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A PUBLIC LIBRARIES ACT.

Notice has been given of an intention to apply to Parliament for an Act, under which a free Public Library may be established in this city. The subject was brought before the public some months ago, in a lecture delivered at the Rooms of the Natural History Society, by Mr. F. W. Torrance, and has since been agitated by a portion of the daily press. The proposed Bill will probably be based on the Public Libraries Act of Great Britain and American legislation on the same subject. Divided as the community is in religious creed, it has been deemed advisable to restrict the present application to the non-Catholic section, and the main object of the Act is, we understand, to authorize the non-Catholic portion of our citizens to impose a trifling rate on themselves for the support of the Library; leaving their fellow-citizens of the Catholic faith at liberty to establish a similar Library for themselves, to be sustained in the same way, if they should think proper to do so. It is, doubtless, matter for regret that any partition wall should be built up between the books provided for the use of one and the other section; but, at the present time, it seems the easiest way to avoid difficulties which would otherwise have to be encountered; and, fortunately, the city is wealthy and populous enough to bear without inconvenience the cost of two libraries. Pending the discussion which will probably take place on this Bill in Parliament, and the objections which will doubtless be raised, it may be instructive to glance at what has been done towards the establishment of Public Libraries elsewhere.

Reverting to ancient times, we need hardly remind the reader of the existence of vast libraries of costly parchments, when printing was unknown, and books were multiplied only by the laborious art of the penman. What lover of ancient lore has not sorrowed over the destruction by Omar of the noble collection of parchments at Alexandria, a library which fed the baths of that city with precious fuel for six months! In modern times, circulating libraries have been in use for more than a century, the most stupendous being that of Mudie, in London, which is said to buy over 200,000 volumes every year, and to take from 50 to 200 copies of every new work.

But it was not till 1850, that the first Public Libraries Act was passed in England. By this Act, we believe, it was necessary that a majority of the burgesses should poll their votes in favour of the introduction of the measure, before it could be enforced,—somewhat like Mr. Dunkin's Temperance Act in this Province. The rate to be levied was not to exceed a halfpenny in the £.; and, rather strange to say, the Corporation were not empowered to expend any of the money so levied in the purchase of books, but solely in procuring and keeping up the necessary buildings for the reception of the Library.

Manchester was the first of the great English towns to avail herself of the Act. She already possessed a free Library, the funds for which had been raised by voluntary subscriptions and donations, but she gladly availed herself of the permission to levy a rate, granted by the Act, as the firmest and surest basis for the permanent support of her Library. There were croakers in Manchester when the project was first started, yet only forty votes were polled in that great city against the introduction of the Libraries Act, while four thousand were cast in the affirmative! It is a significant fact that voluntary contributions to the Library were received from 22,000 of the operatives of Manchester,—"the metropolis of that Titanic industry, on the continued success of which England has deliberately pledged her station and authority among the nations of the world." The inauguration of the Manchester Free Public Library took place in September, 1852, and at the public meetings held on that occasion, the people of Manchester were applauded for the noble example they had set, by Thackeray, Dickens, Bulwer, Charles Knight, R. Monckton

Milnes, Sir James Stephen, and others eminent in English literature.

In 1855, the Act of 1850 was repealed, and a new Act passed, by which several changes were made, in the mode of introducing the law into towns and cities. By section 4 of the new Act, the mayor of any municipal borough, the population of which exceeds 5,000, shal , on the request of the Town Council, convene a public meeting of the burgesses. Ten days' notice of the time, place and object of the meeting must be given at church doors, and by advertisement. If two-thirds of the persons at the meeting determine that this Act ought to be adopted, the same shall take effect. By sec. 15, the rate levied is not to exceed one penny in the £.; and section 23 enacts that if any meeting determine against the adoption of the Act, no other meeting for the same purpose shall be held for at least a year.

Other great cities followed the example of Manchester, and now Public Libraries and Museums flourish in twenty-five English towns, and are the daily resort of thousands who there seek " to satiate that inextin-" guishable craving of the soul of man for " exact knowledge, for abstract truth, and " for comprehensive principles." Doubtless, as Sir James Stephen observed at Manchester, " Such collections are not without their " inconveniences. It may be admitted that " they tend to a desultory, discursive, and " idle use of books. But which is that of " all the blessings we possess of which some " similar abuse is not possible ?" Besides, it must be remembered that many who begin with the lighter description of literature, are gradually drawn on to graver studies, in history, political economy, or science.

The people of the United States have been noted for the ample provision made for the education of the young, and this preliminary training has been wisely followed up by the establishment of free libraries in several cities, thus throwing open to all classes what, in the words of Bulwer, "are the school-rooms " of grown up men." The noblest public library in the world is that of Boston. The edifice containing it was completed eight years ago, at a cost of $360,000. On the 1st August last, according to a statement in Mr. Torrance's lecture, " it contained 123,016 " volumes, and 32,558 pamphlets. During " the previous year, it had circulated over " 197,000 volumes, or an average of over 707 " per day. There were used for consul-" tation in the building in the same time " 13,090 volumes, and during the same pe-" riod 290,950 visits were made to it for the " purpose of reading in its halls, or of tak-" ing out or consulting the books to be found " on its shelves." This Library, though also receiving aid from the City Treasury, has been chiefly built up by the princely donations of which it has been the recipient. Mr. Joshua Bates, of the Barings firm, London, alone contributed the sum of $100,000; Mr. Jonathan Phillips gave $20,000; the Hon. A. Lawrence, $10,000; and Theodore Parker bequeathed to it his own noble collection, comprising 17,000 volumes. The main object sought is to provide useful and entertaining books, which may be taken out and read in the homes of the citizens. There is also a Library of Reference in an Upper Hall. In 1861, it was ascertained that 23 per cent. of the books in the Lower Hall were English novels, which was believed to be a fair proportion of light literature for the popular demand.

It is not necessary in this Journal to enter at length into the advantages derived from a Public Library. They have been set forth in words of glowing eloquence by Dickens, by Thackeray, by Bulwer, the men who have delighted and instructed millions of the present generation from their infancy. The reader will find the subject ably treated in the lecture of Mr. Torrance, to which we have before referred. One reflection, however, occurs to us as of special force in a young, and, comparatively speaking, poor country. How can we, in this colony, hope to have a creditable literature of our own, or to make an important advance in any department of learning or science, while those amongst us whose minds are enkindled by the fire of genius are debarred from access to any considerable collection of books, and are thus unable to follow out the studies begun,

or to ascertain what has been written or achieved by their predecessors in the department they may have selected? Is it not to be feared that many such, chilled and disappointed in their aspirations, are left to brood in solitary hopelessness, till they abandon their designs, or pass from the stage of life, without having accomplished aught worthy of their genius and industry?

