The Legal News.

VOL. II. JULY 12, 1879. No. 28.

RETIREMENT OF MR. JUSTICE MELLOR.

After a judicial career of seventeen years, Sir John Mellor withdraws from the Court of Queen's Bench, to well-earned repose. His retirement is put upon the ground of his desire to leave the bench before his natural force and vigour are so abated by years as to interfere with the efficient discharge of his judicial duties. The Lord Chief Justice, who has served equally long, and who shared with Sir John Mellor the task of presiding at the famous Tichborne trial, says of him: "A sound law-"yer, a sound thinker, and a zealous, honest, "faithful public servant, his loss will be regret-"ted by the whole bar of England, and by his "colleagues on the bench, as irreparable." Mr. Justice Mellor is succeeded by Mr. Charles Bowen, one of the junior counsel to the Treasury. Mr. Bowen was not even a Q. C., and his age is only 43. Some surprise was created among the ranks of the Queen's Counsel at the unusual elevation of a member of the junior bar, but it seems to be admitted that Mr. Bowen will make a good Judge. The arduous nature of the duties requires that the occupant of the office shall be in the prime of life, so that the comparative youthfulness of Justice Bowen is an advantage rather than a fault.

THE U. S. JUDICIARY.

Judge Dillon, whose interesting paper on the Inns of Court and Westminster Hall was quoted in the first volume of the LEGAL NEWS, has resigned his position on the bench, in order to take a professorship in the Law School of the Columbia College. In his letter of resignation to the President, he says: "In voluntarily "terminating a judicial career of nearly twenty-"one years on the State and Federal bench, it "seems fitting to add that I take this step, not "that I am dissatisfied with the duties of the "office, but because I have recently been hon-"ored by an election to a place of commanding "influence in Columbia College, where the "labours are lighter, the compensation greater, "and which also, in the leisure it affords, as "well as the duties it requires, offers opportuni-"ties for the study and advancement of the law "that may well satisfy the highest professional "ambition." The Judiciary of the United States, it is notorious, are ill paid, and it seems that even a lectureship offers greater temptation than the Federal bench.

RULES OF PRACTICE, QUEEN'S BENCH.

The rules of practice relating to the printing and filing of factums in the Court of Queen's Bench have been revised with a view to secure greater uniformity in the style of compiling and printing, and promptitude in filing the cases before the Court. It will be noticed that an index to the printed case is now exacted, and it is also required that the factum shall be filed at least forty-eight hours before the case is called. The following are the rules as announced on the last day of the June term (June 21):

1. The case in appeal shall contain a summary statement of the pleadings and of the questions of fact and of law on which the party filing it relies; also, in an appendix, copies of the depositions of the witnesses produced by such party, giving the date of each deposition; also copies of all admissions obtained by him, and of all questions and answers on *faits et articles* of the adverse party, whenever the same are relied upon.

2. In addition, the appellant's case shall contain a copy of the judgment or judgments appealed from, with their respective dates, and such judgment or judgments shall appear at the beginning of the appellant's case.

3. There shall also be an index of the printed matter sent up by each party, indicating the page of the case on which each document or paper begins.

4. The cases shall be printed on paper of eleven inches by eight inches and a half, the type to be small pica, leaded face, and every tenth line numbered in the margin.

5. The parties may by a consent in writing file a joint case or factum.

6. Such joint case or factum shall state the questions of fact and of law to be determined by the Court, with a reference to such portions of the depositions, admissions, and questions and

answers on *faits et articles*, to be printed in an appendix, as are required for the proper adjudication of the questions in issue between the parties.

7. Such joint case shall be in the same form, and in other respects be subject to the same rules, and will entitle the parties to it to the same fees as if separate cases had been filed.

8. Forty copies of each case or of the joint case shall be filed in each cause.

9. No case not in conformity to the above rules shall be received by the Clerk of this Court or filed in his office, nor shall be taxed against the adverse party, except by leave of the Court or of a Judge thereof, which may be granted on such terms and conditions as the Court or Judge shall direct.

10. No party shall be heard on the merits unless his case or factum shall have been filed at least forty-eight hours before the case is called for hearing.

