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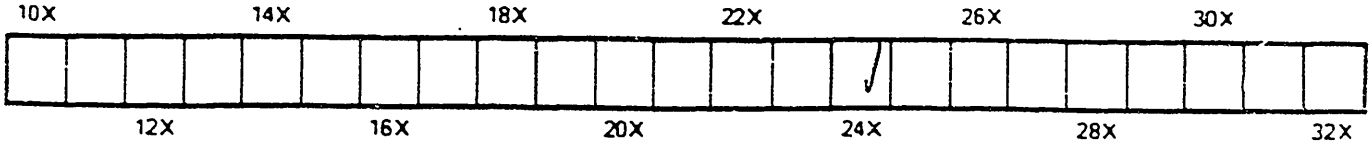

# THE EXAMINER;

A

Monthly Review of Legislation & Jurisprudence.

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# L'OBSERVATEUR,

Revue Mensuelle de Legislation et de Jurisprudence.

Conducted by Members of the Quebec Bar.

No. 2.—FEBRUARY, 1861.

Quebec:

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1861.

To afford to Members of the Legal Profession facilities for the discussion of important points of law; to point out to the Legislature necessary reforms in the Judicature of the Country; to awaken the Public to the importance of the interests which they habitually neglect, and to secure for the Profession to which they have the honour to belong that position in society to which it is entitled, are the chief objects of the conductors of this periodical.

Free from all political or party bonds, they will endeavour so to discharge the duties they have assumed, that it shall be impossible to bring against them the charge of having, in any instance, acted through fear, favour or prejudice.

# The Examiner.—L'Observateur.

No. 2.] QUEBEC, FEBRUARY, 1861.

In the last number of this Review appeared a promise to point out some of the leading contradictions apparent in Mr. Cartier's Judicature Acts. Their number, considering the importance of the work undertaken, is small; but still every departure from the natural consequences of a principle called into action being productive of discord and confusion, it is but right that the attention of the framer of the Acts in question should be drawn to defects which mar the beauty and utility of his *chef-d'œuvre*.

The first weak point presenting itself is, that though, in cases inscribed for *enquête* and hearing, and for *enquête* solely, it is provided that the witnesses shall be examined in the presence of a Judge, it is not enacted that the Judge who hears the first witness shall alone be qualified to sit in the case and give the final judgment. Thus one Judge may hear three witnesses, another of the brethren of the Bench hear three others, and a third Justice pronounce the judgment. Can it be supposed that it was the intention of the Attorney General that the leading principle of his Acts should be thus violated?

2. It was, as has been already remarked, the intention of the Legislature to bring the witnesses face to face with the Judge, who was to found his judgment on their testimony delivered in his presence. It may be said that that portion of the Act by which the old practice of written depositions, taken in the absence of the Judge, was reformed, amounted to an expression of opinion on the part of the Legislature that that system was bad and required change; yet, strange to say, written depositions form the parole testimony upon which the Judges of the Queen's Bench found their judgments, reversing in many instances those of their brethren of the Superior Court, who, under the law, are supposed to have had the privilege of studying all the concomitants of the witness's words, in the shape of his gestures, style, and appearance. There, then, is a manifest, patent contradiction. Either one system or the other is wrong; and no difficulty can be experienced in arriving at the conclusion that the proof, as presented for the consideration of the Court of Queen's Bench, is of an inferior class to that on which the Superior Court founds its decisions.

3. An addition has been made to the number of the Judges in Appeal, and that Court is now composed of five members. That the change in question has aided in rendering the jurisprudence of the country still more confused, admits of little doubt. A judgment, for instance, is rendered in the Superior Court by one Judge,—it is then taken into Appeal, and the judgment is reversed by that Court, two of the Judges dissenting. Within three months a precisely similar point may be raised in Appeal;—the Judge of the Superior Court who rendered the first

judgment may be named *ad hoc* in lieu of one of the majority in the former case, and may, with the Judges who dissented therein, give a decision diametrically opposed to the one first rendered. The old number of four presented the means of attaining the largest possible majority—three against one; it is true that occasionally they were equally divided, and then the law confirmed the judgment; but in such case the Court below, composed of at least two members, gave a majority of two or three Judges, according to the circumstances, in favor of such confirmation. There is no such difference in mental attainments existing between the Judges of the Court of Queen's Bench and those of the Superior Court as would justify the presumption, that a single Judge of the former is always right when his opinion clashes with that of one of his brethren of the latter Court. But rarely is an unanimous decision rendered in Appeal—one dissentient in almost every case brands the judgment of the majority as unfounded in law. On many occasions two of the learned brethren, by lengthy and elaborate arguments, strive to relieve themselves from the opprobrium which they consider would attach were they to acquiesce in a judgment so tainted with injustice, so devoid of equity, as that from which they then have the honor to dissent. Extemporaneous essays, occupying three-quarters of an hour in their delivery, render but more confused the judgment of the majority. Propositions are therein thrown out, carelessly and hastily, which are entirely unfounded in law; facts are mis-stated, and the elementary principles of jurisprudence are denied. A system of pleading is praised by one honorable Judge, abused by another, and its existence denied by a third, and all in the course of one afternoon, whilst a single cause is being decided. American authorities are tabooed, and English precedents are frowned down, whilst the Commentators on the Code Civil are received as diamonds of the first water. Quotations from the Lower Canada Reports are often greeted with a growl of disapprobation, and one or two of the learned Judges beg to protest that their remarks in the cases cited have been misrepresented, and that they have not the slightest idea of pinning their reputations upon *les décisions des tribunaux du Bas-Canada.*

