The Legal News.

Vol. II. JUNE 7, 1879. No. 23.

WHERE ONE PLAINTIFF IS ABSENT.

It has been held, *Beaudry* v. *Fleck*, 20 Jurist, p. 304, that when one of two plaintiffs is resident within the jurisdiction, security for costs cannot be demanded from the absent plaintiff. An exception to that rule has been established in the case of *Henderson* v. *Henderson*, of which a note appears this week. The Court (composed, it may be remarked, of the same Judge as in *Beaudry* v. *Fleck*), holds that where *solidarité* does not exist between the plaintiffs, as in an action by coheirs demanding an account, one of two plaintiffs who resides out of the Province may be called upon to give security. Reference was made to the case of *Humbert et al.* v. *Mignot*, 18 Jurist 217, in which the Court of Appeal, sitting at Quebec, in 1874, apparently approved the judgment appealed from, which held, that where, of two plaintiffs, not copartners, and between whom no *solidarité* exists, one leaves the country after suit brought, he may be compelled to give security for costs. The judgment of the lower Court had gone further, and condemned both plaintiffs to give security, but the defendant desisted from the part of the judgment which concerned the plaintiff who remained in the country. The absent plaintiff had not complained, so that his liability to give security was not directly before the Court of Appeal, but no doubt seems to have been entertained of the correctness of the judgment as far as the absentee was concerned.

INTEREST ON ASSESSMENTS.

The decision in *Ross* v. *Torrance*, and *The City of Montreal*, claimant, noted in the present issue, takes away from the city the right to impose the ten per cent. interest on overdue assessments which has been enforced for a number of years past. The local legislature has no right to legislate on the subject of interest, that being one of the matters within the exclusive legislative authority of the Parliament of Canada, B. N. A. Act., Sec. 91. But, prior to Confederation, power to impose this ten per cent. interest rate on overdue taxes had been conferred by the Legislature of Canada, and the present decision is therefore chiefly noticeable in finding that the power formerly possessed to impose the ten per cent. rate has been lost by the unintentional repeal of the law which conferred it, and the substitution of an enactment of the Local Legislature which, being unconstitutional, cannot be enforced.

MORTGAGES ON VESSELS.

The case of *Kempt* v. *Smith*, and *Cantin* opposant, concedes to the registered mortgagee the right to prevent the seizure or sale of the vessel at the suit of a judgment creditor. The decision of the Court of Appeal in *Kelly & Hamilton*, 16 Jurist, 320, is followed by Mr. Justice Sicotte in preference to that rendered by the Court of Review in *D'Aoust* v. *McDonald*, 1 Legal News, 218, and 22 Jurist, 84. The composition of the Court of Appeal, it may be remarked, is almost entirely changed since *Kelly & Hamilton* was decided, and the only Judge remaining who sat in that case, dissented from the judgment. But the present Chief Justice was counsel for the respondent, whose pretensions were sustained by the majority of the Court.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, May 31, 1879.

JOHNSON, J.

SCANLAN v. HOLMES.

Landlord's Liability—Damages occasioned by absence of grosses réparations.

JOHNSON, J. The plaintiff, a grocer, sues his landlord for damages done to his stock of groceries by rain that penetrated through the walls during a storm. There is no difficulty about the proof: it is all one way. The defendant's plea was that the inundation was caused by defective drains, and not by his fault. The evidence is quite to the contrary. The water came in through crevices in the walls of the cellar. The only doubt I had at the hearing was whether the landlord was liable for damage

occasioned by absence of *grosses réparations* which he had never been called upon by the tenant to make. I think, however, on reflection, that the landlord is liable. The obligations and rights of lessors are, by the nature of the contract, 1st, to deliver to the lessee the thing leased; 2nd, to maintain the thing in a fit condition for the use for which it had been leased; 3rd, to give peaceable enjoyment; 4th, the lessor must deliver the premises in a good state of repair in all respects, and he is obliged during the lease to make all necessary repairs, except those that the tenant is bound to make; and he is also obliged to warrant the lessee against all defects in the thing leased which prevent or diminish its use, whether known to him or not. These are the express provisions of the Civil Code from Art. 1612 to 1614 inclusive. Under the evidence, then, the plaintiff is entitled to damages, and the amount proved is $140, for which judgment is given with costs.

