introduced the Bill of 1860, observed: "In the year 1848, a Committee of the House of Lords was appointed to consider a Bill which was called "The Criminal Law Amendment Bill." When two of the judges, Mr. Baron Parke and Mr. Baron Alderson, both eminent for their knowledge of the Criminal law, were examined on the question to which the present bill referred, Lords Lyndhurst, Brougham and Denman were also examined before the Committee and further, the evidence of Baron Parke and Baron Alderson was sent round to all the Judges, and their opinions with regard to it were requested. What was the result? Baron Parke and Baron Alderson had stated very decidedly their opinion as against an appeal in Criminal cases, and their conclusion was confirmed without the slightest modification by Lords Denman, Lyndhurst and Brougham. At the same time, the following judges concurred with their Lordships by written communication, namely Justices Patteson, Coleridge, Wightman, Erle, Coleman, Maule, Cresswell, Chief Baron Pollock, and Mr. Baron Rolfe. In addition to that the testimony of Mr. Serjeant D'Oyley was against any change; so that, with the exception of Mr. Green and Sir Fitzroy Kelly, all the witnesses were of opinion that the appeal ought not to be allowed."

country, I shall follow the old law; and this law, as laid down by Kenyon and other eminent judges, was clear beyond doubt that no new trial could be had in cases of felony. We have to administer the law as laid down in the books. If the judges on the present occasion err in their view of the case, they err in about the best company of intellectual men that can be found in the world. We make no order; we merely say that Judge Aylwin was right in reserving the question, and that he was perfectly correct in refusing to proceed with a new trial.

DUVAL, C. J.—It is for the person applying for a thing to point to the Statute which authorizes it, and not to ask, where is the Statute prohibiting the act from being done? There are doubtless good reasons for refusing a new trial in cases of felony, while it is granted for misdemeanours; but it is sufficient for us to say that a second trial cannot legally be had on the indictment against the prisoner.

New trial refused.

G. Ouimet, for the prisoner; *T. K. Ramsay*, for the Crown.

REGINA *v.* MCDONALD.

Obtaining Goods with intent to defraud.

The defendant was indicted for obtaining goods from *T. W. R.* with intent to defraud, and convicted on evidence which showed that he had obtained from *T. W. R.* an order for the delivery of the goods, promising to pay cash, but failing to do so, and becoming insolvent a few days after. He had had other transactions with *T. W. R.*, and had met his engagements in them :—

Held, that the conviction was sustained by the evidence, and could not be disturbed.

The defendant, John McDonald, a trader of Montreal, had been indicted for obtaining goods, with intent to defraud; the specific charge being that on the 25th of May, 1865, at Montreal, he obtained from Thomas Walker Raphael 100 barrels of flour, of the value of $540, with intent to defraud. The substance of the evidence against the prisoner at the trial was as follows :—

Thomas W. Raphael stated: "On the 25th May last, I made to defendant a cash sale of 100 barrels of flour for $540. I gave him an order on Halliday & Bros. for the delivery of the flour, which was delivered to him. On the 27th, I met him, and asked him for payment. He told me he would pay me on Monday the 29th. On Monday he did not pay me, nor has he paid me at all." On cross-examination, witness stated that he had had other transactions with the prisoner, and this was the only one which had not been met.

John Craig, bookkeeper to T. W. Raphael, deposed as follows: "On my asking what he had done with the $550, he (the prisoner) answered he had paid a part of it to Laidlaw, Middleton & Co. I asked him if he would return the flour or part of it. He answered he could not, having made away with it. He said also he had no books, and could not say what his assets and liabilities amounted to. I asked him—"At the time you bought that flour from Mr. Raphael, did you know you were unable to pay for it?' He answered, "I did."

The Jury found the defendant guilty. At the trial, the following points were urged by Mr. *Carter*, Q.C., defendant's counsel, and reserved by Mr. Justice Mondelet, the Judge presiding:—

"1st, That the indictment did not specify the name of any person or persons intended to be defrauded, such allegation being necessary, as Section 29 of Chap. 99, C.S.C. did not apply to the offence created by Sec. 73 of Chap. 92, C.S.C.

"2nd, That the evidence did not establish the charge in the indictment, of obtaining so many barrels of flour, but that what he did obtain from the prosecutor was a valuable security, viz., a delivery order."

The case having been argued during the *June* Term, judgment was delivered June 9th.

DUVAL, C. J. We consider the evidence in this case quite sufficient to justify the verdict. Sentence will, therefore, be pronounced upon the defendant at the next term of the Queen's Bench, sitting on the Crown side.

Meredith, Drummond, and Mondelet, JJ., concurred.

The recorded judgment of the Court was as follows: "After hearing counsel as well on behalf of the prisoner as for the Crown, and

due deliberation had on the case transmitted to this Court from the Court of Queen's Bench, sitting on the Crown side at Montreal, it is considered, adjudged and finally determined by the Court now here, pursuant to the Statute in that behalf, that the verdict of the Jury, and the conviction made and rendered against the prisoner, ought not to be disturbed by reason of anything contained in the said case transmitted."

Conviction affirmed.

E. Carter, Q.C., for the defendant; *T. K. Ramsay*, for the Crown.

REGINA *v.* PICKUP.

Obtaining a Signature—Fraudulent Intent.

Held:—That a conviction for obtaining a signature to a promissory note, with intent to defraud, cannot be sustained, where the evidence merely shows that the defendant obtained the signature on promising to pay a certain consideration a few days after, which he failed to do; the parties moreover having had other similar transactions together, in which the defendant had met his engagements.

The defendant in this case was convicted during the March term of the Court of Queen's Bench sitting on the Crown side, of obtaining a signature to a promissory note with intent to defraud. The charge laid in the indictment was that the defendant, "on the 28th Sept. 1865, unlawfully, fraudulently and knowingly by false pretences, did obtain the signature of one Robert Graham, to a certain promissory note for a sum of $1125, with intent to defraud."

Robert Graham, wood-merchant, stated: "On the 26th September last, defendant's son, Edmund James, brought a note dated 14th Sept. 1865, for $1125. There was another paper with it. It purported that out of those $1125, when the note was discounted, defendant would return $550. I did not sign the note at that time. I went to defendant's place of business. He was in my debt then. He agreed when the note would have been discounted, to give $600, on the proceeds of the note, on what he owed me. I signed the note then. On the 29th September, defendant's son, returning with the old note, dated 14th September 1865, told me the other note had been sent in too late, and left among old papers and destroyed, and then I signed the note. When I signed the last note, it bore the date of four months. He said there would be no difficulty, that the date had been altered from 4th to 14th September. Endorsed Edmund Pickup. On the 30th September, he told me that it could not be discounted at the Ontario Bank, but as a compliment, at 7 per cent; but at Brown's, a Broker, he could get it discounted, without favor, at 8 per cent; and on my informing him I required the $600 for the Tuesday, having to pay that sum, on a purchase I had made, he told me it would be all right. On the 4th of October, I went to defendant's office and spoke to his son, who told me his father was not in. I then did not know that defendant had absconded. I have never got the $600." *Cross-Examination.* "There have been between defendant and myself transactions during two years, with me alone. The transactions with defendant amounted to a high figure. If defendant had paid me the $600, I would have been perfectly satisfied."