We may perhaps be here allowed to advert to another subject of the highest importance, which, though not falling within the exact limits originally meted out for this article, still may be considered as so analogous that it may fitly be introduced. For years we had the extraordinary anomaly presented of two systems of evidence in force at one and the same time in Lower Canada. In commercial and criminal cases, the proof was made according to the Law of England, and in all others the old French rules of evidence, founded chiefly on the Ordonnance of 1667, governed the cause. By the latter system, the relatives of the parties within certain degrees could not be examined; two witnesses were requisite in order to make satisfactory proof of a fact; and no one of the parties to a suit could be examined as a witness. That this was an inconsistency of the greatest magnitude had been felt by many members of the legal profession—that it was one reflecting discredit upon our system of law was admitted; but no Attorney General had, up to the year 1860, the moral courage to ventilate the project of reducing the laws of evidence in Lower Canada to order, and of recognising the same principles as applicable to all cases. To Mr. Cartier belongs that honor:

he, a French Canadian, disregarding the prejudices of his nation, (who cling to the French rules of evidence as a portion of their institutions, and who, had an Anglo-Canadian proposed such a change, would have greeted it with hootings and outcries,) carried through his project, swept away distinctions and rules which really fostered injustice, and placed Lower Canadians on a level with other people. It was a great reform—it was sagaciously conceived—it was ably carried out; and so manifest is the benefit to be derived, that no one has dared to appeal to the prejudices of the mob, on the ground of a portion of an institution having thereby been swept away, for even popular censure upon the author of the measure.

By one of the sections introducing the changes in question it is provided, that any party to a cause may examine any of the other parties thereto, who may be cross-examined by his or her Attorney, but that nothing said by such party in his or her own favor shall be taken into consideration by the Judge. Now the effect of this provision will be, to envelope the examination of such party with all the clouds, heretofore surrounding answers upon *Faits et articles*. Would it not be better to leave the credibility of the party so examined as a question to be decided by the Judge, in lieu of according a cross-examination, which is declared inoperative, and from which no good can be derived by the party cross-examining? Would it not be as well moreover that there should be an explicit declaration on the part of the Legislature, quoad the effect of the evidence of the parties? Are their answers to be looked upon as equivalent to those given to *Interrogatories on faits et articles*, furnishing a *commencement de preuve par écrit*, and providing a substitute for the memorandum in writing required by the Statute of Frauds?

An opponent of the system and reforms introduced by Mr Cartier, might discover other inconsistencies and apparent contradictions, in the constitutions of the Courts as remodelled by him, but it is very doubtful whether he could suggest any amelioration or remedy. To play the critic is easy, to cavil at the merits of an idea does not require ability of the first order; but to create, a new judicature system, in which but few errors can be found, to sweep away rules having strong root in the prejudices of his people and which were fostered by his own education, and to have the moral courage to borrow from another system, regarded with peculiar dislike by his compatriots, its excellences, speak volumes in proof of the intellectual power and independence of him who has so created and so acted.

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## DU DROIT DU BAS-CANADA.

*(Suite.)*

Dans un premier article, nous avons signalé la plaie profonde et béante, qui affecte la législation du pays. Un rapide regard jeté sur l'ensemble de nos lois a été plus que suffisant pour dévoiler les vices et les défectuosités dont elles fourmillent. Si notre travail devait s'arrêter là, il ne présenterait pas l'ombre d'une difficulté. Tout le monde peut sonder une plaie, reconnaître une maladie qui s'annoncent par des signes extérieurs; mais dès qu'il s'agit de remonter aux

causes du mal, le doute surgit, les hypothèses se succèdent et se détruisent; car ici le témoignage des sens ne suffit plus—il faut y ajouter l'observation et les connaissances que l'étude de l'art peut seule faire acquérir. Nous sentons que pour atteindre le but proposé, il faudra un surcroit de volonté et de courage; et que pour assigner les causes qui ont fait la législation du pays, si obscure, si contradictoire, il faudra soulever des questions brûlantes, souvent agitées, qui sont plutôt du domaine de la politique que du Droit. Ce terrain est glissant et dangereux; on n'y entre guère sans rencontrer dès le premier pas, des ennemis et des censeurs, qui trouvent mauvais que la vérité se fasse entendre, quand elle est de nature à froisser leurs opinions et leurs sentiments. Nous croyons remplir un devoir et nous poursuiverons avec courage la tâche que nous avons entreprise.

L'état déplorable dans lequel se trouve la législation du pays, résulte du conflit des intérêts et des préjugés qui agitent et aveuglent nos législateurs. Aujourd'hui que le christianisme a promené partout le flambeau de la vérité, il est humiliant pour notre siècle, de recourir à l'histoire d'un peuple payen, pour y chercher des exemples et des enseignements; pour y rencontrer l'amour de la patrie, le désintéressement et le respect dû aux institutions; toutes ces vertus civiques qui font les grands hommes et les grands Etats et qui sont si rares dans notre pays.