It may be said that the proposition to levy a new tax is an objectionable feature in the scheme, and, indeed, we should be glad to see this part of the project altered, if it could be shown that any other course was feasible. But, it must be observed, the proposed rate would probably not exceed half a cent in the £., in other words, a person paying a rental of £50, would have to contribute only 25 cents per annum to the Library Fund; in return for which he would have free access to many thousands of volumes, and be permitted to take them to his home for the perusal of himself and his family. Nor is it proposed to rely solely upon taxation. The voluntary system will also come into play; for while it is considered by the promoters of the scheme, that there can be no other basis so secure as a small rate, for the permanent support, and to defray the annual expenses of the Library, yet it is expected that funds for the erection of an edifice worthy of the position which Montreal assumes as the leading city of British North America, will be provided by individual liberality. It is, moreover, urged that the taxation scheme is not a new or untried course, but one which has been found to work well in other countries.

We have some confidence that this scheme will not be nipped in the bud. Some there are whose faces are set with dogged and unreasoning determination against any improvement, be it what it may. From such, opposition may be expected. But we believe that the majority, convinced that the establishment of a free Lending Library and Library of Reference, [after the model of the Public Libraries of Manchester, Boston, and other cities that have taken the lead in the movement,] must effect important good to the community, will hail the proposal with satisfaction, and will further the measures which may be adopted for the speedy accomplishment of this object.

DISAGREEMENT OF JURIES.

It may be remembered that in the course of the argument in the case of Blossom and others, the point was raised by the prisoners' counsel, though not seriously urged, whether a second trial, after the disagreement and discharge of the first Jury, was legal, on the ground that no one can be twice put in jeopardy for the same offence. The case of Charlotte Winsor, and some remarks in the London *Solicitors' Journal*, were referred to. The woman, Charlotte Winsor, had murdered a child. At the first trial the jury did not agree, and were discharged, but she was convicted by a second jury. After her conviction, her counsel contended that the verdict was illegal for two reasons: first, because the Judge had no right to discharge a Jury, at all events, in a capital case; and, secondly, because no person can be twice put in peril for the same offence. The judge appears to have had some hesitation on the subject, and the question afterwards came up before the Court of Queen's Bench. Here the case was fully examined by the Court, and the judges were unanimously of opinion that the verdict was a good one, and ordered the execution of the sentence.

No importance, apparently, was attached to a point which was also urged in the Blossom case, namely, that a failure to agree by one or two Juries raises any presumption of the prisoner's innocence, which requires to be noticed by the Court or Jury at a subsequent trial; and they held that the doctrine, that a man must not be twice put in peril for the same offence applies only to a trial which leads to some re-result. If the man were acquitted, he could not be tried a second time. But if he were neither acquitted nor convicted, he was just where he was before the trial began.

As to the time during which a Jury that cannot agree should be detained, it will be noticed from the remarks cited below, that the Lord Chief Justice was inclined to doubt

the legality of supplying the Jury with refreshments. If it were illegal to do this, of course, the Jury could not be detained more than six or seven hours; otherwise the verdict would have the appearance of being obtained by compulsion. "Our ancestors," observed his Lordship, "insisted upon unanimity in the jury, and were not scrupulous as to the means by which they secured it. It was a mere contest between the strong and the weak—who could best sustain hunger, and thirst, and the miseries incidental to such circumstances. It was said to be competent for the judges to lug the jury about in carts. I doubt whether such a thing was ever done. But assuming it to have been so, we now look upon trial by jury in a very different light. We do not desire that unanimity amongst the jury should be the result of anything except unanimity of conviction. I hold it to be of the essence of the juror's duty that, if he has formed a deeply-seated conviction, he is not to give it up, although the majority may be against him, from any desire to purchase freedom from restraint. That being so, when a reasonable time has elapsed, and the judge is convinced that unanimity can only be attained from the sacrifice of conscientious conviction, why is he to subject them to the torture and misery, men, shut up without food or drink for a long time must endure, in order that the minority may purchase ease by the sacrifice of conscience? The judge was placed in a position of very great difficulty and embarrassment, in consequence of the Sunday intervening. Then arises the startling difficulty that, whereas it would be absolutely inhuman to keep the jury locked up without meat or drink until Monday, the only alternative would be to give them refreshment, and there is no satisfactory authority for saying—the authorities seem rather to be the other way—that after a jury have retired to consider their verdict, you can give them meat and drink."

A bill has recently been introduced in the Imperial Parliament to make it legal to supply a Jury ~~with refreshments~~; and also to take a verdict on Sunday.

THE TRIAL OF GOVERNOR WALL.

At the present time, when we have been daily reading about the atrocities committed in Jamaica, in suppressing the mutiny there, it may be interesting to revert to a very remarkable case of signal punishment, inflicted on an officer of high rank, who had not committed a tithe of the cruelties laid to the charge of Provost Marshal Ramsay. We refer to the case of Governor Wall, who was tried by a special commission directed to the Chief Baron Macdonald, Judges Rook and Lawrence, and the Recorder at the Old Bailey, Jan. 20, 1802. We are indebted to the *Annual Register* of that year for the particulars.

The prisoner (some time Lieut.-Gov. of Goree) was charged with the wilful murder of Benj. Armstrong, a serjeant in the African corps, by ordering him to receive 800 lashes, which were inflicted by several black slaves with such cruelty as to occasion his death.

The first witness, (says the *Annual Register*,) was Evan Lewis, who stated that in July, 1782, he was serving at Goree, where the prisoner was then governor, but which situation, it was understood, he was to quit on the 11th of that month. On the 10th, he, the witness, was orderly serjeant, and as such attended upon the governor. Before eleven o'clock in the morning, he observed between twenty and thirty of the African corps collected together, but could not undertake to say whether the deceased was among them, and he understood they were applying to Ensign Deerham, who was the commissary, for a settlement for short allowance. About twelve, he saw them again coming towards the government house, of which he informed the governor, who went out and met them at some little distance from the railing before the court-yard; Armstrong was first, and the rest following in a line. The governor called out to Armstrong, and bid him go back to the barracks, or they should be punished. This order they immediately obeyed without making any noise; on this second time they were not in their uniforms, had no arms with them, nor did the witness hear them make use of any disrespectful language. At the governor's dinner hour the bell rang, and