There was some additional evidence, showing the defendant's business-standing in Montreal.

The jury found the defendant *guilty*.

At the trial, the following points were urged by Mr. *Carter*, Q.C., the defendant's counsel, and reserved by Mr. Justice Mondelet, who was presiding:—

1st, That the indictment did not set forth any offence, as it omitted to specify the false pretences by which the signature of the prosecutor was obtained, and that the clause 35 of chap. 99, C.S.C., dispensing with the necessity for averring the false pretences, did not apply to this new offence subsequently created.

2nd, That the indictment, moreover, did not specify the name of any person or persons intended to be defrauded; such allegation being necessary, as this new offence was not mentioned in the clause 29 of chap. 99, C.S.C.

3rd, That the indictment did not specify, with precision, the date of the note, in whose favor it was made, or when and where payable, and did not describe it to be a note for the payment of money.

4th, That the evidence did not establish that the defendant made use of any false pre-

tence of an existing fact, or such a false pretence as by law was necessary to sustain the charge.

5th, That at most a promise for future conduct was proved, viz., to pay the prosecutor, on account of an alleged indebtedness, a certain portion of the amount defendant would receive when the note was discounted.

Judgment was delivered June 9th.

DUVAL, C. J.—In this case we do not think there was such a misrepresentation on the part of the defendant as to justify the verdict, and, in fact, the judge who presided at the trial thinks the verdict should not have been against him. If this verdict could be maintained, it would follow that every man who purchased goods, stating that he would pay for them next week, and who failed to pay for them, could be prosecuted criminally, instead of being sued. We are bound by the evidence as it comes before us, and we are all of opinion that the evidence is insufficient. The defendant is, therefore, discharged.

MONDELET, J.—At the trial I charged the jury for an acquittal, but the jury thought fit to return a verdict of guilty. I then reserved the case for the consideration of the full Bench as to the sufficiency of the evidence, and I entirely concur in the opinion that the evidence is insufficient. There is another consideration that weighs in favor of the defendant. He and Mr. Graham had had previous transactions and accounts together, and the fact of Mr. Pickup's absenting himself from town a few days subsequent to the particular transaction on which the prosecution was based, could not be adduced to justify the presumption of fraud. I instructed the jury at the time that they must consider the transaction apart from any subsequent act.

Conviction quashed.

E. Carter, Q.C., for the defendant.

T. K. Ramsay, for the Crown.

Master's Wages—Maritime Lien—Under the 10th section of the Admiralty Court Act, 1861, (24 Vic. c. 10,) the master has a maritime lien both for his wages and disbursements, and his claim is therefore to be preferred to the claim of a mortgagee. The Mary Ann, Law Rep. A. & E. p. 8.

COURT OF REVIEW, MONTREAL—JUDGMENTS.

March 31.

DUVERNAY *v.* CORPORATION OF PARISH OF ST. BARTHELEMI.

Practice—Notice of Appearance in Circuit Court Appealable Case—Setting aside Appearance.

Held, that when an appearance is filed, it cannot be rejected, except on motion by the plaintiff in court.

Semble, (MONK J. *dissenting*), that it is not necessary for the defendant, in an appealable Circuit Court case, to give notice of his appearance to the opposite party.

SMITH, J.—In this case judgment had been rendered by default in the court below, and the defendants now asked to have the judgment revised. The question to be decided was simply this: Is it necessary for the defendant, in a Circuit Court appealable case, to give notice of his appearance to the opposite party; and, further, can the prothonotary, after receiving such appearance, take upon himself to reject it as irregular? The defendants had appeared in the suit, but no notice of the appearance had been given to the opposite party. The paper was received; but afterwards it was set aside, and the case treated as a case by default. The defendants now appealed, and the court was of opinion that the appeal was well founded. There was nothing in the statute requiring notice of appearance in the Circuit Court. The moment an appearance was presented, it was the duty of the prothonotary to accept it. His authority and jurisdiction ceased there. If improperly filed, it was for the court to reject it on motion. This case had been treated as if no appearance had been filed. The judgment must, therefore, be reversed.

BERTHELOT, J., concurred.

MONK, A. J., concurred in reversing the judgment. But he was of opinion that in appealable cases it was necessary to give notice to the opposite party of an appearance. Such, at all events, had been the invariable practice. He, in chambers, had ordered the prothonotary to reject the appearance, and enter up judgment for the plaintiff. This was not the proper mode of proceeding, and the

judgment, accordingly, must be reversed; but he was not inclined to hold absolutely that notice was unnecessary.

Judgment reversed.

FARRELL *v.* GLASSFORD, *et al.*

Partnership.

A steamboat captain advanced monies to the owners, on their promise to admit him as a partner. It did not appear, from the evidence, that the promise was carried out. Losses having been incurred in running the vessel, it was broken up.

Held, that the captain had not become a partner, and was not liable for any share of the losses.

SMITH, J. This is an action brought by the plaintiff against the firm of Glassford, Jones & Co., to recover about $1200, for money advanced by him, for salary, and for superintending the building of a steamboat. The defendants set up an agreement by which the plaintiff was to become a partner in the steamer to the extent of 8-64ths, and that the advance he made was to enable him to become such joint owner. The defendants acknowledge that plaintiff was their steamboat captain, but deny that he ever superintended the building of the steamer in question. They say, that by reason of plaintiff agreeing to become copartner, they ran the boat, and at the end of the season found that they had incurred a heavy loss. They contend that the plaintiff's share of this loss more than sets off the amount due him for his advances, &c. and therefore his action should be dismissed. The question then is, did Farrell ever become a partner? It appears that he advanced a certain sum of money, on the promise that within a certain period he was to receive a share. It was the duty of the defendants to have offered him this share. As the case stands, there was nothing more than a promise to admit him to a share. This promise was never fulfilled. Therefore, the only question is, whether the plaintiff is entitled to recover back the advance made for the purpose of becoming a partner. There can be no doubt that he paid this money in the hope of getting a share, and this share was never offered to him. At the close of the season the defendants broke the vessel up, as sole owners, without the plaintiff's participation. There can be no doubt, that under the circumstances, he is entitled to get back his money. The judgment must be confirmed in all respects.