Jamais peuple ne fut aussi jaloux de ses institutions civiles que le peuple romain; aucun ne porta aussi haut que lui le respect et l'attachement aux lois existantes—ce fut le secret de sa grandeur. Désintéressés pour eux mêmes, les citoyens se sentaient mus d'une ambition surprenante, dès qu'il s'agissait de la chose publique. Tendant tous au même but, à la conquête du monde; travaillant tous à la réalisation du même avenir, à la gloire de Rome, ils n'aimaient pas les changements et les innovations, et respectaient l'œuvre de leurs devanciers. C'est ainsi que la loi des Douzes Tables fut longtems, pour les citoyens romains, un monument aussi saint, aussi respecté que les temples qu'ils élevaient aux Dieux. Malgré les rigueurs et la sévérité qu'elle proclamait contre le débiteur insolvable, cette œuvre des premiers temps de la république romaine fut si respectée que pendant longtems il n'y fut fait aucun changement. L'album du Préteur sut bien, plus tard, il est vrai, adoucir dans l'application, la trop grande rigueur des lois; mais à côté de ce droit prétorien, qui s'introduisit peu à peu comme les Coutumes en France, la loi première restait entière, l'édifice restait intact: c'était le Droit strict dont l'abolition eut été regardée comme un sacrilége, tant ce peuple avait de respect pour ses institutions. Aussi, tous les monuments élevés par le peuple romain ont ils traversé les siècles, marqués au cachet de la grandeur et de l'immortalité; et aujourd'hui encore, le jurisconsulte en présence de la législation romaine, et le touriste en face du Colisée sont ravis d'admiration pour les œuvres d'un peuple, qui a laissé derrière lui des ruines imposantes, qui racontent bien mieux sa grandeur passée, que l'histoire la plus exacte et la plus fidèle.

Mais l'intérêt public, ce puissant mobile qui rassemblait autrefois le peuple romain sur le forum et qui animait toutes les délibérations du sénat, n'est ici qu'un piédestal dont on se sert pour y asseoir l'édifice de sa propre fortune et de sa propre grandeur. Qu'importe après tout à nos législateurs, que le pays pos-

sède ou non une bonne législation, pourvu que, leur carrière politique une fois terminée, ils occupent une charge lucrative, qui ne les mette plus dans la nécessité de solliciter les suffrages du peuple ? Mais cette égoïsme ne doit pas nous étonner, dans un pays comme le nôtre, où les différences d'origine et de religion creusent un abime entre les représentants d'origine anglaise et ceux d'origine française; entre ceux qui appartiennent à l'Eglise d'Angleterre et ceux qui appartiennent à l'Eglise de Rome. La religion, ce puissant moteur qui donne l'essor aux grands dévouements et aux grandes vertus; cette chaire mystérieuse qui relie entr'eux les habitants d'un même pays quand elle parle à tous le même langage et impose à tous les mêmes devoirs et les mêmes obligations, n'est plus qu'un brandon de discorde, un principe de désunion, quand au lieu d'être unique dans sa dénomination, ses enseignements et sa foi, elle revêt des caractères, et formule des symboles différents. L'origine, ce foyer toujours ardent où se concentrent les souvenirs du passé comme les espérances de l'avenir quand elle est commune à tous, donne souvent naissance à des aspirations et à des tendances opposées quand elle se diversifie dans les limites d'un même territoire. C'est ainsi que les enfants d'une même famille trouvent dans leur communauté d'origine et d'éducation, des liens de rapprochement et des raisons de sympathie, qui n'existent plus entre ceux issus de familles différentes. Ce défaut d'unité dans la religion et l'origine des habitants de ce pays, a exercé une influence surprenante sur la législation provinciale et explique, du moins, partiellement, les contradictions dont elle est parsemée et les changements qu'on cherche constamment à lui faire subir.

Cette lutte incessante, produite par le choc des croyances religieuses et l'absence d'unité dans l'origine des habitants de ce pays n'est pas la seule qui s'opère au sein de la Législature. Il est une autre cause de désunion, inhérente au gouvernement constitutionel et dont les effets sont plus funestes encore à notre législation provinciale : c'est le conflit des opinions politiques qui se produit entre les partisans du ministère et ceux de l'opposition. Ceux-ci, entraînés par l'ambition et l'esprit de parti, ne cessent de battre le ministère en brèche et de s'opposer à l'introduction des mesures que ce dernier suggère, sans s'inquiéter si elles sont de nature à accroître la prospérité du pays; ceux-là se confiant dans leur nombre et dans leur force, ne pensent qu'à déjouer les trames ourdies par leurs adversaires et qu'à se prévaloir de la faiblesse et de l'impuissance de ces derniers pour inonder le pays de nouvelles lois, qui ne servent qu'à compliquer les difficultés. Ainsi, lorsqu'un projet de loi est soumis à la Législature, la réforme ou bien le bouleversement qu'il peut opérer dans la législation déjà existante n'entre guère en considération. On se demande uniquement, s'il est l'œuvre du ministère ou de l'opposition, et son origine décide de son sort. C'est ainsi que des projets de loi préparés avec soin et qui dénotaient chez leurs auteurs une connaissance approfondie de la jurisprudence ont été repoussés, parcequ'ils devaient le jour à des membres de l'opposition; tandis que d'autres, mal rédigés et qui accusaient une ignorance profonde, ont été accueillis avec faveur, parcequ'ils avaient eu l'avantage d'éclore dans les rangs ministériels. Mais s'il arrive qu'un jour, les chefs de l'opposition parviennent à saisir les rênes du pouvoir, ils s'empressent de détruire et de renverser l'œuvre de leurs devanciers pour donner un champ plus

vaste à leurs conceptions et à leurs projets de réforme. En un mot, nos législateurs construisent sans cesse pour avoir le plaisir de démolir le lendemain leur ouvrage de la veille.