several of the officers came, and he observed they went away sooner than usual. Soon after, the governor came out and passed the main-guard, who saluted him, and went up to the barracks, the witness attending him at some distance, as it was his duty; from the barracks the governor ran hastily down and began beating one of the men, who appeared to be in liquor, and taking the bayonet from the sen ry, beat him with that also, and then had them both confined. At an earlier hour than was usual for them to attend the parade, the governor gave him directions to have the long roll beat, and to order the men to attend without arms. This order they obeyed, and were then commanded to form into a circle, in the centre of which were the governor, Captain Lacey, Lieutenant Paul, Ensign O'Shallaghan, and another officer. There were in all about 300 men: they formed two deep, the witness being outside the circle, but yet so situated as to plainly see all, and hear much of what passed. In a short time the carriage of a six-pounder was brought into the circle, and then he heard the governor call Benjamin Armstrong out of the ranks; Armstrong obeyed, when he was directly ordered to strip, tied to the gun carriage, and flogged by five or six blacks, with a kind of rope; he never saw a man punished with such a thing before, nor ever by blacks. The governor stood by, urging them, through the medium of their linguist, to do their duty, and he distinctly heard him say, "Lay on, you black b———, or I'll lay on you; cut him to the heart; cut his liver out." During the punishment, Armstrong said something which the witness did not rightly hear, but he believed it was begging for mercy; and when it was over he was led to the hospital, where he understood him to have died a few days after. This witness saw nothing like a court-martial held; the officers in the centre of the circle, it was true, conversed a minute or two, then turned to the governor, who ordered Armstrong out in the manner he had before stated. He declared that he saw no appearance of a mutiny; that he heard them talking of going to the commissary to require a settlement of their short allowance (upon which they had been for some time), as he and the governor were to leave the island the next morning, and which in fact they did. This witness underwent a very long cross-examination, but he did not vary in the material points. He admitted that he heard Armstrong tell the governor that they wanted to settle with the commissary; but denied hearing him make use of any such expression as "I'll be d———d if you shall stir from the island until the stoppages are paid." It could not have passed without his hearing.

Robert Moore, a private in the garrison, confirmed the greater part of the foregoing statement. He counted 800 lashes inflicted. There was no appearance of mutiny. But, though close to Armstrong at the time, he did not hear the governor make use of any such expression as "cut his heart out; cut his liver out."

Surgeon Ferrick, garrison surgeon, stated that he attended to the man, but made no representation of the punishment being too severe for him to undergo without danger; he did not appear to be more affected than men usually were. He died five days after, and from that time the surgeon had always supposed the punishment to be the cause of his death.

The prisoner addressed the jury in his own defence, representing that the garrison was in a mutinous condition, and that the punishment was inflicted on Armstrong by sentence of a court-martial held on the ground. The jury, however, found a verdict of guilty, and the prisoner being sentenced to death, was executed the same month.

This must certainly be looked upon as an extraordinary case. The crime was committed twenty years before the prisoner's trial. Wall was a native of Dublin, and was allied by marriage to many noble families, his wife being a sister of Lord Seaforth. In his youth he had distinguished himself by bravery in the field. He had for many years lived an irreproachable life, and, says the *Annual Register*, "it is most probable that, "had he not himself solicited a trial by his "application to the Secretary of State, he "would never have been molested for a transaction of so distant a date." The prisoner had been in the custody of the king's messengers in 1784, but escaped, and a proclamation was subsequently issued for his apprehension. He then remained in exile till 1801, when he wrote to the Secretary of State, informing him that he had returned to England for the purpose of meeting the charge against him.

THE CAPITAL PUNISHMENT COMMISSION.

The following are the amendments suggested by the above commission to the law of murder:—

"8. We proceed to offer such recommendations as we think expedient for altering the present law of murder. It appears to us that there are two modes in which the change may be effected.

9. The first plan is to abrogate altogether the existing law of murder, and to substitute a new definition of that crime, confining it to felonious homicides of great enormity, and leaving all those which are of a less heinous description in the category of manslaughter.

10. The other plan is one which has been extensively acted upon in the United States of America, where the common law of England is in force; this leaves the definition of murder, and the distinction between that crime and manslaughter untouched, but divides the crime of murder into two classes or degrees, solely with the view of confining the punishment of death to the first or higher degree.

11. We have given both these plans our serious consideration, and we are of opinion that the required change may be best effected by the latter, which involves no disturbance of the present distinction between murder and manslaughter, which does not make it necessary to remodel the statutes relating to attempt to murder, and does not interfere with the operation of those treaties with foreign powers, which provide for the extradition of fugitives accused of that crime. The object proposed can be attained by a short and simple enactment, providing that no murder shall be punished with death except such as are particularly therein mentioned.

These should be called murders of the first degree; all other murders should be called murders of the second degree, and punished as hereinafter recommended.

12. We recommend therefore—

(1) That the punishment of death be retained for all murders deliberately committed with express malice aforethought, such malice to be found as a fact by the jury.

(2) That the punishment of death be also retained for all murders committed in, or with a view to, the perpetration, or escape after the perpetration, or attempt at perpetration, of any of the following felonies: murder, arson, rape, burglary, robbery, or piracy.

(3) That in all other cases of murder, the punishments be penal servitude for life, or for ary period not less than seven years, at the discretion of the Court."

STAMPS ON CROWN PROCEEDINGS.

The question raised last September, whether it was necessary that stamps should be affixed to the papers in proceedings taken by the Crown, was decided in the negative, on the first day of the March Appeal Term. The argument will be found reported at page 81, 1 L. C. Law Journal. No remarks were made by the Court in rendering judgment.

ADMISSIONS TO PRACTICE.

The following are the commissions issued for the District of Montreal since the 1st January, 1866:—

Name,	Date of Examination.	Date of Commission.
John F. Leonard	2 Jan.	5 Jan.
Jean Bte. deLottinville	"	31 Jan.
Jean Urgel Richard	5 Feb.	5 Feb.
Louis L. Maillet	"	8 Feb.
Charles Thibeault	"	"
Joseph F. Dubreuil	"	"
Sévère Gagnon	5 March.	5 March.
Alfred Welch	2 April.	5 April.
John H. Duggan	"	"

Two other gentlemen passed the examination, but not having paid their fees, their commissions have been withheld, and their names are not inserted here.

ADMISSIONS TO STUDY.

The following are the names of those admitted to the study of the Law since the 1st Jan., 1866:—

Name.	Date of Examination.
Pierre Durand	2 January.
Aristide Coutre	5 February.
C. Boucher	5 March.
Theophile Michon	"
Joseph Brousseau	"
Adolphe Matthieu	"
Edson P. Stephens	2 April
Joseph Perry	"

LAW JOURNAL REPORTS.

COURT OF REVIEW.—JUDGMENTS.

MONTREAL, November 30, 1865.

Present:—JUSTICES BADGLEY, BERTHELOT and MONK.

LECOURS *v.* CORPORATION OF PARISH OF ST. LAURENT.

HELD—*That a Corporation is liable for dam-*

ages for neglect of duty, though the damages proved appear to have been sustained by plaintiff in consequence of his own negligence.