11. The above rules shall take effect as to all cases filed from and after the 10th day of September next, from which date all other rules of practice on the subjects provided for by the present rules shall be held to be revoked.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, June 11, 1879.

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

RENNY et al., appellants; and MOAT, respondent.

Insolvency—Appeal—40 Vic. c. 41, s. 28.

The appellants having moved for leave to appeal to the Privy Council from the judgment of the Court of Queen's Bench in Appeal,

The Court refused leave to appeal, the amending Act, 40 V. c. 41, having taken away the right of appeal in insolvency cases. The Chief Justice intimated that the Privy Council, on application being made to that tribunal, would probably allow the appeal.

Bethune & Bethune for appellants.

Abbott, Tait, Wotherspoon & Abbott for respondent.

MONTREAL, June 14, 1879.

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

JOHNSTON, appellant; and LEAF et al., respondents.

Judgment in insolvency case—Appeal.

The respondents moved to dismiss the appeal, which was from a judgment under the Insolvent Act, the notice having been given after eight days had elapsed from the date of the judgment.

The Court granted the motion (Insolvent Act, 1875, s. 128).

Doutre & Co. for appellant.

Bethune & Bethune for respondents.

MONTREAL, June 20, 1879.

Sir A. A. DORION, C.J., MONK, RAMSAY, and TESSIER, JJ.

DEMERS (plff. below), appellant; and THE CITY OF MONTREAL (deft. below), respondent.

Expropriation—Irregularity in proceedings—Notices.

In 1874, the City of Montreal resolved to widen several streets, and, among others, the eastern end of St. Mary street. Two-thirds of the cost of the improvement was to be borne by the proprietors benefited, and the remaining one-third by the city. Commissioners were named according to law, and they proceeded to fix the indemnity to be paid for the land taken for the purpose. The appellant, Demers, received the amount to which he was entitled by the report of the commissioners. But the assessors had another duty to perform. Besides estimating the indemnity to be paid to persons whose land was taken for the enlargement of the street, they had to establish the amount to be contributed by the proprietors held to be benefited. In doing this, they committed an error in not taking the last revised assessment roll, as required by 37 Vict. c. 51. The Corporation discovered the error, and abandoned the collection of the amounts as assessed on the roll made by the commissioners. But they applied to the Legislature to have another roll made; the Legislature granted their prayer, and by 39 Vict. c. 52, s. 6, commissioners were

empowered to make a new roll in accordance with sec. 187 of 37 Vict. c. 51. The present action was brought by one of the proprietors assessed for the improvement, to test the validity of the assessment roll made in pursuance of this Statute. The action was dismissed by the Superior Court, and the roll held to be valid.

Sir A. A. DORION, C. J. Sec. 187 requires the proceedings to be as prescribed by sec. 176, sub-section 2. This requires: 1st. Notice to the expropriated proprietor through the post office. 2nd. Advertisement in the newspapers. 3rd. Notice to be posted in both languages in three places upon every lot of land found liable to expropriation. Here the expropriation had already taken place, and the only thing required was to assess the amount to be paid by the different proprietors benefited by the improvement. The commissioners had not posted the notices on the lots of ground expropriated. There could be no doubt that the notices were intended to cover both the expropriation and the subsequent proceedings. But this statute was passed after the expropriation had taken place, and yet it said that notice must be given as prescribed by sec. 187, under which three notices were required. The Court could not say that the notices need not be given when the law says they must be given. It had been argued that there had been acquiescence on the part of Demers, by his having accepted the amount of the indemnity. The Court did not take this view.

Judgment reversed: "Considering that it appears by the evidence adduced in this cause that the respondents have failed to give the notices required by the Act 39 Vict., c. 52, under which the assessment or report of the commissioners was made, and, namely, failed to affix the notices required by sec. 176, s.-s. 2, of the Act 37 Vict., c. 51, on the properties expropriated and required for the widening of St. Mary street of the City of Montreal, before the appointment of the commissioners which were named to make the valuation roll complained of in the appellant's declaration;

"And considering that the respondent has failed to prove that appellant has waived the said notices;

"And considering that the said valuation roll is, from want of said notices, null and void, and the appellant entitled to the relief prayed for," etc. Judgment reversed, roll set aside, and the Court "doth order that all further proceedings against the said plaintiff be suspended, and the said respondents are hereby prohibited from troubling the appellant for or by virtue of said assessment roll."