Malgré les débats que soulèvent à tout propos les différences de nationalité, et d'opinions politiques, nos législateurs n'oublient pas, qu'une session n'est pas éternelle, et que s'ils veulent s'asseoir de nouveau dans l'enceinte parlementaire, il leur faut se ménager à tout prix l'approbation et la reconnaisance de leurs électeurs. Ici encore l'intérêt général s'efface et laisse la porte ouverte à des prétentions de tout genre. Tantôt c'est un ami, qui, au nom des services rendus, implore de son représentant, l'introduction d'une loi nouvelle, qui doit lui assurer le gain d'un procès, qu'il est à la veille d'entreprendre; tantôt c'est un père, qui, voulant disposer de ses Biens en faveur de personnes que la loi déclare incapables de recevoir, demande à faire fléchir la rigueur des anciens principes; enfin, c'est un électeur influent, qui désire faire disparaître même pour le passé certaines dispositions législatives, qui nuisent au succès d'une cause pendante devant les Tribunaux.

Les passions mauvaises trouvent plus facilement le chemin du cœur que les sentiments louables; si donc l'amitié, la parenté et l'intérêt exercent une si pernicieuse influence sur la législation provinciale, jugez de ce que peuvent faire la haîne, le ressentiment et la vengeance? Et n'a-t-on pas vu des hommes placés à la tête des affaires de ce pays enlever à une corporation honorable et distinguée ses priviléges les plus précieux, parcequ'ils savaient atteindre ainsi quelques uns de ses membres, contre lesquels ils nourrissaient une haîne mesquine?

Nous n'avons pas fini de dérouler cette longue chaîne de causes funestes et malheureuses, qui travaillent sans relâche, à nous enlever le plus précieux héritage, que nous ait légué la France; héritage qu'elle sut nous conserver encore aux jours de ses malheurs, alors que par un traité elle nous cédait à la couronne Britannique,—nous voulons parler de l'union des Canadas, proclamée en 1841 par le Parlement Impérial. Toutes les questions, qui se rattachent à l'économie politique et aux formes gouvernementales, nous sont complètement étrangères. Ainsi, il nous serait impossible de formuler une opinion quelconque sur les conséquences que cet événement a pu produire sous le rapport du progrès et des intérêts purements matériels; mais au point de vue juridique, un pareil état de choses ne paraît ni rationnel, ni logique; car malgré cette union, qui n'est que nominale, les intérêts financiers, la législation et l'organisation judiciaire de l'une et de l'autre partie de la province reposent sur des bases distinctes et contradictoires. Cette différence dans les institutions civiles comme dans les intérêts doit nécessairement produire une opposition ouverte entre leurs tendances et leurs aspirations. Comment expliquer après cela, la faculté donnée aux législateurs du Haut-Canada de s'interposer dans nos propres affaires, de paralyser nos tentatives de progrès et d'avancement, et de substituer à notre Droit civil, qu'ils n'ont jamais lu ni compris, des changements qui lui enlèvent son premier caractère et qui l'assimilent de plus en plus à la législation anglaise? Sans doute, nos législateurs Bas-Canadiens jouissent de la même prérogative relativement aux affaires du Haut-Canada; mais ils ne paraissent pas en avoir abusé, puisque rien dans cette autre partie de la province ne révèle qu'une influence étrangère ait passé par là.

Le temps arrive où notre Droit civil aura complètement perdu le cachet qui lui est propre, et qu'il a su conserver jusqu'à ce jour malgré les causes nombreuses qui concourent à sa transformation. Si nous n'avions pas les renseignements de l'histoire, qui pourrait dire dans quelques années, en parcourant des yeux notre Droit civil, d'où nous sont venues les premières lois qui ont été introduites dans le pays? Qui pourrait dire, sans hésitation, que c'est le Droit français qui a été modifié par des changements empruntés à la législation anglaise? Ne serait-on pas incliné à croire de préférence que ce sont les lois anglaises, qui ont été légèrement modifiées par l'introduction de quelques dispositions empruntées à la législation de la France? A l'heure qu'il est, les exceptions sont plus nombreuses que les principes! A l'heure qu'il est, possèderiez-vous parfaitement la Coutume de Paris et les auteurs les plus en renom, tels que Dumoulin et Pothier, vous ne sauriez rien encore; c'est dans les volumes énormes qui renferment notre législation provinciale, qu'il faut chercher les règles qui doivent nous guider dans la plupart des cas. Le Droit civil du pays, c'est un édifice autrefois construit par des architectes habiles, et qu'on démolit à plaisir sous le prétexte mensonger de lui donner plus de solidité et plus de beauté; aujourd'hui, ce n'est qu'une masure ouverte à tous les vents, dont les parties sont informes, disjointes entr'elles, et qui bientôt n'offrira plus aux regards qu'une masse de décombres.