BADGLEY, J.—This was an action of damages against the Corporation, for not having carried out a certain *procès-verbal*, and put up certain fences. For the purpose of enforcing his claim, the plaintiff served several protests, the costs of which amounted to $14. He, Mr. Justice Badgley, had rendered the judgment now sent up for revision, and he had given the plaintiff judgment for the $14, because the Corporation were bound to put up the fences, and the protests were necessary to put them *en demeure* to do so. But he had not allowed damages, because the plaintiff had not kept his own fences in order, and the cattle who had done the damage would appear to have entered at these side fences. On reflection, his honor believed he ought to have awarded the plaintiff nominal damages for the growing grain destroyed, because the plaintiff's negligence in respect to his own fences did not relieve the defendants from the performance of their duty. The defendants had not done their duty, and the judgment would be reformed, and $20 damages for each year for two years awarded to plaintiff, in addition to the $14, with costs as of lowest class Superior Court.

SICOTTE *et al. v.* REEVES.

HELD—*That a party will not be allowed to fyle an answer to an articulation of facts after the case has been inscribed for review by the opposite party.*

BADGLEY, J.—The judgment in this case was correct as to the merits, and would be confirmed. But a question of procedure came up which had to be disposed of. The defendant had regularly fyled his articulation of facts, and the plaintiffs were bound to answer it, or the facts alleged would be held proved. The plaintiffs did not answer it, but inscribed the case for *enquête* themselves, and judgment was rendered. The defendant now brought the judgment up for review, and it was only now, when the case was being reviewed on the application of the opposite party, that the plaintiffs came in and said they had neglected to fyle their answer, and moved for leave to do so. It was altogether too late to permit such an application. But on the merits the judgment would be confirmed.

FELTON *v.* CORPORATION OF COMPTON AND ASCOT.

HELD—*That a sale of land without notification to the party who is the real owner, though the land stands in the name of other persons on the assessment roll, is null and void.*

BADGLEY, J.—This was a case for revision from the Court at Sherbrooke. It arose from the sale for taxes of two lots of land belonging to the plaintiff, but which were not put down on the assessment roll as his, but in the name of some other persons. The plaintiff's right to the property was clear, for he purchased one of the lots at Sheriff's sale, and he held the other under title which had not been questioned. These lots of land were charged with assessment, not against the plaintiff, but against two other persons. The municipality undertook to sell these two lots of land, and they were sold for $1.37; and the purchaser obtained deeds of conveyance, by which he was to become proprietor of the land. The plaintiff then brought his action to have the sale set aside. He said: No notice was ever given to me that my lots were subject to assessments. You knew that I was proprietor of the land. Why did you allow the name of the men on whom it was sold to continue on the assessment roll? Why did you not intimate to me that there was an assessment on this land? In selling it in the name of another party, you did wrong. The Court was of opinion, that the proprietors of even wild land, on which they did not reside, were entitled to be notified of the sale. Mr. Justice Short at Sherbrooke had adjudged the sale to be irregular, null and void, and this judgment must be confirmed.

KATHAN *v.* KATHAN.

HELD—*That where a party has inscribed a case generally on the merits, he cannot afterwards say that he only intended to inscribe it in part; and final judgment on the whole case will not be disturbed.*

BADGLEY, J.—This was a case from Missisquoi. The facts of the case were as follows: An old man in the townships had several sons. He had settled his property in one way or another, and had been living with the defendant. He had attained an age far beyond the period allotted to man, was perfectly blind, and was in that state of imbecility nearly bordering on fatuity, that he was unable to know right from wrong. Although this old man had been living with the defendant for some time, another brother, on one occasion, during the defendant's absence, went to the house and carried off the old man to his own house. After he had been at the plaintiff's house a short time, not knowing what was passing around him, and attended to only by the plaintiff, his wife and their son, and the door kept continually closed, the son applied to a notary resident in the neighbourhood, to come to his father's room and make a transfer of the estate. The notary, a respectable man, knowing the old man's condition, refused to go or meddle with the old man. But at last the plaintiff obtained a draft of an agreement which he suggested to his father to be executed by him. They set up the old man, the son read the paper, and then guided the hand of the old man to sign it. The old man was quite unconscious of what was passing, and as indicative of his state, it might be mentioned, that at the time this affair was going on, and the paper was being read, he said: "Would you like to hear me whistle; I can whistle very well?" and he whistled two tunes while the ceremony was going on. It was upon the paper executed in this way that the case arose. The plea was, that the old man was insane, of unsound mind, and did not know what was going on, and that the whole transaction was fraudulent. Judge McCord had pronounced a judgment, upon the plea, that the old man was not insane. This was true, but he was imbecile. There was a well under

stood difference between insanityand imbecility. But a difficulty supervened upon the procedure. Upon the previous inscription before Judge McCord, he judged upon the pleadings that the old man was not insane, but he ordered proceedings to go on and be had upon the merits. Thereupon the plaintiff inscribed the case generally on the merits, and submitted it for final judgment upon the issue between the parties, and he, Mr. Justice Badgley, had subsequently rendered judgment, expressing the opinion that the old man was fatuous, and that the agreement so made was suggested and fraudulent. That judgment now came up for revision, the plaintiff objecting that the latter judgment was irregular. But, could a party after inscribing the case generally upon the merits, turn round and say that he only intended to inscribe it in part? Final judgment had been rendered upon the inscription. His honor believed the judgment must be confirmed, and his colleagues concurred in the opinion. Judgment confirmed.

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

HELD—*That the defendant in a case in which judgment has been rendered against him in vacation, may consider the judgment as final, and inscribe the case for review without having put in an opposition, or having waited till the delay for doing so has expired.*

BADGLEY, J.—On the 18th July an ordinary writ issued at the suit of the plaintiffs, the action being brought for the recovery of $151, bill for printing a factum in appeal. The writ was returnable 31st July, and was returned in the usual way, the declaration being signed by M. as the attorney. Nothing further was done till 1st September, when the defendants fyled an appearance, which remained of record. On the 6th September, a petition was presented by P., as attorney for plaintiff, ignoring M., praying that the appearance be set aside, because plaintiff was anxious to obtain an early judgment. This petition was presented in chambers, without notice to the defendants; and the judge adopted the conclusions of the petition, and ordered the appearance to be rejected from the record. This judgment was given, not in Court, but in chambers, ministerially, and upon a petition signed and presented by an attorney who was not in the case. On the same day, evidence was adduced, and judgment rendered by the prothonotary as in a default case in vacation. Now an application was made on the part of the defendants to have this judgment revised. The only difficulty was to determine whether this was a final judgment or not. It was alleged that it could not be considered a final judgment till the delays for fyling an opposition, &c., had expired. But these delays were in the interest of the defendants, and if they declared, as they did: we accept it at once as a final judgment; we do not want to wait for these delays, but wish to take it up for revision, how can the plaintiffs complain? The plaintiff's motion, asking to have the inscription for review discharged, must be rejected.

MONK, J., said his reason for rejecting the defendants' appearance was that no notice of the appearance had been given, and he treated it accordingly as if it had not been put into the record.