Berthelot and Monk, JJ., concurred.

LOISELLE *et al. v.* LOISELLE.

Deposit in Court of Review.

SMITH, J. This is an application on the part of the defendant, that the prothonotary be ordered to receive his inscription for revision, without the deposit, with consent of plaintiff. This is an application which the Court cannot entertain. The prothonotary is by law liable for the deposit, as soon as the case is inscribed, because the law says that the deposit must be made. The prothonotary may make any arrangement he chooses, but he still continues liable. Motion rejected.

Badgley and Berthelot, JJ., concurred.

MASSON *et al. v.* JOHN MCGOWAN, and PETER MCGOWAN, opposant, and MASSON, contesting.

Insolvency—Fraudulent Sale.

John McG., an insolvent trader, made a transfer of his moveable and immoveable property to his brother Peter, a sailor, who afterwards executed a lease back to John. The immoveable property being seized by John's creditors:—

Held, that the transfer was fraudulent; that Peter must be presumed to be acquainted with his brother's circumstances.

Held, also, that the plea of *chose jugée* was good; the transfer having previously been declared invalid in a contestation as to the moveable property.

SMITH, J. In this case I have the misfortune to differ. The firm of Masson & Co. sued McGowan on a promissory note, and seized his moveable effects by a *saisie-arrêt* before judgment. This was in 1855. In 1856, before a judgment was obtained in the Court, John McGowan made a transfer of his estate to his brother Peter. In 1857, the farm which had been transferred to Peter, was seized as belonging to John. Peter opposed the seizure, alleging that he had acquired the property for valid consideration, and had been in possession for two years. It is pretended that John McGowan & Co. were insolvent; but there does not appear to be any proof of their insolvency. Their effects have never been discussed. The

plaintiff, after getting his judgment, sued out an execution against the real estate of John McGowan, and seized it as in his possession. The bailiff's return, however, shows that the property was not in the possession of John when seized, and there is not one word of evidence to show that it then belonged to John. The first question is this: Can you take out an execution *de plano* against a man, and seize property, as his, in the possession of another? I think that when property has passed out of the possession of the debtor into the hands of a third party, who holds it in good faith, it cannot be seized under an execution. There may be an action *in fraudem creditoris*. Even admitting that there is fraud, you cannot seize A's property under an execution, in the possession of B. The moment that the debtor's property has passed into the possession of a third party, under a title, it is only by a revocatory action that it can be brought back to the creditors. It may be brought back by a process, but not by a seizure. Besides the plea of fraud in this case, there was a plea of *chose jugée*. There was a decision when the moveables were seized, that there had been no legal transfer of the moveables to Peter; and now, when the immoveables are seized, it is contended that the previous decision has the force of *chose jugée*. I am of opinion that the plea of *chose jugée*, as well as the plea of fraud, is unfounded, and should be dismissed.

BADGLEY, J. It is necessary to examine the facts in this case, as they appear on the face of the record. In 1855, John McGowan & Co. were carrying on business at Vaudreuil, and in that year they became indebted to the plaintiffs, Masson & Co., in a considerable sum of money, first, in March, in the sum of £23 for goods sold and delivered, and subsequently in various amounts on notes, &c., in all about £370. The firm paid no part of these sums as they became due; they were, in fact, insolvent, and unable to pay anything. On the 3rd Dec., when they still owed the plaintiffs this sum of £370, and other amounts to other parties, swelling their indebtedness to a total of £800, John McGowan, the head partner, transferred to his brother Peter a farm that belonged to him, and not only the farm, but all the farm stock that was upon it, consisting of five horses, waggons, &c. At this time Peter McGowan was not a trader nor a farmer; he was a sailor. In this way he became the *cessionnaire* of the farm and of all the stock upon it. Early in January following, the plaintiff sued out a writ of attachment, and seized all the goods belonging to the partnership firm. These goods realized £150, while the firm owed £800. It is pretended that there was a large amount in debts due to the firm, but experience teaches us how little such debts in the country are worth; and, in fact, there is the evidence of the collecting bailiff that he had a large amount of debts in his hands, but that they were all prescribed. Does this show that John McGowan was solvent? It is said that his partner was solvent; but this did not make John solvent. He was then hopelessly insolvent, not having paid even the first £23 due for goods in March, or any part of the subsequent liabilities, yet he ceded to his brother the only immoveable and moveable property he possessed in the world.

From this statement of facts, I make the deduction, not only that John was a bankrupt, but that Peter knew the circumstances under which John made the transfer to him, and that it was made for the purpose of secreting the property from John's creditors. John had allowed his father and sisters to occupy this property, and, after the transfer, he went and resided there with his sisters. In fact, in the deed of cession, John reserved to himself and his wife the right of occupation of half the house for their lifetime, and when he found his affairs so involved that he was unable to carry on his business, he removed into the house, and lived there on the farm. Further, in 1857, Peter, who was a sailor, made a lease to his brother John, for three years, of this very property. These transactions were kept very quiet; no one knew anything about them, except the few to whom they were communicated. One of the witnesses states that during the whole time, John was the apparent and reputed proprietor of the farm. Under these circumstances, the possession of the farm was in John. The *procès-verbal* says that service could not be

made on John, because he was away. Mr. Shepherd, who was the opposant's own witness, refers in his testimony to circumstances which occurred in 1855. He states that in the fall of 1855, and the beginning of 1856, he knew from Peter, who was then in his employ, that there were some difficulties about the property likely to be raised by the creditors of John. The testimony of Mr. Shepherd shows that Peter had a perfect knowledge of the affairs of John, and it is only natural to suppose that one brother should be acquainted with the affairs of the other. On the 9th of April, 1857, Peter made to John a deed of lease, for three years, of the farm and farm stock which had been transferred to him, and this being seized at the instance of the creditors, Peter filed an opposition, claiming the property as his own. The opposition is contested on two grounds; first, that there was *chose jugée*, and, secondly, upon the merits.