Est-il surprenant que notre législation soit si contradictoire et si confuse quand ceux-là mêmes qui l'ont rédigée et créée, n'en saisissent ni le sens ni la portée? L'ignorance ne s'avoue jamais elle-même, et quand elle est accompagnée de la hardiesse et de l'ambition, elle trône souvent au sein de la Législature. Sans nul doute, l'ignorance doit avoir le pas sur les causes que nous avons déjà parcourues. Qu'on se rappelle la fameuse assimilation qu'un de nos législateurs fit un jour du Douaire préfix et du Douaire Coutumier, et l'on n'hésitera pas à reconnaître sa malheureuse influence. Cette assimilation, qui est en contradiction ouverte avec l'essence des choses, est encore écrite en toutes lettres dans la législation du Bas-Canada. Hélas! quand on voit des hommes, qui ne possèdent même pas les éléments du Droit, présider aux destinées de notre pays, il est bien difficile d'avoir foi en son avenir!

On parle souvent de l'incertitude du Droit,—on s'étonne de ce que les décisions des Tribunaux présentent aussi peu d'harmonie et d'accord entr'elles; on accuse volontiers d'ignorance les avocats, qui, sur une même question, formulent tous des opinions différentes: mais tout dans nos lois concourt à produire ce résultat. Leur style même, leur rédaction ne contribuent pas peu à augmenter les difficultés et l'incertitude. Au lieu d'être conçues en termes clairs, simples, précis, elles cachent souvent la pensée du législateur sous un style prolixe et diffus qui fatigue l'intelligence et la mémoire. Une loi bien faite devrait se comprendre à la simple lecture, sans aucun effort, sans aucune tension de l'esprit; mais il n'est pas une seule page, une seule ligne de toute notre législation provinciale, qui ne demande un travail incroyable pour être bien comprise. Et ces longs préambules qu'on lit partout en tête de nos actes législatifs, comme s'ils leur étaient essentiels, ne vaudrait-il pas mieux qu'ils fussent supprimés? N'y a-t-il pas assez d'intelligences dans l'enceinte parlementaire pour apprécier les motifs du législateur et le but qu'il désire atteindre, sans qu'il soit besoin de les écrire et d'en faire une partie inté-

grante de nos lois ? D'ailleurs le plus souvent, ils ont une portée plus grande que la loi elle-même ne le comporte, ou bien encore ils rétrécissent singulièrement le cadre qu'elle paraît embrasser. Dans les deux cas, ils ne peuvent que rendre obscure et douteuse une disposition qu'ils veulent expliquer et faire comprendre; et le juge sur son tribunal, s'inspirant tantôt des motifs, tantôt de la loi, flotte indécis, incertain et finit par recevoir une fausse impression,—ce qui n'arriverait pas si la loi était débarrassée de ce vain entourage qui ôte à sa clarté et qui met en doute sa portée réelle.

C'est ici que doit se terminer cet essai sur le Droit du Bas-Canada. Nous sentons bien qu'il a peu d'utilité pratique; car au mal que nous avons signalé, il n'y a guère de remède. Il provient en partie de causes qu'il est impossible de faire disparaître, puisqu'elles dérivent de notre Constitution et de la différence qui existe dans la religion et l'origine des habitants de ce pays. Aussi, n'attachons-nous à ce travail qu'une importance secondaire,—ce n'est à proprement parler qu'une préface ou une introduction, qui a pour but de faire connaître le terrain sur lequel se dirigeront particulièrement nos recherches et nos observations. Nous nous estimerons bien heureux, si, une fois descendu dans ce labyrinthe, nous parvenons à découvrir le fil conducteur, sans lequel il serait impossible de ne pas s'égarer et d'arriver à la découverte de la vérité.

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## INSOLVENCY.

To the profession and to the mercantile community it must be equally apparent that some change is necessary in the law, as it now stands, in this section of the Province, in relation to the rights and remedies of insolvents and their creditors. To the honest trader, overtaken and overwhelmed by misfortune, there is no harbour of refuge, unless it should be his good fortune to obtain the assent of all his creditors to the settlement which he may have it in his power to offer. The desired haven may be closed to him by *one* illiberal or obstinate creditor, and thus the good wishes and generosity of all the others entirely frustrated. It has been lately solemnly held by the highest judicial authority, (the Court of Queen's Bench, Appeal Side) in *Cumming & Smith*, at Montreal, and *Withall & Young* at Quebec, that *voluntary assignments* are not recognised by the law of this country, and that no form or mode of conveyance to trustees will avail to prevent any one dissenting creditor from enforcing his rights by execution against the goods and chattels, lands and tenements of the debtor, as fully and effectually as if the deed of assignment were waste paper; and this, even though it should be beyond all question that such a course must necessarily result in heavier loss and damage to the creditors. In the very able argument of Meredith, J. (dissenting in the cases adverted to) it was clearly pointed out that in very many cases the winding up of insolvent estates by the summary process of seizure and sale by the Sheriff, or a Bailiff, produces a return of *nil.* to the creditors. Sales arbitrarily and unseasonably made, heavy fees of office, bills of cost on claims and oppositions, and the other

&c, &c, which invariably accompany the distribution of moneys in Court, proclaim to creditors that when they enter *there*, they must leave all hope behind them; while, on the other hand, the judicious management and nursing of the estate by the careful and experienced persons generally selected as trustees, seldom fail to give satisfaction (if that be a possible feeling with less than twenty shillings) to the creditors, and spares to the debtor the sad contemplation of assets entirely frittered away. But the majority of the Judges of the Court of Queen's Bench are of opinion, and have distinctly and unequivocally decided, that inasmuch as the law of France, as it prevailed at the time of the cession of this country, did not sanction voluntary assignments, such as we are now discussing, and as the Legislature of the Province has not yet thought fit to introduce them, their adoption and general use by the mercantile community will not suffice to give them legal vitality and force; and some of the learned Judges have expressed strong doubts as to the degree of preference to be given to that mode of liquidation over one that takes place under the immediate eye of a judicial tribunal.