Barnard, Q.C., for the appellant.

Roy, Q.C., for the respondents.

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

HUBERT (deft. below), appellant; and BARTHE (plff. below), respondent.

Commission—Construction of agreement.

The action was brought in the Court below for commissions. The respondent had been employed to procure subscriptions of stock in the projected "Banque St. Jean Baptiste," of which the appellant was President. He was to get one per cent. on stock subscribed by persons outside of the city, and ½ per cent. on stock subscribed by persons within the city limits. He obtained subscriptions to the amount of $65,300. The commission was to be payable "after the first call," there being a *postscriptum* to the agreement, as follows:—"Cette commission sera payable après le 1er versement." Very few subscribers paid the call, and the banking scheme was abandoned. The respondent sued the President for the commissions earned, alleged to amount to $375. The defence was that the commissions were not due until the subscribers had actually paid the first call. This construction of the agreement was overruled by the Court below, and, after some small deductions were made, judgment went for $311.50.

The Court unanimously confirmed this judgment, holding that the respondent became entitled to the commissions as soon as the call had been made.

Barnard, Q.C., for appellant.

Girouard, Q.C., for respondent.

MARTIN (plff. below), appellant; and THE CORPORATION OF THE TOWNSHIP OF ASCOT (defts. below), respondents.

Damages—Where drunkenness does not contribute to accident.

Sir A. A. DORION, C. J. The appellant sued

in the Court below to recover damages sustained by his sleigh having upset on a road in the township of Ascot, which accident, he alleged, was due to the bad state of the road. The defendants had pleaded several pleas; one was that the road was not under their control; and, by another plea, they alleged that the plaintiff had contributed to the accident by being drunk and driving carelessly. The Superior Court, after considerable evidence had been taken, condemned the Corporation to pay $200 damages. There could be no doubt that, if the plaintiff was entitled to recover, the amount of damages was not excessive, as the plaintiff had one of his ribs broken. The Court of Review, however, reversed the judgment, on the ground that the plaintiff himself was blameable, being intoxicated at the time of the accident, and having contributed to it by his condition. It was a matter of evidence, and this Court was always anxious to confirm in such cases. But here there were two judgments, and the evidence was conflicting. There were two facts established: one was that the road on the day of the accident was in a shockingly bad condition; and it was also proved that the appellant had been drinking, and was in an excited state. But there was no proof that this drunkenness contributed to the accident. It was proved that other people had to get out of their sleighs and hold up their loads, or otherwise accidents would have occurred; it appeared, in fact, that the accident might have happened to any sober man, and that the drunkenness of plaintiff did not contribute to it. The Court, having to choose between the two judgments, preferred to maintain that which was rendered by the Superior Court, and the judgment in review would therefore be reversed, and the plaintiff's action maintained for the sum of $200 and costs: "Considering that the appellant has proved that the accident complained of by his action, and by which he was severely injured, has occurred through the negligence of the respondents in not keeping in proper state of repair, as they were by law bound to do, a public highway which was under the control of the said respondents;

"And considering that the said respondents have failed to establish that the appellant had contributed to the said accident;

"And considering that by the negligence of respondents the appellant has suffered damages to the amount of $200."

Ives & Brown for appellant.

Brooks, Camirand & Hurd for respondents.

BROUILLARD et vir (plffs. below), appellants; and GUNN (intervening below), respondent.