KINGSTON *v.* TORRANCE, and REV. JOHN TORRANCE *et al.*, T. S., and KINGSTON contesting.

Garnishees condemned to pay over moneys.

BADGLEY, J.—This was a contestation of a declaration of garnishees. A judgment having been rendered against the defendant, the plaintiff attached the sum of £2,750 in the hands of the executors of his father's estate, this sum being left to defendant by will, to be paid to him by the executors after he had attained the age of 30. The attachment took effect before the defendant had attained the age of 30. At this time the executors had the £2750 in their hands, less the sum of £500 which they had paid out. Since the attachment was placed in their hands they had paid away the balance of £2,250. Now at the time they paid this money away, they were under the obligations of the law, because the Queen's writ had ordered them to hold it. There could be only one consequence of their having divested themselves of the money; they must be held liable for it. Under these circumstances the judgment of the Court below must be confirmed.

MCDONALD *et al.*, *v.* MOLLEUR *et fils.*

HELD—*That where the defendant pleads trouble to an action for instalments of purchase money, and offers to pay on security being given, the plaintiff should be condemned to pay the costs of the contestation.*

BADGLEY, J.—The question here was with reference to a *trouble*. The defendant purchased some land clear and free of all mortgages. Two instalments of the purchase money were transferred to plaintiff, who now applied for payment. The plea was *trouble*, *i.e.*, defendant said: remove the mortgages upon the land or give me security that I shall not be troubled, and I will pay you. The plaintiff did give security, and the Court had condemned the defendant to pay the full costs of the action. This would have been right if the defendant had simply asked that the action should be dismissed. But under the circumstances of the plea the Court was of opinion that the plaintiff should pay the costs of the contestation, the defendant to pay the costs up to the fyling of the plea. Judgment confirmed with this emendation.

COURT OF REVIEW—JUDGMENTS.

Montreal, 30th Dec. 1865.

PRESENT: BADGLEY, J., BERTHELOT, J., and MONK, A. J.

SCHOOL COMMISSIONERS OF THE PARISH OF ST. BRUNO *v.* CHAMPEAU.

Action to account.

BADGLEY, J. — The Court is unanimous in confirming the judgment rendered in this case. The defendant, who is the Secretary-Treasurer of St. Bruno, being called upon to render an account, came forward and volun-

tarily allowed two different persons to go over all his accounts, for the purpose of establishing the amount due. The result was that both of these persons came to pretty nearly the same conclusion as to the amount due. More than this, the defendant himself admitted that the statements fyled by these persons were right. The case was very plain, and the judgment of the Court below must be confirmed.

LASELL *v.* BROWN.

Defendant allowed to amend his plea after enquête.

BADGLEY, J.—This was a case from the Superior Court, District of St. Francis. The action was brought on an account. Certain figures were adopted as the balance then due. But there were various amounts to be paid by plaintiff, which if paid would have very materially reduced the amount due by defendant. Unfortunately, being sued, he was unable to give his instructions personally to his attorney, and the latter had not included these paid sums in his plea. Subsequently, after evidence had been adduced, application was made to the Court to be allowed to set these things up in abatement of the amount claimed. The Court below refused to allow the defendant to come in and replead. We think this was a harsh judgment, and are disposed to allow the defendant to come in and fyle his statement with repleader, but of course on payment of full costs. Judgment reformed.

CHARBONNEAU *v.* CORPORATION OF PARISH OF ST. MARTIN.

Action by widow, to recover damages from Corporation, dismissed, because the accident was the result of negligence on the part of deceased.

BADGLEY, J.—This was an appeal from a judgment dismissing plaintiff's action. The plaintiff is the widow of a man who was carting wood from St. Eustache to Montreal, and as he was going along the road to town from St. Martin, his load of wood turned over against the fence, and the man, who was between the fence and the load of wood, was killed almost immediately. The action is brought by the widow to recover damages, on the ground that the Parish did not keep the road in good order. The plaintiff should have shown that there was no negligence on the part of the deceased. The circumstances showed that there was no ground of action. The deceased went over the same road on the Saturday previous, and if it was in so dangerous a state, he must have been aware of it on the Sunday night following when he was killed. His load of wood was very heavy, and the wood very long. The night was dark, and deceased, while leading the horses, gradually drew the sleigh into the ditch, so that it turned over. Shortly before the accident he had changed places with his companion, saying that he would go to the side of the vehicle and hold it up on the side where it turned over. It was very foolish of him to suppose that he could hold up a very heavy load of wood. It was in evidence that many parties had passed over the road the same night without suffering any inconvenience, and he would also have escaped had he not gradually diverged from the centre of the beaten road, and driven his horses at last into the ditch on the roadside near the fence, when his load upset upon him. Under the circumstances, the judgment dismissing plaintiff's action must be confirmed.

TURGEON *v.* TURGEON.

HELD—*In an action for separation de corps et de biens, the proof being only sufficient to establish mere incompatibility of temper, that such incompatibility cannot justify a judicial divorce.*

BADGLEY, J.—This was an action brought by a wife against her husband for separation *de corps et de biens*, after they had lived together for nearly thirty years, and after their children had grown up to be almost men and women, the oldest daughter being 19 or 20. It was easily conceivable that during this long period the husband may have been more or less violent at times. The only question was whether *sevices* had been proved. The only proof of this was made by the two eldest children, the one a daughter, aged 19, and the other a son, aged 16. The principal thing proved was that on one occasion, when the husband came in and found his soup cold, he asked his wife how that happened. She gave him a very impertinent answer, and thereupon some abusive language passed between them; and that some time previously the husband had given the wife a kick. But all this occurred long ago, and had been condoned by subsequent harmony. There was no proof of general ill treatment; on the contrary, unexceptionable witnesses, relatives, strangers and servants, referring to many years of their intercourse with the parties, proved nothing against him. The servants stated that he was a rough man, but that the wife was also rough. Mr. Justice Smith dismissed the action, and we think his judgment should be confirmed. It is not on account of a mere incompatibility of temper between husband and wife that the law authorizes a separation. This Court has not the power to divorce parties from such incompatibility of temper; and as the only evidence of *sevices* is by these children, which is not sufficient against all the other testimony adduced in the case, the judgment must stand.

MONK, A. J., had great difficulty in concurring in this judgment. It was established that the defendant's conduct was perfectly outrageous, and it was proved, moreover, that he was a drunkard. The proof, however, had not brought the ill treatment down to so recent a date as to justify the Court in granting a separation. It was hoped that the parties would make a virtue of necessity and live peaceably together in future.

TREMBLAY *v.* VADEBONCŒUR and TREMBLAY, opposant, and DUBOIS, opposant, contesting.

Judgment, homologating report of experts as to value of rente, confirmed.