The law, then, does not place it in the power of the debtor, whom the vicissitudes of trade have broken down, to relieve himself and start afresh, on giving up all that he has. He must, therefore, struggle on, oppressed with the intolerable burthen of old debts, and engage in the hopeless task of Sisyphus, or he must have recourse to some of those modes of foiling creditors, which are now so constantly brought under the notice of the Courts, and to which the upright trader, parting with his fair fame, shrinkingly and reluctantly resorts, and only, as it were, in defence of life and limb. We allude in particular, to the *séparation de biens* and fictitious-partnership schemes, which the hardy creditor who is not to be imposed upon and who is willing to spend some money and no little time in Court, may expose and defeat, but which, as the said stout-hearted creditor is the exception to the rule, generally prove a sufficiently strong shield against old scores. When men, striving to do right, are driven to such shifts as these, the demand for legal reform, upon this branch of the law, becomes imperative.

But, while charity and common justice call for some measure of relief on behalf of the simply unfortunate in trade, the existing state of the law justifies the appeal of creditors for some comprehensive and at the same time stringent remedy against the dishonest debtor. The Bankrupt Acts of 1839 and 1843, and subsequent statutes now in force, set forth divers pains and penalities to be inflicted upon persons guilty of certain fraudulent practices therein mentioned, but though frauds of all kinds abound and the particular frauds referred to are of very frequent occurrence, the law has hitherto proved to be a dead letter. Unless dishonesty in trade be met by measures *sharp and summary*, knavery will continue to flourish, confident in the efficacy of the great emollient, *Time*, when skillfully presented to an indignant creditor. And every day's experience shows how great are the facilities extended, by the imperfect provisions of the existing laws, to the unscrupulous and wary trader who has made up his mind to "stop," and draw his subsistence, for such time as may suit his convenience, from concealed stores or cash, *ære alieno*, laid up in due season for the well-matured occasion.

This state of things being indisputable, it is manifest that in the interest both of the creditor and of the honest debtor, the intervention of the Legislature has became a matter of urgent necessity; and we trust that another session of the Provincial Parliament will not be allowed to pass over without the attention of the Executive being called to the earnest consideration of this important subject.

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**SHERIFF'S SALE.**

By Auction, will be sold, on WEDNESDAY next, the 7th November instant, at the Printing Establishment of S. T. & Co., Printers and Stationers, St. Ursule Street:

ALL the PRESSES, with an ENGINE for working the same, together with TYPES, and other Printing materials, the whole seized under execution.

Sale at ONE o'clock.

J. RICHARD,
Sheriff's Bailiff.

QUEBEC, Nov. 1, 1860.

**SALE OF PRINTING MATERIALS.**

By Auction, will be sold on TUESDAY, the 6th November, at the Establishment of S. T. & Co., Printers and Stationers, St. Ursule Street:

ALL the PRESSES, with an Engine for working the same, together with the PRINTING TYPES, Paper, and other Printing Materials. Sold under execution.

Sale at TEN o'clock, A. M.

FRS. LEPAGE,
Bailiff.

Quebec, Oct. 31, 1860.

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The above we clip from the "Chronicle." It shews what confusion, uncertainty, and irregularities prevail in one of the most important branches of the administration of justice, and this, we state without hesitation, in utter disregard and violation of the plainest rules of law. The well-known maxim, *saisie sur saisie ne vaut,* is founded upon principles both of private right and public convenience. The creditor who *first* attaches the property of his debtor by execution has the preference over other creditors, (unless the debtor be insolvent,) and the law does not recognize the right of any other creditor to step in and take the goods under a second seizure until the former has been withdrawn, abandoned, or determined in due course. The preference we allude to is a preference upon the proceeds, but a second seizure, pending the first, is equally irregular and invalid, whether the defendant be insolvent or not. Under the present system of judicature, goods and chattels may be sold by a Bailiff, as well as by the Sheriff, the latter only executing writs which issue from the Superior Court, which Court has jurisdiction in cases of £50 and upwards. It is evident, with reference to the case to which we draw attention, that judgments have been recovered against the defendants both in the Circuit Court and in the Superior Court, and that both the Sheriff and the Bailiff consider that they have seized; and each, no, doubt, considers himself entitled to sell. *One* of these officers *must* be wrong, but what is the public to do? and how does this clashing of *saisies* affect all parties, plaintiff, defendant, and creditors generally? With respect to the public, it amounts to loss of time, at least, perhaps of money in travelling or paying agents, and, clearly, a *doubtful* title, should they purchase; as to the plaintiff, *premier saisissant,* in whose suit the later day has been fixed, *he* finds, when that time comes, that everything has been sold off *the day before!* gone for a song probably: and,—then,—he either turns away, muttering something "not loud, but deep," and wipes out the debt from his book—or he braces himself up for a long and uphill fight in Court to set the pretended sale aside, and finally comes off with a victory, glorious but—perhaps barren, as the chances are that the moveables have in the meantime become scattered, or lost, or worn out, or burnt, or—become extinct through some other fortuitous cause. In

many cases, the property may be worth thousands of pounds, and, if judiciously and properly sold, may bring in a considerable sum for distribution, but what chance can there possibly be of a fair sale, if both the Sheriff of the District and a Bailiff of the Circuit Court inform the public by *affiches* at the church-doors, and through the public prints, that they have made the seizure, and each one announces that he will sell the whole of the property seized on a given day—each naming a different day? The whole thing becomes a farce, enacted with the most meagre forms of law, and if the "ill-wind" blows good to anybody, it is not, most certainly, to the creditors, who, duped and discomfited, may not unreasonably conclude that they could not have been much worse off even in the old Bankrupt Court.