J. & W. A. Bates for plaintiff.
Doherty & Doherty for defendant.

Ross et al. v. Torrance es qual., The City of Montreal, claimant, and Plffs., contesting.

Powers of Local Legislature—Right to legislate on subject of Interest or Increase on unpaid Assessments.

Johnson, J. Under the Prothonotary's report of partial distribution, as drawn in this case, there is a sum of $995.08 given to the city for arrears of assessments on the property sold by the Sheriff; and the plaintiffs, who brought it to sale for the satisfaction of their hypothecary claim, contest this item in part: that is to say, as far as regards three sums of $79.43, $178.71, and $18.09, making together the sum of $276.23 asked by the city as a ten per cent. increase on overdue assessments, and these three charges for increase, as it is called, in the claim, or rather in the account which the Corporation are by law allowed to substitute for a regular demand or opposition (see art. 719 C. P.), are resisted on three separate grounds. First, the plaintiffs say that these charges, though made under the name of increase, are in reality charges for interest at ten per cent. for delay in paying overdue taxes; and that, as such, they are not authorized and cannot be authorized by Provincial legislation subsequent to the B. N. A. Act, 1867, which vested the power of legislating on this subject in the Federal Parliament. Secondly, they say that these charges are continued to be made up to February, 1879, while the property was sold in December, 1878; and thirdly, they say the proprietor assessed was not in default, the assessments having been reduced by the Corporation, and no default existing where the assessment is acknowledged to be wrong.

There are two by-laws of the corporation professing to authorize these charges: 1st, one of April, 1876, and 2nd, one of August, 1878; and the questions will be, first: is there anything having the force of law to empower the corporation to make them; and 2nd, whether there is any difference in law between *interest, eo nomine*, and *increase, addition* or *penalty* imposed for delay of payment. The 75th section of the 14 and 15 Vic. chap. 128—passed before confederation, clearly gave the right to impose an increase or penalty, and there it might have remained till this day, unless it had been repealed; but the 37 Vic. c. 51, instead of leaving well alone, repealed sixteen different statutes respecting the corporation of Montreal, and and consolidated the law generally; and on this particular subject it gave power to the corporation to remit by way of discount for prompt payment, or to charge "interest" (*eo nomine*) at ten per cent.; and under this statute the first by-law was passed. Among the statutes repealed by the 37 Vic., c. 51 (sec. 241) was the 14 and 15 Vic., c. 128, which by its 75th section had given the power; and this statute, I say, was absolutely repealed, with the exception of six sections and part of a seventh, the 75th section not being included in the excepted sections, and being therefore repealed also. The statute 37 Vic., c. 51, therefore, did two things; first, it absolutely repealed the 14 and 15 Vic., c. 128, sec. 75, which had authorized an imposition of increase or penalty; and second, it proceeded, after having repealed it, to substitute a new law on the subject, that is to say, by its 99th section, it authorized a by-law imposing *interest* at ten per cent. on arrears. This new legislation was in 1874 (seven years after Confederation), and the question would have been, if it had stopped there, whether, under the distribution of powers