Registration—Usufruct—Art. 2098 *C. C.*

In 1843, by a deed of donation, passed at Montreal, Anselme Brault and his wife gave a certain property in the St. Joseph suburb, to two of their sons, Charles Augustin and Joseph Leandre, who were to have the enjoyment of the property after the death of the donors; and a substitution was created in favor of the children of these donees. The donation was made with the condition that the donees should purchase a property of the value of £800 for their brother, Joseph Antoine Brault. A similar substitution was created, after the death of his widow, in favor of the children, and Joseph Antoine was to have power to will the usufruct to his widow. The donors died, and the two sons took possession of the estate donated, which thus became charged with the sum of £800, the share of Joseph Antoine Brault. The two sons did not invest this sum as directed. The third brother sued them hypothecarily, the property was sold at Sheriff's sale, and by the judgment of distribution his claim was reduced, in consequence of prior incumbrances, to £497, which remained as a hypothec on the immovable, which passed through several hands into the possession of Owen McGarvey. In 1867, Joseph Antoine Brault married the respondent. By his marriage contract Joseph Antoine gave the usufruct of the £497 to his wife. In 1877, he died, without issue, and by his will left it to her, as he had a right to do under the terms of the original donation. Charles Augustin, one of the original donees, died, leaving three children, one of whom assigned his third of his father's share in the succession of his uncle, Joseph Antoine Bault, to the appellant, who instituted a hypothecary action, for one-third of half of the £497, against the *détenteur* of the property, Owen McGarvey. The respondent intervened, claiming the usufruct of this sum.

The principal question was whether the

failure to register a declaration under 2098 C. C., of the death of Joseph Antoine Brault, and identifying the legacy of the usufruct under his will with the hypothecary charge on the immoveable in the possession of McGarvey, barred the rights of the intervening party.

The Court below declared the respondent to be proprietor of the usufruct, and maintained the intervention.

In appeal this judgment was confirmed, the Chief Justice, among other reasons, remarking that the non-registration of the death of Joseph Antoine Brault could not well be invoked by the appellant, because if he was not dead, she (appellant) could have no right.

Doutre & Doutre for appellants.

Lareau & Lebeuf for respondent.

MONTREAL, June 21, 1879.

Sir A. A. DORION, C. J., MONK, SICOTTE, *ad hoc*, RAMSAY and TESSIER, JJ.

HUS, appellant; and MILLET et al., respondents.

Appeal—Procedure—Death of a respondent who had not appeared.

A motion was made on the part of Joseph Hus Millet, who alone of several respondents had appeared, that inasmuch as the appellant had not produced his reasons of appeal within the delay required by law, the appeal be dismissed.

The appellant prayed *acte* of the production of the certificate of burial of Dame Lucie Bigné, widow of Alexis Peloquin, one of the respondents, and of the declaration that he cannot proceed on the appeal until the heirs take up the *instance*.

Sir A. A. DORION, C. J. This was an appeal in which there were several respondents. One of them had appeared, and the others had let the case go by default. The respondent made a motion to dismiss the appeal, because the reasons of appeal had not been filed in time. The appellant, in answer, proves the death of one of the respondents, and says that this suspends all proceedings. But the contestation was between the respondent who had appeared and the appellant; the other respondents who had not appeared had nothing to do with this. The point was a new one, but the Court was of opinion that the death of a respondent who had not appeared did not interrupt the proceedings between the appellant and the respondent who had appeared. The Court would give the appellant fifteen days to file his reasons of appeal, and the motion would be granted as to costs.

Geoffrion, Rinfret, Archambault & Dorion for appellant.

Mathieu & Gagnon for respondent, Joseph Hus Millet.

CANADIAN MUTUAL FIRE INSURANCE CO. (defts. below), appellants; and DONOVAN (plff. below), respondent.

Insurance—Preliminary proof—Waiver.

The action was for $4,000 on a policy of insurance. The appellants pleaded the fact that other insurances were effected on the property without notice to the company, absence of proper preliminary proof, and fraudulent overvaluation. The Court below held that the company got sufficient notice of the other insurances; and that the objection arising out of irregularities in the preliminary proofs had been waived by the conduct of the company after the fire. The claim was maintained for $3,000, that being the proportion assessed upon the defendants.

SICOTTE, J., after a full statement of the case, came to the conclusion that the judgment must be maintained, except that the amount must be reduced to $2,266.66. The whole value of the building was $6,800, and the appellants were liable for half of two-thirds of the value.

MONK, J., *dubitans*, had great difficulty in concurring. The preliminary proofs were not made in due form. It was strange that the plaintiff should come to Montreal to swear to a document before a magistrate here, when it was proved that there were magistrates in the neighborhood. The valuation, too, appeared to be exaggerated.