It is the frequent recurrence of such lamentable irregularities (to use a mild term) as the above, that has led the profession to desire that *all writs of execution* should pass through the Sheriff's Office. We believe that we commit no injustice in declaring that, as a body, the Bailiffs of this section of the Province are not remarkable for either capacity, steadiness, or sobriety, and some of them (in the cities) are very worthless characters. There are, of course, honorable exceptions; but there seems to be no good reason why interests so large and important as are often involved in sales of personal estate should be entrusted to men, to whom no responsibility attaches either through their status or their means.

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COURT OF QUEEN'S BENCH, APPEAL SIDE, QUEBEC. } CHARLES E. LEVEY, Appellant, and PAUL SPONZA, Respondent.

The 14th day of June, 1858.

PRESENT:—The Hon. Sir L. H. LAFONTAINE, Bart., C.J.,
" T. C. AYLWIN, J.Q.B.,
" R. E. CARON, J.Q.B.,
" J. DUVAL, J.Q.B.

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1. The answers of parties to interrogatories on *faits et articles* or their refusal to answer such interrogatories, supply, in commercial cases, the place of the memorandum in writing required by the Statute of Frauds.

2. A clerical error in the judgment of the Superior Court, by which the Defendant was condemned to pay £54 4s. in lieu of £50 4s., will be corrected by the Court of Queen's Bench; and the judgment will be affirmed, with costs, against the Appellant, if, on the other reasons of Appeal, the Court is against his pretentions.

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In June, 1857, Sponza instituted an action against Levey, to recover £60 currency, grounded on the following facts:—

In 1851, by deed passed before Notaries, at Quebec, on the 24th November, Levey agreed to advance E. P. Lee, £5 a ton on a certain ship then being built by him at Quebec.

On the 18th June, 1852, Defendant agreed with E. P. Lee, to pay him another sum of ten shillings per ton on the said ship, the said sum of ten shillings

payable to the parties having claims on the ship, as confirmed by Lee, and signed a memorandum of such agreement, and delivered it to Lee.

On the 16th July, 1852, Lee was indebted to the Plaintiff in the sum of £50 4s. for rigging, masting, &c., the said ship, and then and there confirmed his account, and required the Defendant to pay the same.

On the 3rd of July, 1857, the Defendant promised to pay the Plaintiff his claim against the said ship, to wit, the said sum of £50 4s.,—"which the said Defendant has often acknowledged to owe, and promised to pay."

The Defendant pleaded, by *exception péremptoire*,—

1. That on the 18th June, 1852, he had paid to E. P. Lee a sum of money exceeding ten shillings per ton on measurement of such ship, to wit, £545 5s., which sum was paid by him to parties having claims against the said ship as confirmed by Mr. Lee, and according to his express orders.

2. That long previous to the institution of the action, and previous to the 16th July, 1852, he had paid to Lee the full amount agreed to be paid, under the memorandum of the 18th June, 1852.

3. That no claim of the Plaintiff in respect of the said ship, against, and confirmed by Lee, was ever presented to, or accepted by, Defendant. The fourth and fifth *moyens* of the exception are included in those already given. He also fyled a *défense au fonds en fait*.

A. Campbell, Esq., Notary, was examined by the Plaintiff, and deposed that the Defendant, previous to the putting to sea of the ship built by Lee as aforesaid, on the representation made to him by witness, that if Plaintiff's account, amounting to £50 4s., were not paid, the ship would be seized, (Plaintiff having informed witness that his intention was to seize,) Defendant said he would pay it. That witness then turned to Plaintiff, who was in Defendant's office, and in Defendant's presence, said—"Sponza, you are perfectly safe; Mr. Levey will pay you." The Plaintiff thereupon, being satisfied, left, and the ship was not seized by him.

Lee was also examined, and testified to the fact, that Defendant had often expressed himself to him, relative to Plaintiff's account, under the promise in writing, and said that he would pay it;—he also proved its confirmation.

The work done by the Plaintiff was proved to be worth £50 4s.

To the questions put to Campbell and Lee, by which it was sought to prove a promise to pay Plaintiff, objections were made by Defendant, on the ground that it was intended thereby to prove, by parol testimony, a promise by the Defendant to pay the debt of a third person, without the proof of any memorandum in writing, signed by the Defendant, containing such promise; the promise in writing, referred to in the said question, not containing the name of the said Paul Sponza, as creditor of the said E. P. Lee, or as having any claim against the said ship.

The objections so taken were argued at *enquête* sittings, before Bowen, C. J., on the 10th September, 1857, and were over-ruled by him.

On the 2nd October, 1857, the Defendant moved to revise the rulings of the Chief Justice so made. On the 13th October, 1857, the Superior Court (Morin, J., and Chabot, J.) refused to reject the questions so put.