in the Confederation Act, a Provincial statute could then change or authorize change in the rate of interest; but it did not stop there. The Provincial Legislature, in 1878, passed another Act (41st Vic., c. 27), and under this the second by-law was passed, imposing increase, addition, or penalty, instead of interest as under the previous Act. Sec. 3, then, of the 41st Vic., c. 27, enacted that whereas section 99 of the 37 Vic., c. 51, had intended to continue and retain in force sec. 75 of the 14 and 15 Vic., respecting the penalty of ten per cent, and whereas the wording of it might give rise to erroneous interpretation, it would substitute another section —99, for the sec. 99 of the 37 Vict. It did not proceed to declare that the 14 and 15 Vic. was still in force; it did not repeal the repealing clause. If it had done so, the duty of the Court would, as far as that goes, have been plain; for, if the supreme legislative power in the Province chooses to say that a thing is one way, when it is another, I suppose the courts must say so too, or at all events say that the legislature has said so; but they went further, and they said, not that they declared the 75th section of the 14 and 15 Vic. to be still in force, notwithstanding the express repeal of it; nor yet that they repealed the repealing section of the 37 Vic., c. 51; but they said that, for the 99th Section of the 37 Vict., c. 51, they would substitute another; and what they substituted was this, viz., that the corporation might by a by-law exact an increase, addition, or penalty of 10 per cent. on all arrears not paid within a certain delay. That is to say, this last statute is to be read as if it was in fact Section 99 of the 37 Vict.; and the only difference between the new reading of the 99th Section and the old reading, is that the old reading authorized the exaction of interest, and the new reading authorizes an exaction of an increase, addition or penalty. Therefore, the question is left precisely where it was before, with this exception, viz., that, before the Act of 1878, the question would have been whether the Provincial Legislature could, in 1874, change or authorize any creditor to change the legal rate of *interest;* and now the question is whether the Provincial Legislature could, in 1878, authorize the exaction of an *increase, addition,* or *penalty* of ten per cent. for delay of payment of taxes. I do not enter upon the question whether, if they had even repealed the repealing section (which on general principles would have restored the first law), such an enactment would at that time—nine years after Confederation—have had the effect of legally changing the rate of interest; I only say that they did not repeal the repealing section; and the 14 and 15 Vic., sec. 75, remained repealed. As to the real nature of the exaction, whether it be called interest, or increase, I must say at once that my judgment and conscience utterly refuse to yield to any attempt at distinction between these two things. The law itself rejects any such distinction. It is old law and finds plain and emphatic expression in the words of a specific article of the code (art. 1077): "The damages resulting from delay in the payment of money, to which the debtor is liable, *consist only of interest* at the rate legally agreed on by the parties, or, in the absence of such agreement, at the rate fixed by law." If any other rate is to be fixed by law since Confederation, it must be by the Parliament of Canada. *Interest,* by par. 19 of section 91 of the British North America Act, 1867, is a subject *exclusively* allotted to the legislative authority of the Dominion. If the Provincial Parliament in 1878 thought themselves competent to deal with the subject of *interest,* it had one of two things to do; it could either declare that the 14th and 15th Vic. was still in force notwithstanding its absolute repeal, or it could repeal the section of the 37 Vic. that had repealed it. What the effect of either course would have been, as I have said before, I give no opinion upon; but it is certain that the Legislature has taken neither the one course nor the other, but it has only said that the 37 Vic. intended to continue the 14th and 15th Vic. in force, (not that it did so, nor yet that they, by their subsequent act of 1878, declared it to be in force); and it has shown that it did not consider it in force by enacting another section 99 for the old one that is supposed to have continued it in force. The Provincial Legislature might, perhaps, have taken a third course—for it can alter our local laws—however fundamental. It might, if it can deal at all with interest since confederation, have repealed the 1077 art. of the code, but it has not attempted to do so. Therefore, by whatever name they call the exaction in