With reference to the second ground, it seems to the majority of the Court on the facts as proved, that the insolvency of John was complete at the time he transferred his property to Peter, and, therefore, the latter had no title to the farm. It is very true, that in these matters of fraud, our law has no particular rules for indicating what fraud is. Fraud is so peculiar in itself, and is made up of so many circumstances, that the decision in every case must be guided by its own particular circumstances. But there are certain principles which it is right to consider in a case of this kind; and one of these principles is with reference to insolvency—that when a debtor ceases to meet his commercial engagements, and has become insolvent, everything he does in this state of insolvency in disposing of his property, is wrong, so far as his creditors are concerned. In this case the farm was withdrawn from the creditors; and there is no clear information as to the consideration for the transfer. It is only upon receipts for money alleged to have been paid that the Court is called upon to say that this was a valid transfer. Mr. Shepherd says the farm was worth £500, and the most that can be made up as paid by Peter is £350, so that there would be £150 to come to the creditors. A person treating with an insolvent is bound to know the position of the party with whom he treats. To know of a fraud, and to participate in it, is an act of complicity, and the person thus concurring in a fraud must repair his own act, and make reparation by annulling the deed at his own cost. The quality of the party must also be taken into consideration; the proximity of relationship, because the interests of near relations are presumed to be the same. The relationship of John and Peter, brothers living together, shows such proximity that their interests are presumed by law to be the same. Then there is the retention of the transferred property. John reserved to himself the right of living on the property, and this not for a short time, but for his own lifetime, and for the lifetime of his wife. Two months after the transfer, he entered into possession of the property and remained there for three years afterwards, having in the meantime taken a lease of it from his brother.

Next, as to the first plea of *chose jugée*. A judgment was rendered in 1861 upon a similar contestation raised by the plaintiff; the only difference being that that contestation arose upon a writ of *fieri facias de bonis*, while this contestation is upon a writ *de terris*. The judgment of 1861 declared the transfer to be fraudulent, and annulled the deed. That judgment has not been appealed from; Peter was a party to it, and it is that judgment which is now set up under the plea of *chose jugée*. In order that this plea may apply, there must be identity of object, of cause, and of parties. The identity of object is not in question here; but the case turns upon the second point, namely, the identity of the contestation, or cause. The same thing may be due for several distinct causes, and therefore a judgment upon one cause, is not a *chose jugée* upon another cause. A judgment upon the form is not a *res judicata* upon the essence of the deed. But a judgment between the same contestants, on a convention, is final as regards the convention itself. It takes away its existence. It was the vice in the convention that was the *fond* of the judgment here, and it is the same vice in the convention that is now attacked. That vice once determined by a

judgment, the jurisdiction of the Court with reference to that convention is a *res judicata*. It is asserted, however, that the nullity pronounced by the judgment applied only to the moveables, and not to the immoveables. But there was only one contract between the parties. John sold his farm and his farm stock, and Peter bought the farm and the farm stock, by one convention, and for one consideration passing from the seller to the purchaser. A deed may be resiliated, it is true, for one head, and not for another; but when a deed contains several heads, and the whole passes for one price, the judgment then applies to the whole, and the deed itself is annulled. Under the circumstances, this Court, in revising the judgment, agrees with the *dispositifs*, both upon the first and the second point. The judgment will therefore be maintained, opposant to pay the costs of revision.

Monk, J., concurred.

SHERIDAN *et al. v.* BOURNE.

Procedure—Foreclosure.

The Court, in its discretion, permitted the defendant, on payment of costs, to file his plea after foreclosure, where the plea was ready, and deposited on the day of foreclosure.

BADGLEY, J. This case, from the district of Iberville, comes up on a matter of procedure. As a general rule, the Court is not disposed to interfere with the discretion exercised by judges in matters of procedure. But in this case there has been a final judgment, and the case comes up in such a way as to justify the Court in interfering. The action was returned and the defendant called upon to file his plea. A day or two after, the defendant filed a motion that all proceedings be suspended till the termination of the *litis* between the parties, in another case, in which the same things were in contestation. The parties remained in this position till September, after the vacation, when the plaintiff foreclosed the defendant from pleading. The defendant had his plea ready, and filed it on the same day that he was foreclosed, having apparently desired to get as long a delay as possible. The Court at Iberville rejected the plea and allowed the plaintiff to proceed *ex parte*. The case now comes up on the final judgment.

This Court is disposed to think that the course adopted was too strict. The plaintiff knew that the plea was filed, because he moved immediately to reject it. Under the circumstances the Court is disposed to revise the judgment and allow the plea to stand. But as the defendant has obtained so long a delay, and as it was his own fault that he did not file his plea sooner, he must pay the costs of the action, which, to avoid any difficulty hereafter, will be taxed by the judgment at $30, otherwise the first judgment will stand.

Berthelot and Monk, JJ., concurred.

PREVOST *v.* POIRIER.

Mortgage—Amount due to be specified.

BADGLEY, J. This is an action *en interruption de prescription*, brought by the plaintiff against the *tiers detenteur*, who has acquired certain property on which plaintiff holds a mortgage under a transfer. The defendant pleads in the first instance that there is no mortgage, because, in the transfer, the amount due is not stated. It appears from the deeds, however, that the amount due is 1700 *livres*, the land having originally been sold for 4700 *livres*, of which 3000 *livres* have been paid. Consequently, the provision of the Registry law, which requires the amount to be stated in the mortgage, is satisfied. The object of the action was simply to prevent prescription from being acquired. The judgment in plaintiff's favour must, therefore, be confirmed.

Smith, and Monk, JJ., concurred.

DEAL *v.* CORPORATION OF PHILIPSBURG.

Municipal Council—Expropriation.

The proceedings of a Municipal Council, which caused the plaintiff's fence to be taken down, and expropriated part of his land, for the purpose of changing the direction of a certain road, without having caused the land to be valued by valuators, were held illegal and set aside.

BADGLEY, J. This is an action for $400 damages against the Corporation of Philipsburg, a small Corporation included in that of St. Armand West, and one of the old Corporations constituted by Royal Letters Patent. This local Corporation was very anxious to change the direction of a certain road, so that

it might reach a particular point in St. Armand West, which would bring its people nearer to the Railway Station, and an application to this effect was made to the County Council. An inspector went to see the road, and returned his *procès-verbal* to the proper officer; and immediately persons were set to work to make the road, who tore down the plaintiff's fence. The plaintiff now claims a certain amount of damages. The plea is that all the proceedings were regularly taken, and that the road is in reality conferring an advantage upon the plaintiff. The latter answers that it may be an advantage, but he has a right to be heard in the matter. He further alleges that all the proceedings taken were contrary to law, and sets out no less than seven or eight different grounds of objection to the proceedings. The judges are all of opinion that these grounds are tenable to the full extent. The judgment that was rendered in the Court below went upon the 71st section of the law, which says that no objections of mere form shall be allowed to prevail in any action under this act, unless special injustice would be done by not allowing the objection. This is a clause to be found in a good many acts, and is intended to prevent mere groundless opposition. But it is a different case where the substantial rights of the parties are concerned. And further, the law provides that no person shall be deprived of his property till valuators have gone and estimated the value, and settled whether anything is to be paid. In this case there was no valuation of the property. The defendants went at once and took down the plaintiff's fence. The Court is of opinion that the Municipal Council had no right to proceed in that manner. The judgment appealed from must, therefore, be set aside, and damages to the extent of $25 will be awarded to the plaintiff, with costs as of lowest class, Superior Court.