DORION, C. J. There were only two points in the case. The Court decided that a company receiving preliminary proof, and with knowledge of all the facts, joining in an arbitration, without having made any objection, waived the right to object, and could not raise the point afterwards. The other point was as to notice of the other insurances. It was proved that notice was given, but the agent made a mistake in supposing the insurances were on stock, instead

of on the building. The party could not suffer by the error of the agent. The judgment would therefore stand, except as to the modification of amount.

Lunn & Davidson for appellant.

Judah, Wurtele & Branchaud for respondent.

MONTREAL, June 24, 1879.

Sir A. A. DORION, C. J., MONK, RAMSAY and CROSS, JJ.

GOLDRING (deft. below), appellant; and THE HOCHELAGA BANK (plffs. below), respondents.

Capias—Affidavit—Personal knowledge.

The appeal was from a judgment of the Superior Court, MACKAY, J., April 5, 1879, rejecting the appellant's application to quash the *capias*. In giving judgment the learned Judge assigned the following reasons:

There are two petitions. First, to have the affidavit for *capias* declared insufficient, and the order of the Judge allowing the writ declared to have been improvidently issued; that the defendant's arrest be declared illegal; that he be freed, &c. By the second petition the defendant complains of the amount of bail ordered, and asks that it be reduced to $5,000.

The first petition is in two parts—the one of law, the second mixed of law and fact. The first part claims that the affidavit does not show legal or lawful cause of action, nor a debt personally due by defendant to plaintiffs; that it does not appear by the affidavit in what place, or in what manner, the pretended indebtedness of defendant was contracted; that the information alleged in the affidavit to have been received from J. S. Paquet was and is insufficient to justify the making of the affidavit; that no demand of payment was ever made upon defendant in respect of the pretended debt set forth in the affidavit, &c. The second part of the petition repeats all that, and denies the truth of the affidavit's allegations, denies indebtedness of the defendant to the Bank, denies that the defendant ever intended to leave Canada with any intent to defraud; alleges that the defendant's transactions with J. S. Paquet were in the ordinary course of business; that the only monies received from Paquet were $5,625 under the first sale to him by defendant, and $12,500 under the second sale, and not $12,500 under the first sale and $65,000 under the second, as in the affidavit falsely alleged; that it is false that petitioner ever knew that Paquet was using any funds other than his own; that the Bank has obtained possession of all the property acquired by Paquet from defendant, and is now enjoying it; that the Bank has never asked payment from defendant in respect to any of the pretended matters and things referred to in the affidavit; that defendant was arrested before by the Bank for the same causes, but they discontinued that arrest and defendant was ordered to be released from it, but the plaintiffs, without any new grounds of action, have again arrested the defendant, in fact before defendant had been perfectly freed from the first one discontinued. The affidavit in question is not one of the most ordinary description, and the facts of the case, as we see at the end of it, are far from ordinary. It is fitting, therefore, to state the substance of the affidavit. [This is quoted, in part, below.]

Does St. Charles' (Director of the Hochelaga Bank) affidavit show a legal cause of action against defendant? I can't hold the contrary; though now, after a long *enquête* in the case, we see that St. Charles might have sworn more largely against both Paquet and defendant. The affidavit commences with charge of personal indebtedness by defendant, and ends with charge against him of having damaged plaintiffs beyond $77,000. I think it shows a debt personally due by defendant; it states place well enough (Montreal). That a demand of payment on defendant was not made before his arrest, ought not to hurt; certainly in a case like this, ought not; nor ought the affidavit to be held bad merely because of its reposing in part upon information from Paquet, the alleged confederate of defendant. Now passing to the second part, or the merits, of defendant's petition to annul the arrest, can the petition be allowed, seeing the proofs made? Certainly not; serious proofs are made against defendant. I do not want to hurt him needlessly, by a pronunciation at this stage of the case, upon his own petition, more strongly than requisite, but cannot allow him to succeed upon his petition, considering his acts and deeds, and Paquet's, in combination with him, so disastrous to plaintiff's Bank. Paquet was known to be the plaintiff's cashier, the defendant was bound to