BADGLEY, J.—This case came up on a judgment of distribution of money, proceeds of property sold. The only difficulty in the case was to

ascertain the probable lifetime of the opposant, and two modes had been suggested for the purpose; one by an *expertise* of medical men, and the other by taking the statistics of the Insurance Companies. In this case an *expertise* was resorted to, and medical men were appointed to ascertain the value of this man's life. On the 6th June, 1865, they examined the physical condition of the subject, made careful calculations, and it was decided that he would have five years and four months to live, which would bring his age up to seventy. The Court was disposed to adopt this statement. The *rente* at £40 a year would amount altogether to £258 for the estimated time, and this sum being a *bailleur de fonds* claim, would absorb the whole proceeds to be distributed. Judgment confirmed.

LACOMBE *et al. v.* LANCTOT.

HELD—*That a demand made upon a trader, under the Insolvent Act of* 1864, *requiring him to make an assignment, will be dismissed, when it appears from the proof that such demand was made for the purpose of enforcing payment of a particular debt.* 27 & 28 *Vic., cap.* 17, *sec.* 3.

BADGLEY, J.—This was a proceeding under the Insolvent Act. Messrs. Lacombe and Perrault notified the defendant to make an assignment. The latter fyled a petition under the Act, setting up that he was not insolvent, and that Lacombe's claim was not a commercial debt. The facts were as follows: At the time of his marriage, Lanctot, son-in-law of Lacombe, was living in Sherrington, at a considerable distance from Laprairie where Lacombe was of old standing in business. Lanctot came to settle in business at Laprairie, and possibly was a rival in business of his father-in-law. They had some transactions together, which resulted in a certain balance being due by Lanctot, for which Lacombe obtained judgment against him. Lanctot had given instructions to his attorney to fyle contra claims against the amount demanded, but owing to the absence of the attorney, these claims were never fyled in offset. After the judgment had been obtained, Lanctot entered into partnership with Dandurand at Laprairie; and it was shown by the evidence of record that they were substantial merchants, paying their way, and doing a considerable business. There was no claim against the firm, the claim was against Lanctot individually, made after his entering into the partnership. Now a reference to the Insolvent law shewed that the fact of this debt existing was not sufficient ground to justify proceedings in bankruptcy. The other creditor, Perrault, had never previously asked for his money, so that there was no refusal to pay his claim. The chief claim before the Court was this claim of Lacombe, and he swore positively that he forced the defendant into bankruptcy to get himself paid. The Act specially excluded the case of a creditor proceeding under the Act solely for the purpose of enforcing his own claim. As to the other objection of the non commercial nature of Lacombe's debt, it appeared that it was a commercial debt, but on the first ground the Court was of opinion that the judgment must be revised and reversed, but without costs.

MONK, A. J., who rendered the judgment now reversed, observed that the point on which the Court based the present decision had not been brought under his notice before.

COURNOYER *v.* TOURQUIN *dit* LEVEILLE.

HELD—*That where a motion to amend declaration has been allowed, the amendment must be made on the face of the declaration, and an opportunity given to defendant to replead, before judgment can be rendered.*

BADGLEY, J.—This was an action brought by an old man for value of services performed for his nephew during a number of years. After the *enquête* was completed, the plaintiff found it necessary to amend his declaration, and having made a motion for leave to amend, the application was granted, and he paid to the counsel for the defendant, the costs of the amendment. But unfortunately the case remained as it was, the amendment not having been made on the face of the declaration. The Judge in the Court below passed over this and gave judgment on the merits. We think that the amendment should have been put on the record before judgment, because the other party might have had something to plead. We cannot permit the defendant to be foreclosed from repleading to an amendment which changes the face of the declaration. The judgment will be that plaintiff amend his declaration and give notice to the defendant to plead. If the latter does not wish to plead, the case may be sent up again.

BOUVIER *v.* BRUSH *et al.*

HELD—*That the omission, after oppositions fyled with Sheriff, of publications at the Church door, of the day of sale under an execution, will not invalidate the subsequent sale of the property under the venditioni exponas.*

BADGLEY, J.—A writ of execution was taken out at the suit of the plaintiff, and certain property was seized as belonging to the defendant. The Sheriff proceeded to advertise the sale in the usual manner, but long previous to the date of sale, oppositions were fyled in his hands. Thereupon he did not make publication of the sale at the Church door, but the advertisement was continued in the *Canada Gazette*. When the *venditioni exponas* issued, there was no opposition to the sale on the part of the defendant. He knew the sale was to take place, but only reserved to himself the right to bring the present action against the Sheriff and the *adjudicataire*. He alleges collusion, and says that neither could the Sheriff give, nor the *adjudicataire* obtain, a good title, because there had been no notification or publication at the Church door of the day of sale under the execution. Now, the Statute says that the Sheriff shall not suspend the advertisements, but what would have been the use of making the publication at the Church door when he knew that he could not proceed at all? Upon the writ of *venditioni exponas* proper publications and notices were made, and the sale took

place in the presence of the defendant, without any legal objection on his part. He has now brought his action to set aside the *decret*. We think he is not entitled to succeed in this action, and that the judgment at Industry Village must be confirmed.

MONK, A. J.—The publications were regularly made in the *Canada Gazette*, but were entirely omitted at the Church door. He was of opinion that in this case the writ of *vend. ex.* might go out, as previous publication would be an utterly useless waste of money.

BERTHELOT, J., dissented from the majority of the Court, being of opinion that the publication of the sale under the execution, should have been made at the church door, and that the absence of this formality invalidated the sale under the *venditioni exponas*.

RUSSY *v.* LAMOUREUX.

Action to recover damages. Judgment dismissing the action confirmed.

BADGLEY, J.—This was a case from the District of Richelieu. The action was brought to recover damages for injuries alleged to have been sustained by the *Seaflower*, in the spring of 1862, at Sorel. The vessel was lying on the North shore when the ice in the Sorel harbour gave way, and carried down the *Seaflower* to the middle of the channel. As in this position she impeded the efforts which were being made to save the vessels, and as she had no known proprietor, the Harbour Master, with the consent of Voligny, agent of the Richelieu Company, brought her to her former position, and it was supposed that she had been secured in a place of safety. But some nights after, when the water rose from the St. Lawrence ice coming down, the vessel not being fastened to the shore was carried down and landed on the river's bank, half a mile lower down, where she lay during the ensuing summer and was much injured. The value put upon the vessel had been greatly exaggerated; but, apart from this, the defendant could not be held responsible for damages, the act complained of being the act of the Harbour Master with the consent of the agent of the Richelieu Company; and therefore the judgment dismissing the plaintiff's action would be confirmed.

COMMISSIONER OF INDIAN LANDS *v.* JANNEL.