The Plaintiff submitted interrogatories upon *faits et articles*, to the Defendant, of which Nos. 2 and 3 were couched in the following words:—

2. Did you ever acknowledge to owe, and promise to pay, to the Plaintiff any sum of money for his work and labour done and performed on board the "Derry Castle"? Did you ever promise to pay to the said Plaintiff, or to Archibald Campbell, Esq., Notary Public, on his behalf, the amount sought to be recovered by the present action, or any amount on account or in full of the said work and labour done, as in the Plaintiff's declaration alleged, on board of or to the said ship or vessel called the "Derry Castle"? if so, state what amount you promised to pay.

3. Are you aware that the vessel called "Derry Castle" would have been seized, had it not been for your promise made to, or in presence of, the said Archibald Campbell, to pay the amount of the said Plaintiff's claim?

To the second question he answered: "Having been advised that I am not legally bound to answer this question, I refuse so to do." To the third—"the same answer as the last."

The Plaintiff moved that the *facts* stated in the said second and third questions be taken "*pro confessis.*"

At the hearing before Morin, J., on the 25th November, 1857, it was contended by the Plaintiff, that the promise was not one falling within the provisions of the Statute of Frauds—Because it was made, not to Sponza but to Lee, that he, the Defendant, would discharge Lee's debt to the Plaintiff.—Hargreaves vs. Parsons, 13 M. & W. 561; Eastwood vs. Kenyon, 11 Ad. & El. 438; Barker vs. Bucklin, 2 Denio 45.

2. That Sponza had a lien, claim or privilege upon the ship, with a right of seizure, for the amount of his account, which right he abandoned on the faith of the Defendant's promise to pay him, and that consequently that promise was not within the Statute.—Williams vs. Leper, 3 Burr. 1886; Houlditch vs. Milne, 3 Esp. 86.

He moreover contended, that, even supposing that it did fall within the provisions of the Statute, the memorandum in writing of the 18th June, 1852, could be explained by parol evidence, and that it would be valid though it did not specify amount of the debt or the creditor's name.—Taylor on Evid. §§ 936, 937, 938, 939, 997, 1052.

That the refusal of the Defendant to answer the questions on *faits et articles*, established conclusively the promise made by him to pay the debt sued for.

On the part of the Defendant, it was contended, that the promise was one falling within the provisions of the Statute of Frauds. That no memorandum in writing having been drawn up by which he had promised to pay the Plaintiff the debt due by Lee, he was not bound. That the memorandum of the 18th June, 1852, was incomplete and insufficient. That he had, moreover, paid £545 5s. under it, which was more than he had agreed to advance (as was fully established by the proof). That the want of the memorandum in writing could not be supplied either by the answers of the Defendant, or by his refusal to answer the questions propounded.

On the 9th January, 1858, Morin, J., considering the case as one falling within the Statute, delivered the following Judgment:—

"The Court having examined. &c.

"Considering that, by the laws of this country, and the practice followed, the judicial answers of parties to interrogatories on *faits et articles*, or their refusal to answer, are tantamount in their effect on such actions to admissions in writing of the agreements or facts acknowledged, in such answers, or affirmatively propounded in the questions unanswered; considering, also, that the right of interrogating parties on *faits et articles* has not been abolished by the introduction of any portion of the Statute of Frauds, but that, on the contrary, the said right has been, by the Act of the 12th year of Her Majesty's reign, chapter 38, declared to obtain in actions of a commercial nature—any law touching the rules of evidence to be observed in such cases to the contrary notwithstanding; that the Defendant has refused to answer to the second and third interrogatories put to him, and to which an affirmative answer would have been, in the present case, a sufficient proof of the agreement or promise mentioned in the declaration;—doth declare the said interrogatories *confessés et avérés*, and doth condemn the Defendant to pay to the Plaintiff, for the causes set forth in the said declaration, the sum of £54 4s. currency, with interest, &c."

The Defendant appealed therefrom, and the Judgment of the Court of Queen's Bench is couched in the following terms:—

"The Court, &c.

"Seeing that the Appellant was bound to answer all, each and every the interrogatories propounded to him by the Respondent, and that upon his refusal to answer the second and third of the interrogatories, the same were duly and properly taken and held *pro confesso*, [*sic*] and as an admission, on the record, of the promise relied upon by the said Respondent—superseding all other proof in writing of the debt claimed, and in no wise conflicting with any of the rules of evidence of the law of England in that behalf,—and that, therefore, in the award of judgment made by the Court below, in favour of the Respondent, there is no error. But seeing that, in entering up judgment against the Appellant, the sum of £54 4s. has been, by a clerical mistake, inserted as being the amount in capital of the sum awarded to the Respondent, in the stead and place of £50 4s. stated in the declaration and particulars as being the amount of the debt claimed by the Respondent, and the promise of the Appellant relied upon,—it is considered and adjudged, by the Court now here, that the said Judgment, to wit, the Judgment rendered in the Superior Court, at Quebec, on the 9th day of January last past, be, and the same is hereby, affirmed; and the Court here, to the end that the said clerical mistake be corrected, doth hereby order that the sum of £54 4s., inserted in the said Judgment, be altered to the sum of £50 4s. And it is further considered and adjudged, that the said Appellant do pay to the said Respondent, for the causes stated in the said declaration, the said last-mentioned sum of £50 4s., with interest, from, &c., and costs of suit, as well in the Court below as in the Court here, &c."