know that he only had limited authority; for instance, he was bound to know that Paquet had no authority to buy lands for himself, personally, and to pay for them out of the bank's money and securities. It is, in my opinion, idle for the defendant to say that he was ignorant that Paquet was using funds other than his own to pay defendant. The Courts are asked to believe very improbable stories sometimes, and incredible sometimes. The $10,000 cheque of 25th September, the four bank drafts (over $22,000 in amount), and the $4,800 *bordereau* of Oct. 21st, with what is proved about them, make appearances fatal to defendant's petition. Suppose Paquet not to support some of the affidavit's allegations, for instance, that Goldring knew *all* the payments made to him to have been made with money *détourné* from the Bank, we have yet proof to show a limited amount of money so *détourné* to have been had by Goldring, viz, the four drafts, the $10,000 cheque and the $4,800 *bordereau*, and he ought not to be allowed to retain them.

The case is a little embarrassed by the fact that Paquet has, since his arrest, given up to the Bank the very lands and mining rights acquired from Goldring; these cannot, fairly, be said to be of small value, but of what value are they? It is perfectly uncertain. Yet is the *capias* to be set aside? I can't see it. The land referred to, when it was given up, was really not Paquet's. He had used trust money to buy it, and the Bank might fairly claim to follow their money into the land as into stocks, had he bought stocks instead of land. Paquet was only doing common honesty in giving the Bank the land bought with the money stolen from it. (See 1 Hovenden on Frauds, c. 13).

The defendant may have rights, and has some, no doubt, derivable from the Bank's acquisition from Paquet of the lands alluded to, but what they are must be referred to another court. The Bank will probably hesitate to allow Goldring to take out of the lands to their prejudice, etc. He will pretend what he thinks best. I think, upon all that I have before me, that the *capias* was, and is, perfectly warranted. The petition is rejected with costs.

Upon the petition to reduce the bail, considering what is proved, and that the Bank ought not now fairly to have more bail than $36,800, instead of that originally ordered, but without finding, as prayed, that defendant owes the plaintiff nothing, or that the affidavit for *capias* is insufficient.

Petition is granted to this extent, and defendant shall be allowed freedom on first giving bail in the usual manner to extent of $36,800.

In appeal,

Sir A. A. Dorion, C. J. Art. 798 of the Code is in these words: "This writ (of *capias*) is obtained upon an affidavit of the plaintiff, his bookkeeper, clerk, or legal attorney, declaring that the defendant is personally indebted to the plaintiff in a sum amounting to or exceeding $40, and that the deponent has reason to believe, and verily believes, for reasons specially stated in the affidavit, that the defendant is about to leave immediately the Province of Canada, with intent to defraud his creditors in general, or the plaintiff in particular, and that such departure will deprive the plaintiff of his recourse against the defendant." Then, art. 801 adds this: "If the demand be founded upon a claim for unliquidated damages, the writ of *capias* cannot issue without a Judge's order, after examining into the sufficiency of the affidavit; and the affidavit in such case must state the nature and, moreover, amount of the damages sought, and the facts which gave rise to them, and the Judge may, in his discretion, either grant or refuse the *capias*, and may fix the amount of the bail, upon giving which the defendant may be released." So that to obtain a *capias* for damages it is necessary to allege, first, that there is an amount due; second, it is necessary to state the amount of damages sought, and the facts which gave rise to them; and, after that, it is necessary to state that the man is about to leave the Province with intent to defraud his creditors. In the present case, the Judge to whom the original application was made was satisfied that the party was entitled to a *capias*. The defendant complained of that order, and asked that the *capias* should be quashed on several grounds, amongst others, because it was not alleged in the affidavit that the defendant, Goldring, was indebted to the Hochelaga Bank; also, that it did not appear in what place the debt arose. The defendant went on to traverse the allegations, stating that he is really not indebted to the Hochelaga Bank as alleged; that he was not about to leave the Province of Canada with

intent to defraud, &c. The affidavit was made by Mr. St. Charles, President of the Hochelaga Bank. The first allegation meets exactly the terms of Art. 798. Then, as regards the indebtedness, it was necessary to see whether the reasons assigned for the indebtedness were in accordance with Art. 801. It had been contended that throughout the whole of the affidavit Mr. St. Charles never spoke positively as to the facts upon which the demand was based; that he spoke of his belief only. The affidavit was very long, and in most of the allegations the President speaks of the information which he received, but in one or two allegations he swears positively to his knowledge.