Berthelot, and Monk, JJ., concurred.

SUPERIOR COURT.

LACOSTE *v.* JODOIN.

Transfer—Costs of opposition.

Held, that a *cessionnaire* is entitled to the costs of an opposition necessary for the purpose of establishing his title, though the deed of transfer be not enregistered.

SMITH, J. A question was raised in this case as to the opposant's right to costs of opposition. The law says that a man whose title is not registered, is not entitled to the costs of his opposition. The opposition in this case was filed by a *cessionnaire*, who claims under the deed of cession, which is not registered. Is he entitled to the costs of the opposition? The original deed of the *cédant* was registered, and the law does not render it imperative on the *cessionnaire* to register his title. The Court, therefore, is of opinion that he is entitled to the costs of the opposition, because he had no other way of establishing his title. Contestation rejected and report maintained.

HUBERT *et ux. v.* RENAUD *dit* DESLAURIERS.

Execution.

Held, that the plaintiff in a suit has no right to accompany the bailiff when the latter is executing the writ.

SMITH, J. This is an action of damages. The question arises, whether the plaintiff in a suit has a right to accompany a bailiff in the execution of the writ. In this case the defendant in the suit went with the bailiff, and his appearance so incensed the lady of the house, that he was obliged to hold up a chair in front of him to protect himself, while she poked at him with a long stick, and cried to him to begone about his business. The defendant was the most in fault. He had no right to be there. He should not have gone to provoke the woman. The plaintiff will have judgment for $25 damages, with costs as of the lowest class, Superior Court.

TOURVILLE *et al. v.* BELL *et al.*

Partnership.

H. being sued jointly with *B.* as the firm of *B.* & *H.*, pleaded that the firm was composed of himself and *B.'s* wife. The partnership was not registered till after action brought, and credit was given to *B.* & *H.*, the reputed firm:—

Held, that under the circumstances, *H.* was liable.

BADGLEY, J. This is an action brought for goods sold and delivered, under the following circumstances:—The goods were purchased by

the firm of Bell & Higgins. Bell was married to a sister of Higgins, and some years ago Mrs. Bell obtained a *séparation de biens.* It is said that she carried on business with Higgins under the firm of Bell & Higgins; but the partnership was never registered until after the present action was brought. In the meantime her husband continued to buy and sell. No one knew till the plea was filed, that there was a Mrs. Bell, and that she was the partner in the business. No intimation whatever was given to the parties from whom Bell purchased, that Mrs. Bell was the real partner, nor was credit given to her. The plaintiff having brought his action, the case proceeded *ex parte* against Bell; but Higgins said he never was the partner of Mr. Bell, but of Mrs. Bell, and he attempted to prove it by producing the certificate of registration of partnership, the registration being posterior to the institution of the action. This is not enough. Credit was obtained in the name of the two men. Judgment will, therefore, go in favour of the plaintiff for the amount claimed.

RUSSELL *v.* GUERTIN *et al.*

Sale—Possession.

Held, where a person sold the timber upon certain property to two different parties, who both had possession, that the title of the first vendee was to be preferred to that of the subsequent purchaser.

BADGLEY, J. This is an action to recover the value of some timber which was cut down. On the 21st July, 1865, Baxter, the party then in possession of certain property, sold to Cosgrove the white pine timber upon the land in question by a written agreement. The timber was to be cut in November following, and to be paid for at the rate of $8 per thousand feet. The area of the land was 256 acres. On the 1st November following, Cosgrove assigned his rights to the plaintiff under a written engagement, for consideration stated to have been received. We have, therefore, the chain of title clearly and strongly deduced. It appears, however, that Baxter afterwards, in October, sold to the defendant, Guertin, who entered upon the land and cut down 210 trees. This timber, it is proved, was of the most valuable description, being the first cut upon the land: and the average length was between seventy and eighty feet. Cosgrove was to pay $8 per 1000 feet, 210 trees at 70 feet would make 14,700 feet equal to about $120. On the other hand, taking 210 trees at $3, the proved value, it would amount to $630. The question of right in the timber is mixed up with possession. There is no doubt of the sales by Baxter to the defendant Guertin, and also to Cosgrove. Both sales were made by the same person, the latter in July and the former in October. It appears that Guertin only overcame Baxter's repugnance to sell to him also, by telling him Cosgrove's purchase was not valid, because the latter had not paid any earnest. The sale to Cosgrove, however, was a perfect bargain between Cosgrove and Baxter, and nothing further was was required to be done. Baxter himself had no right to depart from it. When Guertin went upon the land to cut timber, the plaintiff forbade him to proceed, but Guertin went on cutting trees, which the plaintiff marked with his own mark. So not only was Guertin aware that the timber was cut, but he was also aware that the 210 trees were all marked with the plaintiff's mark. The timber was then floated down to the mouth of the Gatineau, and while it was floating about there, the plaintiff attempted to raft it, but Guertin would not permit him to do so. The plaintiff then took out a *saisie-revendication,* and the timber was placed under the care of two guardians. Guertin, however, apparently thinking that he was out of the reach of the law in those parts, floated away the two rafts, with the two guardians on them, to the opposite side of the river. When they reached St. Genevieve, another attachment was taken out, and by this the timber was seized and brought under the jurisdiction of the Court. Under the circumstances, the Court is of opinion that the original title to Cosgrove was a good title, and could not be interfered with by Guertin. It preceded the contract of the latter, and must be preferred to it. Guertin alleges that he entered on the land first; but when Baxter went over the land with Cosgrove, he gave Cosgrove possession of the timber as far as it was possible to do so. Both having had possession, the question is, whose possession was the best. In order to settle this point, it is

necessary to go back to the titles. Now Cosgrove had both the first title and possession. Guertin's subsequent possession can not prevail over this. Judgment will therefore go maintaining the *saisie-revendication* for the value of the timber, at $3 per tree.

LIGHTHALL *v.* WALKER.

Verbal Slander—Taxation of Witness struck off.

Held, that the use of the term "loafer" in reference to a person, gives ground for damages.

Held, also, that where the evidence shows that the suit has been maliciously instigated and urged on by a witness, the taxation of such witness will be struck off.