HELD—*That the sale of Indian Lands without authority from the Commissioner is illegal.*

BADGLEY, J.—The defendant having bought a piece of land from the Abenaqui Indians without any authority from the Commissioner, the latter brought the present action to revendicate this land, as sold without any authority from him. The plea was that the land was out of the precincts of the Indian Village. The statute did not draw any distinction of this kind. It extended to all the lands of the tribe. The defendant never got any authority, though others did. There was no doubt about the land in question belonging to the Indian tribe. The statute was precise; and therefore the judgment of the court below in favor of the plaintiffs must be confirmed.

SUPERIOR COURT.

Montreal, 30th December, 1865.

BERTHELOT, J.

IRISH *v.* BROWN.

Motion to reject exception à la forme attacking the truth of bailiff's return, dismissed.

In this case a writ of *saisie-arrêt* before judgment had issued, and a motion was made to reject the exception *à la forme*, because it attacked the bailiff's return, and it was contended that the bailiff's or sheriff's return could only be attacked by an inscription *de faux*. The defendant replied to this that it was necessary in the first place to fyle an exception *à la forme* in order that there might be some proceeding on which to base an inscription *de faux*, if he chose to take that proceeding subsequently. Motion for rejection of exception dismissed.

CIRCUIT COURT.

FERGUSON *v.* JOSEPH.

Prescription of thirty years for overhanging trees.

This was an action to recover $100 damages, said to have been caused to the garden and fruit trees of the plaintiff, by the growth of seven poplar and willow trees close to the fence dividing the plaintiff's property from that of the defendant. The plaintiff alleged that these trees had extended their roots and branches so that the latter overhung his property, and that caterpillars, insects and worms had migrated from the defendant's poplar and willow trees to the plum and other fruit trees of the plaintiff, and had done considerable injury. The plea of the defendant was that the poplar and willow trees had stood there for more than thirty years, in fact for fifty or sixty years, without any objection being raised by plaintiff or his predecessors, and that prescription had been acquired. The Court was of opinion that prescription had been proved, and that it was not through the fault or negligence of the defendant that the damage complained of had been suffered. The plaintiff's action would therefore be dismissed with costs

MONK, J.

LEROUX *v.* BRUNEL.

Action to recover damages for slander; $50 awarded.

This was an action of damages for slander. The defendant was about to purchase some property from Lachapelle, a brother-in-law of the plaintiff, but he had refused to execute the deed, at the instigation of the plaintiff, and an action had been brought against him which was now pending. On the 5th of April, 1864, Lachapelle received a most extraordinary letter, in which the defendant, (who seemed to be a man of education, and who was probably annoyed that Leroux should have interfered with the sale) proceeded to put Lachapelle on his guard against his brother-in-law, the present plaintiff, and depicted him as a scoundrel in almost every form that could be imagined

It was said that the letter was only intended to put things right. If the allegations of the letter had been true, there might be some mitigation of damages, but there did not appear to be any evidence of the charges. Moreover, this letter was written to an intimate friend of the plaintiff, and to a man who could not read writing, and was obliged to get a friend to read it to him. This friend read it, and then it was given to Leroux to read. Leroux seeing the extraordinary nature of the letter, went to a notary and had it read again. The notoriety thus given to the contents was almost inevitable from the circumstance of Lachapelle being unable to read. Damages would be awarded, but the Court was of opinion that fifty dollars would be sufficient.

MARTIN *v.* BRUNEL.

Action by bedeau, for annual quart de blé, dismissed.

This was an action brought by the *bedeau*, or beadle, of the Parish of St. Anne of Varennes, against a farmer of the same place, to recover three quarter bushels of wheat, or 75 cents, the equivalent thereof. The plaintiff set up that on the 12th April, 1784, the parishioners of Varennes held a meeting at the *Presbytère*, and made a regulation by which it was decreed that each parishioner should contribute annually to the *bedeau* a *quart de blé*, as a remuneration for his services. The original minute had been deposited with Archambault, Notary, on the 24th March 1845. Subsequently, the *bedeau* agreed to accept 25 cents in money instead of the wheat. It was further alleged that defendant, though liable for this contribution, had refused to pay the same for three years. The plea denied the validity of the impost, and also set up that plaintiff was not the *bedeau* of the Parish, but was only employed by the *curé*, another officer having been engaged by the Parish. The Court considering the plaintiff's action unfounded, dismissed the case.

SUPERIOR COURT.—DISTRICT OF BEDFORD.

JOHNSON, J. 1865.

AITCHISON *v.* MORRISON.

HELD—*That a report of provincial land surveyors, acting as experts, will be set aside on motion, if the surveyors have not been sworn, though the rule appointing said experts does not order that they shall be sworn.*

In this case the plaintiff by his counsel moved to revise the interlocutory judgment rendered by Mr. Justice McCord, homologating the report made by three provincial land surveyors who had been appointed to make a survey. This report had been concurred in by all three surveyors, and duly homologated, on motion of defendant, on the 17th May, 1864. The plaintiff moved that this judgment be revised and the report set aside, because the *experts* had not been sworn. The rule did not order that they should be sworn, and they were described in the rule, &c., as "sworn Provincial Land Surveyors," (being public officers acting under their oath of office.) Mr. Justice Johnson rendered judgment, setting aside the interlocutory judgment, and rejecting the report on the ground that it was illegal in consequence of the *experts* not having been sworn.

CIRCUIT COURT.

Montreal, 13th Dec., 1865.

MONK, A. J.

BRADY *v.* AITCHISON.

HELD—1. *That a surveyor is entitled to his fees and disbursements from the party who named him expert, though the report has been set aside by the Court on the ground that the experts were not sworn.*

2. *That the tariff established by Consol. Stat. Can., cap. 77, sec. 108, subsec. 5, by which the time of a provincial land surveyor attending a Court in his professional capacity is valued and taxed at $4 per day, may be disregarded by the Court, and the sum reduced at the discretion of the judge.*

3. *That though a written promise to pay the account sued on, acknowledged by the defendant on oath, is the only evidence adduced, such written promise may be taken as proof of part of the account, and not of the whole.*