"Que chacune de ces dites sommes de $12,500 et de $65,000 ont été illégalement, frauduleusement et félonieusement détournées de la dite demanderesse, en la dite cité de Montréal, par le dit Jean Salem Paquet, vers l'époque de la passation des deux actes sus-dits, pour en faire le paiement au dit défendeur, qui savait que les dits argents étaient frauduleusement détournés de la dite Demanderesse, suivant les informations croyables que le dit déposant a eues à ce sujet du dit Jean Salem Paquet, dans les limites de la Province de Québec; le tout hors de la connaissance de la demanderesse et d'aucun de ces officiers qui viennent seulement de découvrir ces choses."

The affidavit further alleged:

"Que le dit déposant est croyablement informé par le dit Jean Salem Paquet, que le dit défendeur, Henry William Goldring, avait, à l'époque des paiements qui lui ont été faits en vertu des deux actes sus-récités, raison de savoir que ces paiements lui étaient ainsi faits au moyen d'argent que lui, le dit Jean Salem Paquet, détournait frauduleusement de la dite demanderesse; que le dit Jean Salem Paquet a même avoué au dit déposant, qui a toutes raisons de le croire, et le croit vraiment, qu'il (le dit Jean Salem Paquet) avait, avant de faire au dit défendeur un dernier paiement sur le prix d'achat des dits terrains miniers, représenté à ce dernier qu'il serait de court (*short*) dans sa caisse, (parlant de sa caisse comme caissier de la banque demanderesse,) pour l'état du trente et un Décembre dernier, que lui, le dit Jean Salem Paquet, aurait alors besoin de $25,000 pour faire balancer sa caisse, et que le dit défendeur lui aurait alors promis de lui faire l'avance de cette somme, dans le but d'obtenir ce dernier paiement qui lui fût effectivement fait.

"Qui le dit défendeur était présent au bureau de la dite banque demanderesse lorsqu'une grande partie des dits argents étaient pris dans la voûte de la dite banque, par le dit Jean Salem Paquet, pour le payer au défendeur, le tout suivant les informations du dit Jean Salem Paquet.

"Que par les faits ci-dessus mentionnés le dit défendeur a causé à la demanderesse, sus-dite, des dommages pour plus de soixante et dix-sept mille, cinq cents piastres courant."

Here the allegation was positive, according to the requirement of the Code.

There was another pretension, that Goldring being indebted to Paquet, the bank had a right to *capias* Goldring in the same way as Paquet might have done:—"Que le dit déposant est en outre croyablement informé que le dit défendeur est endetté envers le dit Jean Salem Paquet en une somme de $13,000, par suite de ce qu'il ne serait en position de livrer que quatre-huitièmes au lieu de cinq-huitièmes des dits intérêts et terrains miniers mentionnés dans l'acte en dernier lieu sus-mentionné, et que la demanderesse serait bien fondée à se pourvoir contre le dit défendeur pour cette dite somme, comme étant aux ou exerçant les droits du dit Jean Salem Paquet, le débiteur de la dite banque demanderesse." This pretension was not well founded. But the other allegations were sufficient, especially in consideration of the fact that the affidavit was by the President of the Bank, who could not know all the facts personally.

RAMSAY, J., considered that the affidavit, though weak, was, in one of the allegations quoted, sufficiently positive to save it.

Judgment confirmed.

Davidson, Monk & Cross for appellant; *E. Carter, Q.C.*, counsel.

Beique & Choquet for respondent; *W. H. Kerr, Q.C.*, counsel.

GOLDRING, appellant; and THE HOCHELAGA BANK, respondent.

Capias—Appeal.

The appellant moved for leave to appeal to the Privy Council from the judgment noted above.

MONK, J., thought it was an interlocutory judgment.

Davidson, Q.C. The appeal to this Court was *de plano*.

DORION, C.J. It is a new point, as no appeal to England has ever been granted, that I can remember, from a judgment rejecting a motion to quash a *capias*. But as there would be less harm in granting the appeal than in refusing it under the circumstances, we will allow the appeal, and leave it for the Privy Council to determine whether an appeal lies from such judgment.

Leave to appeal granted.