BADGLEY, J.—This is an action to recover damages for verbal slander, brought by a notary of respectable standing in the city. The upper floor of defendant's house is occupied by a clergyman named Donaldson. On this upper floor was by a sink, by which the dirty water was sent down. Unfortunately, the defendant is a married man, and as it happened, the ladies of the two families were not quite harmonious in their intercourse; and long before the present action was brought, considerable differences existed. On one occasion these dissensions grew to such a height, that the Rev. Mr. Donaldson instructed the plaintiff with whom as an elder of his Church he had some acquaintance, to serve a protest upon the defendant on account of the defective state of the premises. On the day this protest was served, there was more than usual excitement about the dirty water from the upper story, some of which, owing to the condition of the sink, fell down upon the cradle in which the defendant's child was sleeping. The lady on the lower story was not pleased to see her child bathed in this dirty water, and when the plaintiff came to serve the protest, she was in a particularly bad humour. When the defendant, her husband, came home, the events of the day were of course communicated to him. He was told not only of the protest, but also about the dirty water, and the injury to the child. The defendant, with some reason in his proceedings, called in a neighbour, a respectable woman, as a witness, and went up to Donaldson's premises, to speak to him about the overflowing of the sink. They accordingly ascended the stairs, and not wishing to open the door improperly, knocked on the partition. This brought out Mrs. Donaldson, Mr. Donaldson remaining inside, and hearing what was going on. Walker began at once by saying that it was very wrong to allow the sink to overflow in this way, and one word led to another, till Walker said, "Why did you allow a loafer like that Lighthall to come and bring me a paper," and added some further imputations on that gentleman's character. Then the clergyman told him he would kick him down stairs if he did'nt go at once, and used most abusive language with reference to him. He afterwards went to Walker's office to pay his rent. Walker not being in, Donaldson amused himself by abusing Walker to strangers in the place, and in fact, brought a man with him expressly to hear how he abused Walker. He also declared, "I will ruin him and see him on the street within six months; he has a house to pay for and I have none." He further spoke of his being a Minister of Christ, and likened his treatment of the defendant to the chastening which God inflicts on his erring children for their good. A man who could conduct himself in this way is not one upon whose testimony much reliance can placed. Having told the plaintiff the story of how Walker had abused him, and said, according to his version, "Why did you send that miserable loafer, Lighthall, who had to fly from his country, to serve me with a paper?" he succeeded in inducing Mr. Lighthall to bring the present action. It is proper to state that there is not a tittle of evidence in the record that can injure the character of Mr. Lighthall. No credit is to be attached to the evidence of Donaldson and his wife. The Court will take, in preference to the statements of these people, the evidence of the woman who accompanied Walker up the stairs. She states that the words mentioned above were never spoken, though she admits that Walker did make use of the word 'loafer' in reference to Mr. Lighthall. In using this word he employed a most offensive term, which was altogether unjustifiable. He had no business to bring the name of Mr. Lighthall into his

quarrels with Donaldson. The plaintiff has thus been exposed to the trouble and annoyance of bringing an action of this description. Under these circumstances the Court cannot justify the defendant. He must learn to speak more circumspectly. It is true that this action has been stirred up by Donaldson, whose conduct throughout has been most improper. The Court will, in consequence of this, order his taxation as a witness to be struck off, as it cannot be permitted that a witness shall be paid in a case which he has prompted and instigated. The defendant will be condemned to pay $25 damages, and costs as of the lowest class in the Superior Court.

RYLAND *v.* ROUTH.

Court of Review—Deposit.

Held, that the deposit in the Court of Review will not be paid over to the successful party, when an appeal is taken from the decision in Review.

BERTHELOT, J. In this case an appeal was taken from the decision of the Court of Review, and the plaintiff, who has been successful in the latter Court, now moves that the deposit be paid to him at once. The Court is of opinion that while the case remains undecided, owing to the pending appeal, the application cannot be granted, as the costs must abide the final decision.—Motion rejected.

RECENT ENGLISH DECISIONS.

Negligence — Railway Company — Level Crossings—Injury to foot passenger—Absence of Protection for Carriage Traffic.—The defendants' railway crossed on a level a public carriage and footway near to the P. station. There were gates across the carriage-way, and a turnstile for the use of foot-passengers. S., a foot-passenger, whilst traversing the railway at the level crossing, was knocked down and killed by one of the defendants' trains. At the time of the accident, contrary to the provisions, by statute and by the defendants' rules, for the safety of carriage-traffic, the gates on one side of the line were partially open, and there was no gatekeeper present to take charge of them; although no traffic was passing across, and although a train was overdue. In an action against the defendants by the executors of S.:—*Held*, that there was, under the circumstances, evidence of negligence on the part of the defendants to go to the jury, inasmuch as by neglecting the required precautions for the safety of carriage traffic, the defendants might be considered to have intimated that their line might safely be traversed by foot passengers. Stapley *v.* The London, Brighton, and South Coast Railway Co. Ex. 21. Baron Channell remarked: "At the time of the accident one of the carriage gates was open. It did not exactly appear how the gate came to be open. Half an hour before it was proved to have been shut. Nor does it appear how the deceased got on to the line, whether through the open carriage gate or through the turnstile. Now, upon the part of the company, it was argued that whatever obligations they were under for the protection of carriage traffic, neither the statutes nor the rules applied to the case of foot passengers. But by rules 219 and 220 it is provided, that 'the gates must be kept shut across the carriage road, except when required to be opened to permit the railway to be crossed;' and that before opening them the gateman must satisfy himself that 'no train or engine is due or in sight.' In this case the gate was open, there was no gateman present, and the train was overdue. Supposing, then, the case had been one of a carriage passenger, there would have been negligence proved against the company. Then, the carriage gate being open, and no gatekeeper present, a foot passenger was invited by that state of things to pass across the line, and the conduct of the company, therefore, was, we think, evidence of negligence to go to the jury. The case depends upon the principle of *Bilbee* v. *The London, Brighton, and South Coast Railway Company*. We adopt the opinion there expressed by Erle, C. J., that we ought to be careful not to impose any undue burdens on railway companies that are not imposed on them by act of parliament, and we do not say that a railway company must keep servants at every crossing. At the same time, we concur in the view, that the company are not to be exempt from using due and ordinary care, although their statute gives them the right of crossing public ways on a level."

Injunction — Railway Company — Inequality of Charge for "Packed Parcels."—The plaintiff, a "packed parcel" carrier, having been charged by the defendants, and having paid to them under protest, a sum for the carriage of his packed parcels beyond the sum charged by them to certain wholesale houses, for the carriage of goods of a similar description, brought an action against them to recover the amount of the overcharge, and obtained a verdict, which was afterwards upheld in the Exchequer Chamber, upon argument of a bill of exceptions. The defendants continued, however, to make the same charges, and to receive the same sums of money from the plaintiff for the carriage of his goods, as before, and he therefore issued a fresh writ to recover the money paid by him during another and more recent interval of time. After issuing the writ, he applied, under the provisions of the Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125,) ss. 79, 82, for an injunction to restrain the defendants from charging him for the carriage of his goods, "otherwise than equally with all other persons, and after the same rate, in respect of goods of the like description under the like circumstances:"—

Held, that the case was not one in which the Court would exercise their statutory power to grant an injunction. Sutton *v.* The South Eastern Railway Co. Ex. 32. Pollock, C. B. observed, "I think we ought to be very cautious in dealing with this power which has been conferred upon us, in cases where there can be no appeal from our decision. * * * It is not true that the plaintiff has no other adequate remedy. He can recover his money back again, and, as I think, can recover it back with interest. The inconvenience, moreover, of granting this injunction might be very considerable; and by doing so, we should not effect any advantage to the plaintiff. * * * It is much better that the plaintiff should appeal at once to a jury, directly and not indirectly, for any infringement of his rights which he may have suffered."