question, it is by law still interest and nothing else. They can't change its nature by changing its name. They are dealing (to use the very words of the law), with damages resulting from delay in the payment of money by a particular class of debtors. If they can give the Corporation of Montreal, by this mere changing the name of the thing, a legal right to ten per cent. in the absence of agreement between the parties, they can give it to the Bank of Montreal or to any other creditor they choose to designate, and the plain provision of the constitution would become a dead letter. Although, therefore, the Quebec Legislature in 1878 says that it intended, in 1874, to do the very reverse of what it actually did, and to continue in force the 75th section of the 14th and 15th Vict. instead of repealing it as it expressly did; and although I should probably have been bound by that extraordinary statement, if it had been followed by any enactment declaring the 75th sec. still in force, or repealing the repealing section of the 37 Vict., and so restoring the original provision, it is now no longer a question of interpretation, but a question of the effect of that which requires no interpretation. Interpretation serves to show the meaning; but when we have got that, we have only to deal with the effect of what is meant. No law of interpretation can require me to say that the statute of 1878 has repealed the repealing section (241) of the 37 Vic., when it has not only not attempted to do so; but has proceeded to substitute another 99th section for the 99th section of the Act of 1874—a step that obviously could not be required, if the 75 sec. of the 14 and 15 Vic. was still in force. Therefore, in dealing with the new section 99 which has been substituted for the old one, I must say that its effect, in my judgment, is not to better, or in any manner to change, the old provision about interest, unless it can be shown that it really means to do something else that they had a right to do, besides exacting interest, which they had no right to do. This has been attempted. It was said by the counsel for the Corporation, that paragraph 15 of the 92nd section of the Confederation Act gave power to the Local Legislatures to impose penalties. Let us see that paragraph. Here it is. It is found among the exclusive powers of the Local Legislatures, no doubt, but what does it say? Here are the express words of the power given:—"The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." Surely this never meant that people were to be punished by fine, penalty or imprisonment imposed by a treasurer or other officer of a Corporation without defence, trial or hearing. Therefore, it seems to me that the penalty theory won't do; that the interest authorized by the 37 Vic., c. 51, was *ultra vires;* that the new section 99, substituting increase or penalty instead of interest *eo nomine*, is no better; that the 75 sec. of the 14 and 15 Vic., c. 128, was repealed by section 241 of the 37 Vic., and has never been declared to be still in force; but, on the contrary, instead of being restored by the new section 99, that Section only declares that it had been previously intended to keep it in force, but does not repeal the repealing section, only substituting another provision for the 99th section of the 37 Vic., which would be inconsistent and absurd if the old provision had really subsisted. I recognize in the fullest manner the duty of Courts of justice to give effect to statutes, but it must be a legal effect—one that is rationally deducible from their terms. I cannot make a statute say what it does not say; I can only give effect to what it *does* say. The legislators 'intended,' it is said, to keep the old law in force; perhaps so; but it was precisely because they had intended to do what they had not done that subsequent legislation became necessary; and when this subsequent legislation comes, what does it say? Not that the 14 and 15 Vic., section 75, is still in force, but that Parliament will substitute another section 99 for the old section 99 of the 37th of the Queen, and what it substitutes is just the same, only with the change of the word *increase*, etc., for *interest*. Now, if I could abstain from applying the rules of interpretation known to the administration of the law, and could consult only my individual experience of Provincial legislation, I might find, perhaps, little difficulty in believing that the idea of the framers of this last statute of 1878 was to repeal the repealing section (241) of the 37 Vic., c. 51, and make the 75th section of the 14 and 15 Vic., reappear in

better form than it had taken in the 99th section of the 37th Vic. That, I have no manner of doubt, is what they wanted to do; it is what I would readily help them to do if they had only helped themselves; but it is not one of my numerous functions to aid by conjecture the unexpressed ideas of Parliament for the purpose of helping them to do, under another name, what the constitution forbids them to do at all. I must apply rules to my work; and besides general and well-known rules of construction, there is a specific rule in our own provincial interpretation act that exactly applies to the present case. It is the 11th section: "When any provisions of law are repealed, and other provisions are substituted therefor, the provisions repealed remain in operation until the provisions substituted come into operation under the repealing law." It is plain then, I think, that up to the passing of the 37 Vic., the 75th section of the 14 and 15 Vic., was in force. That it ceased to be in force when the 241st section repealed it, and section 99 of the 37th Vic. was substituted for it. That at the time of this substitution, in 1874, there was no power in the provincial legislature to meddle with *interest* at all, and the by-law that was passed under it was waste paper. That the act of 1878, putting a new section 99 in the place of the old one, and calling the thing increase or penalty instead of interest, did not make it any better. That the Act of 1878, could not be held to restore or declare in force the 75th section of the 14 and 15 Vic. for two reasons: first, because it neither said it was in force, nor repealed the repealing law; and secondly, if they had intended to declare it still in force, there would have been superfluity and nonsense in enacting a new provision of the same kind. That it is perfectly obvious that what the Legislature has attempted to do, is to cure or to elude an illegality existing in the 99th section of the Act of 1874, and to do this by using the words increase, addition or penalty instead of the word interest; and that there is in reality, and in point of law, no difference between them, nor any greater power either possessed or given in 1878, than was possessed or given by the Legislature in 1874. I am therefore of opinion that the first by-law imposing interest (*eo nomine*) is bad—(and under it almost all this charge is made). I am also of opinion that the 2nd by-law is equally bad in imposing increase or penalty, and that the contestation must be maintained. It is unnecessary, of course, to go into the other points.

R. Roy, Q. C., for Claimants.

Lunn & Cramp, for Plaintiffs contesting.

RAINVILLE, J.

BRUNET v. SAUMURE et al.

Donation by Particular Title—Art. 780 C. C.

The action was brought against the defendants to recover a debt due by one of them, who had made a donation of all his property to T. Saumure, the other defendant.

The defendant, T. Saumure, pleaded that he was donee by particular title, and therefore could not be sued for the debts of the donor.

RAINVILLE, J., said the question raised in this case had frequently been decided. The point was this: when a person gives all his property, but designates it specially, without stating that it is a universal donation, does such donation render the donee responsible for the debts of the donor? His Honor referred to *McMartin* v. *Gareau*, 1st Jurist, 286, and to *Paquin* v. *Bradley*, 14 Jurist, 208, and other cases, and held that in the terms of 780 C.C., in order that a donation be considered universal, the donor must give all his goods as a universality, and that the donation of things specially designated constitutes only a special donation, though in effect the donor has given all that he possessed. Here the donation was a special donation, and the donee was not responsible for the debts of the donor. The action must, therefore, be dismissed as regards T. Saumure, the donee.

The following were the reasons of judgment:

"Considérant qu'aux termes de l'article 780 C.C., pour que la donation soit universelle, il faut que le donateur donne tous ses biens comme universalité, et que la donation de choses désignées particulièrement ne constitue qu'une donation particulière, quand même en fait le donateur aurait donné tous ses biens;

"Considérant que la donation en question en cette cause, savoir la donation par François Saumure, père, et son épouse en faveur du défendeur Théodule Saumure, alors mineur et représenté par son tuteur, passé à St. Martin, le 16 Février, 1877, ne constitue qu'une donation

particulière, et que le donateur n'est pas responsable personnellement des dettes du donateur;

"Déboute," etc.

Loranger & Co. for plaintiff.

Geoffrion & Co. for defendants.

JETTE, J.

SCRIVER v. STAPLETON et al.

Service—Action to annul Sale, when Purely Personal.

The plaintiff had obtained a judgment against the defendant Stapleton, and he now sued both Stapleton and one O'Mara to have a deed of sale of an immovable from Stapleton to his father-in-law, O'Mara, declared to be simulated and fraudulent, and passed with intent to defraud plaintiff (the defendant Stapleton being insolvent at the time the sale was made), and that the deed be annulled and set aside.

The defendants, who were served personally in Montreal, filed an *exception déclinatoire*, alleging that the action, involving the title to real estate in the district of Iberville, and seeking to set aside a deed of sale thereof, was in the nature of a mixed action, and the defendants could not be sued in Montreal, but only in the district of Iberville, where the real estate is situated, and which is the place of domicile of one of the defendants, or in the District of Bedford, the place of domicile of the other defendant. C. P. 37.

The Court held that the object of the action, in asking the cancellation of the deed from Stapleton to O'Mara, was in reality to get rid of the obstacle which interfered with the recovery of plaintiff's claim from Stapleton, and the action did not claim possession of the immoveable passed by the deed. The action took its source as to the vendor Stapleton in 1032 C. C., which confers a purely personal action on the creditor to impeach the acts of his debtor in fraud of his rights; and as to the purchaser O'Mara, the action was based either on the principle that no man can enrich himself at the expense of others, or on 1053 C.C., which obliges every person to repair the wrong done to others by his fault,—according to whether O'Mara was in good or bad faith in buying the immoveable. The action, then, being based on a purely personal relation, created directly and immediately between the plaintiff and the defendants by the deed of sale in question, must be considered purely personal. Under Art. 34 C.P.C., in matters purely personal, the defendant may be summoned before the Court of the place where the demand is served upon him personally, and the action in this case having been served upon the defendants personally in Montreal, was properly before this Court. The declinatory exception was therefore dismissed.

Trenholme & Maclaren for plaintiff.

A. & W. Robertson for defendanst.

MONTREAL, May 29, 1879.

SICOTTE, J.

KEMPT v. SMITH, and CANTIN, Opposant.

Vessel—Rights of Judgment Creditor and Mortgagee.

The plaintiff, a judgment creditor for a debt of $141, seized the steamer *Cantin* in the possession of the defendant.

Cantin opposed the seizure and sale of the steamer, alleging that he alone had the right to sell the vessel, in accordance with the conditions of sale by way of mortgage, made to him in May 1875 by defendant, the registered owner, for $10,000.