PROBATE, MATRIMONIAL AND DIVORCE.

Will — Execution — Position of Testator's Signature.—A will ended on the middle of the second page of a folded sheet of paper, and the rest of the page was in blank. The attestation clause and the signatures of the testator and the attesting witnesses were written on the third page, the signature of the testator being opposite to the clause appointing executors, the attestation clause being written beneath the signatures and ending opposite to the concluding words of the will, and the signatures of the attesting witnesses being at the bottom of the attestation clause:—*Held*, on motion, that the signature was so placed beside or opposite to the end of the will, that it was apparent on the face of the will, that the testator intended to give effect by such his signature to the writing signed as his will, and that the will was therefore entitled to probate under 15 Vic. c. 24, s. 1. In the Goods of Williams, P. M. & D., p. 4.

Will — Ambiguity — Parol Evidence — Mistake.—A testator duly executed a will and five codicils. The fourth codicil revoked the three preceding codicils, and the fifth codicil confirmed the will and the four codicils. Parol evidence was admitted to explain the ambiguity of these codicils, and it was proved that the confirmation of the will and four codicils contained in the fifth codicil was a mistake, the intention of the testator being to confirm the will and the fourth codicil. Probate was granted, on motion, of the will and the fourth and fifth codicils only. In the Goods of Thompson, P. M. & D. p. 8. Sir J. P. Wilde said: "There is sufficient ambiguity in the codicils to let in parol evidence to explain it, and on that evidence I will grant probate of the will and the fourth and fifth codicils only."

Seaman's Will—Surgeon in the Navy.—A surgeon in the navy was invalided at a foreign station, and wrote a letter at sea, on board a steam-ship, on which he was a passenger homewards, containing directions as to the manner in which he wished his property to be disposed of:—

Held, first, that a surgeon in the navy was a mariner or seaman within the provision contained in 29 Car. 2, c. 3, s. 23, and 1 Vict. c. 26, s. 11, exempting mariners or seamen, being at sea, from making formal wills.

Secondly, that although the deceased was not on duty at the date of the letter, yet as he was returning from service, this will was entitled to probate, as made at sea. In the Goods of Daniel Saunders, P. M. & D. p. 16. The will was a letter written by deceased to his brother in the following terms:—

"P. & O. Steamer, 'Cadiz,' 12 hours from Hongkong, China, June, 1865.

"My dear George, I am very ill, and am daily getting more exhausted, so I endeavour to write my last wishes. I was invalided at Yokohama, June 8, 1865, for disease of the liver of four months' standing, and sent home overland for the preservation of my life. The small note contains a cheque for £396, &c., which I wish to be equally divided between my dear mother, three sisters, and yourself. There is also in the funds some £1200 belonging to me. Mr. Lawrence has the whole management of this, and you can write to him and ask him to send the whole amount to you, which I wish to be equally divided between you all. There is also money in my portmanteau in the leather bag, and there will be some residue of pay due to me from the Admiralty. Mr. Lawrence will assist you, I dare say. I wish to leave Mr. Lawrence £40 to purchase a mourning ring in my memory. This is all I am able to write at present. God bless you all; Amen. My love to all. I am completely exhausted. A long farewell to you all, my dear relatives; and may the Lord bless and protect you all is my last wish in this world; and when I do depart, may the Lord receive my soul is my fervent prayer.

I am, your loving brother,

D. Saunders, R. N.

"At sea, June 25, 1865. Near Hongkong, China."

Dissolution of Marriage.—In a suit for dissolution of marriage, the only evidence of adultery consisted of written and verbal admissions by the respondent, and of a verbal admission by the co-respondent. The Court being satisfied, from the circumstances under which these admissions were made, and the conduct of the respondent at the time when they were made and subsequently, that they were genuine, and that there was no reasonable ground to suspect collusion, pronounced a decree *nisi*, with costs against the co-respondent. Williams *v.* Williams and Padfield, P. & D., p. 29. The parties in this case were married in July, 1856. A few years after, they went to live at Chantry in Somerset, where the petitioner held the situation of organist of the church, and taught music; their house was opposite the house occupied by the family of the co-respondent, who was a farmer; and the two families became intimate and visited at each other's houses. On the 9th of July, 1863, Mrs. Padfield, who suspected that her son George was carrying on an improper intercourse with Mrs. Williams, taxed him with it, and he did not deny it. She then sent for Mrs. Williams, and taxed her with it: Mrs. Williams confessed it, and fell on her knees, and asked that it might be concealed from her husband. Mrs. Padfield said she should tell Mr. Williams, and Mrs. Williams then went back to her house, packed up her things, and went away by the railway, before her husband returned from business, to her mother at Southampton. When Mr. Williams returned home, Mrs. Padfield communicated to him what had taken place. On the following day, the 10th of July, Mrs. Williams wrote to her husband a repentant letter, and in that and in several other letters, which were put in evidence, she begged to be forgiven, and plainly acknowledged her guilt. There was no evidence of adultery except these confessions. The Judge Ordinary observed: "In each case the question will be whether all reasonable ground for suspicion of collusion is removed. I think that all reasonable ground for suspicion is removed in this case."