SICOTTE, J. The mortgage is given and made according to the form and prescriptions of the Shipping Act, and contains the following condition: "The borrower declares that the mortgage is made on condition, that the power of sale, which by the 'Merchants Shipping Act of 1854,' is vested in the said Augustin Cantin, shall not be exercised until the 15th February, 1876."

This mortgage was duly registered the day of its execution.

The Con. Statutes of Canada, chap. 41 and chap. 42, respecting the registration of ships, and for the encouragement of ship building, have been repealed by the 36 Vict., chap. 128.

Chapters first, second and third of Title second of Book fourth of the Civil Code, except so much of articles 2356, 2359, 2361, 2362, 2373 and 2374, as are not inconsistent with the provisions of the Act 36 Vict., are also repealed.

It follows that the Shipping Act of 1854 is the law regulating such cases as the present.

By the 66th clause, a ship registered may be

given as guarantee for a loan, and by the 77th clause it is required that every such mortgage be registered.

By the 70th clause, the mortgagee shall not, by reason of its mortgage, be deemed owner of the ship, and the mortgagor shall not be deemed to have ceased to be the owner of the ship, except in so far as may be necessary for making such ship available as security for the mortgage debt.

By the 71st clause, every recorded mortgagee shall have power absolutely to dispose of the ship, in respect of which he is registered as such, and to give effectual receipts for the purchase money; but if there are more persons than one recorded as mortgagees of the same ship, no second or subsequent mortgagee shall, except under the order of some court capable of taking cognizance of such matters, sell such ship, without the concurrence of every prior mortgagee.

The enactments of the Articles of the Civil Code repealed, were fully in accordance with those of the Shipping Act of England; and although, new applications, new conditions, new guarantees of mortgage, were declared, the law-makers of Canada adopted these new applications, conditions and guarantees. It is evident that they fully intended that they should be enforced and carried out, in conformity with the jurisprudence and usages of England.

The law itself is very explicit as to the mode of disposing by sale of the ship so mortgaged. The 71st clause vests absolutely the power of disposing of the ship in the registered mortgagee, and if there are more than one, no subsequent mortgagee shall sell such ship without the concurrence of every prior mortgagee, except under the order of the Court.

In this instance there is no such concurrence; and also no order of the Court. The convention was made with that condition, in the form and in the words of the law.

The Court must obey the law, and carry it into effect. And to enforce the convention, and the enactments of the law concerning such convention, it must be adjudged, in the terms of the law, that the sale of the ship cannot be allowed, as the prior mortgagee has not given his consent.

The order contemplated by the law may be obtained, when the Court will consider the thing just and beneficial to all parties interested; but it must be asked and obtained in the usual mode, and by the proceedings prescribed to submit any demand to the Court.

A seizure, previous to any such order, cannot be held to be the proceeding prescribed by the 71st clause.

The plaintiff, being only a judgment creditor, has not even the right to obtain such order; he is not recorded as mortgagee; and such recorded mortgagee only, can obtain such order. At all events, he cannot have more rights as to the disposal of the ship than a second recorded mortgagee.

Otherwise the law would be a nullity; a thing without effect and protection, notwithstanding the distinct enactments of the Statute.

In England the jurisprudence in these matters is fully in accordance with the letter of the law.

In the Province of Quebec, the judgments reported are also in accordance with the letter of the Shipping Act, except the case of D'Aoust v. McDonald, and Norris, opposant. In that case the four Judges who were called to adjudicate were equally divided, not as to the privilege of the mortgage, but as to the mode of enforcing it.

The Court of Appeals, in the case of Kelly v. Hamilton, confirming the judgment of the Court of Review, adjudged that even the sale by sheriff was no bar against the right of a registered mortgagee, to revendicate the ship upon the adjudicataire; and ordained and enjoined the defendant to deliver the ship, without delay, to the plaintiff by revendication. Two of the Judges differed, not by reason of the inefficiency of the convention or of the mortgage, but that the sheriff's sale, without opposition by the mortgagee, had passed absolutely the property to the adjudicataire.

The opposition of Cantin is maintained with costs.

Cruickshank & Co. for plaintiff.
D. R. McCord for opposant.

TORRANCE, J.

[In Chambers]

MONTREAL, June 2, 1879.

HENDERSON et al. v. HENDERSON.

Security for Costs—Action by coheirs of whom one is a non-resident.

The plaintiffs were coheirs and joined in the

action which asked an account from the defendant. The latter moved for security for costs from both of the plaintiffs, one of whom was a resident and the other a non-resident.

Maclaren, Q.C., for defendant, cited *Humbert et al.* v. *Mignot*, 18 L. C. Jurist, p. 217.

Bowie, for plaintiffs, cited *Beaudry et al.* v. *Fleck*, 20 L. C. Jurist, p. 304.

TORRANCE, J. In the present case the two plaintiffs have distinct interests. The defendant may plead a settlement with the non-resident plaintiff, with which the co-heir has nothing to do, and *Humbert et al.* v. *Mignot* would appear to recognize this, and that where there is no *solidarité* between the plaintiffs, security for costs may be ordered to be given by the non-resident plaintiff. In *Beaudry et al.* v. *Fleck*, the plaintiffs sued the defendant for breach of an agreement which they jointly and severally made with him. The non-resident plaintiff is ordered to give security for costs.

Bowie for defendants.

Trenholme & Maclaren for defendants.

COURT OF REVIEW.

MONTREAL, November 30, 1878.

MACKAY, TORRANCE, RAINVILLE, J J.

[From S. C. Joliette.

LA BANQUE D'ECHANGE DU CANADA v. MASSÉ, and E. MASSÉ, T. S.

Saisie Arrêt—Attacking validity of Sale of Immovables by contestation of declaration of T. S.

Defendant by notarial deed, subsequently registered, sold his immoveable property to the garnishee. He was then sued by the plaintiff, who, after getting judgment, issued a writ of *Saisie-arrêt* in the hands of garnishee. The latter made a declaration that he owed and had nothing belonging to defendant, and plaintiff contested this declaration, alleging that the deed of sale by defendant to garnishee was fraudulent, made by connivance between defendant and garnishee, for the purpose of defrauding defendant's creditors, and depriving plaintiff of his recourse against defendant. By the conclusions of his contestation, plaintiff demanded the revocation of the deed and that garnishee be condemned personally to pay the debt.

The Court of Review, reversing the judgment of the Superior Court of Joliette, unanimously decided that the plaintiff could not wage such controversy by a contestation of the declaration of the garnishee, but only by a substantive revocatory action; that the revocatory action was the only proceeding left to plaintiff to complain of the transaction of his debtor; and that the creditor, in such cases, had only the right to have the fraudulent deed of his debtor declared null and void, in order to restore to defendant the possession of his property, but could not take conclusions tending to obtain a personal condemnation against garnishee. The reasons of the judgment are as follows:—

"Considering that the declaration of the *Tiers-Saisi*, was true when and as made, and that the *Tiers-Saisi* was not bound to state indebtedness or liability whatever to defendant or towards plaintiff;

"Considering that the *Tiers-Saisi*, plaintiff in review, may complain of the judgment against him as erroneous, in condemning him personally to pay as thereby ordered;

"Considering that the plaintiff had knowledge or means of knowledge of the sale attacked, which sale was registered before the issuing of the *saisie-arrêt* in this cause, and was not simulated, and that under the circumstances the controversy raised by the *saisie-arrêt* and the contestation of the declaration of the *Tiers-Saisi* ought to have been made subject, not of an execution, but of a substantive suit;

"Considering, &c."—Contestation rejected.

Baby & Co. for plaintiffs and contestants.

G. A. Champagne for *tiers-saisi*.

LEGAL EDUCATION.—*The London Law Times* says:—"If the Bench has gained by the appointment of Sir James Stephen (which every one admits), legal education has suffered a great loss. The learned judge was peculiarly fitted to be a teacher. He had none of the diffuseness and wordy uncertainty of ordinary professors, and we trust that the lectures which he delivered may be reproduced in a shape available to law students. A great change has recently come over legal education. The proportion of plucked candidates annually becomes larger. But it is curious that the ranks of the Bar do not furnish more brilliant advocates or sounder lawyers than those of the last generation, when examinations were optional. We are much disposed to doubt the value of stringent examinations as part of the training of a lawyer. They are too often taken as a substitute for practical experience in barristers' chambers, which is a fatal mistake."