Nullity — Malformation of Woman — Refusal to submit to examination.—The respondent, in a suit for nullity by the man, on the ground of malformation, had not been personally served with the citation, and had never submitted to a medical examination, and could not be found, but was supposed to be out of the jurisdiction. No evidence could therefore be given that she was suffering from incurable malformation. The Court suspended its decree, in order to give the petitioner an opportunity of having her examined

if she should hereafter be found within the jurisdiction. T. *v.* M., P. M. & D., p. 31. The Judge Ordinary said: "This petition was filed by a husband for the purpose of having his marriage with the respondent declared null and void, on the ground of the incurable malformation of the wife, and the petitioner and some medical men were examined in support of the allegations in the petition. It appears that the marriage took place on the 11th August, 1864, that the parties lived together for about six weeks, and that at the end of that time the wife, under pretence of a temporary visit, left the husband's home in concert with her elder brother, and went with him to the continent, in order to avoid the petitioner. The consequence was, that the petitioner was unable to obtain what is invariably required in these cases, namely, a medical inspection of the respondent; and he has been placed in a difficulty as to proving his case, if it was capable of proof. But the Court must look at the evidence before it, and if that evidence is not sufficient to establish the proposition that the wife is the subject of incurable malformation, precluding consummation of the marriage, it cannot grant a decree. Now the evidence of the petitioner by no means satisfies the Court of that fact, and the evidence of the two medical men who attended the respondent, but neither of whom had examined her person, rather pointed to a complaint of a very different character, and in its nature curable. On that evidence the Court cannot grant a decree, but it will, as it has done in a former case, suspend its decree if the petitioner desires it, with the view of having the respondent examined, if she should come to this country, as such an examination alone can satisfy the Court that a decree ought to be pronounced. If the petitioner is not satisfied with this judgment, but desires an opportunity of appealing from it, the Court will at once dismiss the petition."

Alimony—Examination of Husband.—A husband, who had filed no answer to his wife's petition for alimony, was subpœnaed by her to attend at the hearing, and to be examined in support of the petition. He did not answer to his subpœna, and on the service being proved, the Court made an order that he should attend on the next motion day, and that an attachment should issue in the event of his non-attendance. Jennings *v.* Jennings, P. M. & D., p. 35.

ADMIRALTY AND ECCLESIASTICAL.

Wages—Illegality—Breach of Blockade.—By principle, authority, and usage, it is not a municipal offence, by the law of nations, for a neutral to carry on trade with a blockaded port. In a suit for wages, upon an agreement entered into for the purpose of breaking the blockade of the Confederate States of America, an article in the defendants' answer, alleging such agreement to be contrary to law, ordered to be struck out. The Helen, A. & E. p. 1. Dr. Lushington, who rendered the judgment, referred to a decision of Lord Westbury, whilst he was Lord Chancellor, laying down that a contract of partnership in blockade-running is not contrary to the municipal law of England. He also cited a judgment of Chief Justice Parsons, in which the law is stated as follows: "It is agreed by every civilized state that, if the subject of a neutral power shall attempt to furnish either of the belligerent sovereigns with goods contraband of war, the other may rightfully seize and condemn them as prize. But we do not know of any rule established by the law of nations, that the neutral shipper of goods contraband of war is an offender against his own sovereign, and liable to be punished by the municipal laws of his own country." Dr. Lushington concluded by saying: "I cannot entertain any doubt as to the judgment I ought to pronounce in this case. It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that, to carry on trade with a blockaded port, is or ought to be a municipal offence by the law of nations."

Bottomry Bond.—Transactions between the owner and mortgagee of the vessel, which might render the voyage illegal, cannot invalidate a bottomry bond given by the master to a *bona fide* lender, who has only to look to the facts that the ship is in distress, that the master has no credit, and that the money is required for necessary purposes. The Mary Ann, A. & E. p. 13.

CHANCERY APPEAL CASES.

Succession Duty—Foreign Domicile.—Succession duty is not payable on legacies given by the will of a person domiciled in a foreign country. Wallace *v.* Attorney General. Jeves *v.* Shadwell. Law Rep. Ch. Ap. 1.

Vendor and Purchaser—Sale—Conditions of Sale—Puffers.—Property was put up for sale by auction, the conditions stating that the highest bidder was to be the purchaser, and not saying anything as to bidding on behalf of the vendors. An agent of the vendors bid £2,500, the auctioneer then bid £2,600, and the agent and the auctioneer continued bidding against each other, till the biddings reached £3,600. The defendant then bid £3,650, and the property was knocked down to him:—

Held, reversing the decision appealed from, that the vendors could not enforce the contract.

Quære whether the rule allowing one puffer is good. Mortimer *v.* Bell, Ch. Ap. 10. From the evidence in the cause it appeared that what took place at the sale was as follows:—The vendors instructed the auctioneer to put up the property for sale, but not to let it go under £4,000. The auctioneers, very eminent men in their line of business, employed a person named *Webb* to bid, which the member of the firm who acted at the sale stated in his evidence to be the universal practice, unless a sale was to be without reserve. *Webb*, by the direction of the auctioneer, started the biddings at £2,500. The auctioneer then bid against *Webb*, and so on, until the biddings reached £3600. The defendant then bid £3650. The auctioneer then, by the direction of one of the vendors, who was present, ceased to bid, and the property was knocked down to the defendant at £3,650. From the first bidding of £2,500, the biddings had advanced by £100 each time, *Webb* and the auctioneer bidding alternately, so that there had been eleven fictitious biddings, that of the defendant being the only real one. The purchaser insisting that the sale was fraudulent, and refusing to complete, the vendors filed a bill for specific performance, and the purchaser brought an action to recover his deposit. Lord Cranworth, L. C., observed: "The conditions of sale in this case contained the usual provision that the highest bidder should be the purchaser. Courts of law have held that such a condition prevents the vendor from interposing any reservation—that he has, by that condition, agreed that whoever offers the highest price shall have the property. A bidding by the vendor, or his agent, is, it is said, no bidding, and so there is a contract that the highest bidder other than the vendor shall be the purchaser. It is not disputed that the vendor may stipulate for the power of buying in the property, if it is going at a sum below what he considers a fair price. But in the absence of such stipulation, courts of law hold, that it is a fraud in a vendor to interpose any bidder to prevent the property from going to the person who offers the highest price. * * * Here there were in effect two persons (*Webb* and the auctioneer) bidding for the vendors. The whole sale, up to the bidding of £3,600, was a mere fiction. * * * I can find neither principle nor authority for holding that in such a case a vendor who, by this misrepresentation, has induced a third person to bid, can enforce his contract." [The Lord Chancellor even doubted whether a sale would be valid, if there were only one fictitious bidder, or *puffer*, unless it were stipulated that the property would not be sold under a fixed price. If this doctrine were enforced in Canada, a good many sales at auction would be null.]

Ancient Lights—Injury.—The owner of ancient lights is entitled not only to sufficient light for the purpose of his then business, but to all the light which he had enjoyed previously to the interruption sought to be restrained.

CRANWORTH, L. C., observed: "Even if the evidence satisfied me, which it does not, that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have sufficient light remaining, I should not think the defendant had established his defence unless he had shown that for whatever purpose the plaintiff might wish to employ the light, there would be no material interference with it." (The local custom in London permitting the owner of a house to raise it to any height he might think fit, was abolished by 2 and 3 Wm. IV., c. 71, and the Lord Chancellor feared that serious inconvenience would ensue.) Yates *v.* Jack, Ch. Ap. 295.