This was an action brought by J. Brady, the surveyor named by Aitchison in the case reported above, under the rule of Court, for the purpose of surveying the property. The sum claimed as due was $67, viz., $56 for 14 days actual work, and $11 travelling expenses. The plaintiff's proof consisted of a promise by defendant in writing to pay Mr. Brady's account for the survey without further trouble, this promise being in answer to a letter by plaintiff's attorney, requesting payment of $67 amount of plaintiff's account for survey. The plea was that the work was not completed properly; and further that the report had recently been set aside by the Court, because the surveyors had not been sworn. Hence the work had proved to be useless to defendant, and the surveyors were not entitled to any remuneration. On the part of the plaintiff it was urged that all three surveyors had concurred in the report, and it had been duly homologated by Mr. Justice McCord on the 17th May, 1864. Had the defendant, Aitchison, acquiesced in this judgment, there would have been no necessity for another survey; but, on the contrary, his counsel had succeeded in getting the judgment homologating it set aside on the purely technical ground that the surveyors, who were sworn public officers, had not been sworn afresh when appointed to do this work. With respect to the amount of remuneration claimed, the plaintiff urged that the promise to pay the account for the survey covered the amount claimed, which was at the rate of $4 per day, being the tariff rate established by chap. 77, C. S. C., sec. 108, for surveyors attending a Court *in their professional capacity*. Mr. Justice Monk said the report having been homologated, the pre-

sumption was that the work had been properly done. Nevertheless it had proved to be utterly useless to defendant. However, as the rule appointing the experts did not direct that they should be sworn, this could not debar the surveyors from claiming remuneration, especially as it was through defendant's persistent endeavors that the report had been set aside. It might be doubted whether the judgment rendered by Mr. Justice Johnson was correct, surveyors being public officers acting under an oath of office. The plaintiff must have judgment; but as to the amount of remuneration, he would not pay any regard to the statute cited, and would fix the rate at 7s. 6d. per day. (No suggestion had been made by defendant at the trial that the rate charged was too high.) Judgment for $1.50 per day, and travelling expenses.

SHEFFORD CIRCUIT COURT.-DISTRICT OF BEDFORD.

Before Mr. Justice JOHNSON.

23rd January, 1866.

WOODARD *v.* AURINGER.

Action to revendicate certain oxen, which defendant claimed to have been purchased by him with a term of payment not yet expired.

On the 14th Sept., 1865, plaintiff instituted the action in this cause, and alleged in effect that on the 22d Sept., 1862, defendant leased from him a pair of three years old steers for two years; that in acknowledgment of this agreement, defendant then and there signed and delivered to him a paper writing in the following words; "This is to certify that I "have this day taken one yoke of three years "old steers to be returned two years from this "date, in good working order, to Mr. Silas H. "Woodard;" That on the 22d Sept, 1864, when the defendant should have returned the oxen to him, they were worth $91; That the defendant never returned the oxen, although requested so to do. Conclusion for $91 and interest, unless defendant chose within eight days to give up the oxen to him. The defendant met this action by a *défense en fait*, and also by a second pleading alleging that at the expiration of the two years referred to in the declaration, he returned the oxen to plaintiff, and the latter then and there, viz., on the 22d Sept., 1864, allowed him to keep the oxen till the following spring, and that therefore the agreement of September 1862 sued upon was at an end and became extinct;—That on or about the 15th June, 1865, while the oxen were in his (defendant's) possession, plaintiff sold them to him for the sum of $55 which defendant agreed to pay 1st January, 1866, and interest; That thereby defendant became the owner of the oxen; That at the time of the action this sum was not yet due.

At *Enquête*, plaintiff proved that the defendant had the oxen, and that their value in September 1865 was $91, and the defendant sold them for that price a short time before the date of the action. One of his witnesses proved that on the 15th June, 1865, the plaintiff sold the oxen to defendant for $55 to be paid with interest on the 1st Jan., 1866; and that a cow was turned out by defendant, and it was agreed that if the defendant did not on the 1st Jan., 1866, pay plaintiff the said sum, the cow would be forfeited. Interrogatories *sur faits et articles* were submitted to the plaintiff, and amongst others the following:—"2. Is it not true that on or about the 22d Sept., 1864, you allowed the defendant to keep the pair of oxen in question till the month of June in the spring following?" Ans.: "I allowed him to keep them." 3. Is it not true that on or about the 15th June last, while the said pair of oxen was still in defendant's possession, you sold the said two oxen to the defendant in the presence of Peter Papin and one Jeannreil?" Ans.: "I agreed to sell them if he paid me, and the oxen were to be security for themselves." 4. Is it not true that the price for which you sold the said oxen to defendant was $55, which the defendant agreed to pay to you with interest on the 1st Jan., 1866? Ans.: He agreed in the fall before to take them on those terms, if he paid for them, the cattle to be security for themselves. In his answers to subsequent interrogatories plaintiff says that he told William Thompson, Andrew Auringer and one Bourgard, that he had sold the oxen to defendant if he paid for them. The defendant attempted to prove by witnesses the precise terms of the sale of the oxen on the 15th June, 1865, and the term of payment up to 1st Jan., 1866, contending that the plaintiff's answers to interrogatories were a sufficient *commencement de preuve* to allow parol evidence, but the Court declared parol evidence inadmissable, unless it went *only* to explain the bargain made in the fall of 1864, alluded to by the plaintiff in his answer to the fourth interrogatory, and no other bargain. At the argument it was contended on behalf of the defendant that the plaintiff's action could not be maintained; That the lease of Sept. 1862, which formed the basis of the action, had long ago become extinct, and new agreements had taken its place. That it was evident either that a new lease, a sale, or a promise of sale of the oxen by plaintiff to defendant had taken place, and that the old lease had expired, and that it mattered not whether this new agreement had taken place in the fall of 1864 or in the summer of 1865. The action upon this old lease could no more be maintained than an action upon an old account settled by note or otherwise; That, moreover, taking the plaintiff's own construction *that he had agreed to sell the oxen to defendant if he paid for them on 1st Jan.*, it was evident that the action was premature, and that defendant owed nothing to plaintiff in September, 1865.

The Court held that such agreements must be equitably interpreted; That the plaintiff had never relinquished his claim under the lease sued upon; That, after getting the plaintiff's oxen and disposing of them, the defendant pocketed the proceeds and now wished to go scot free; That the Court would not support such pleadings, and judgment would go for plaintiff, not for the $55 and interest at 12 per cent, because plaintiff had prayed for simple in-

terest, but for the full amount demanded $91, interest and costs.

Huntington and Leblanc, for plaintiff; Cornell and Racicot, for defendant.

(E. R.)

[The questions submitted were simple questions of law: Could Woodard, after allowing defendant to keep the oxen, and agreeing to sell them to him, sue on the old lease? And, moreover, plaintiff having admitted under oath *a sale of any kind*, the defendant should have been allowed to adduce verbal evidence of the bargain. Auringer bought the oxen and was to pay for them on 1st of January 1866, how could he be sued on that old lease which had long ceased to exist? E. R.]

COURT OF REVIEW—JUDGMENTS.

Montreal, Feb. 28th, 1866.

PRESENT: SMITH, BADGLEY, and MONK, J J.

RYLAND *v.* ROUTH, AND OTHER PARTIES.

INSOLVENT RAILWAY CO.—LIABILITY OF SHAREHOLDERS.

HELD.—*That a shareholder of an insolvent Corporation cannot offer a debt due to him by the Corporation, whatever may be the character of such debt, in compensation to a claim against him by a creditor of the Company, under C. S. C., c. 66, s. 80.*

BADGLEY, J.—The difficulty in this case is not between the intervening parties and the other parties to the record, but simply between the plaintiff and the defendant. By the statute respecting Railways, cap. 66, Consol. Stat. Can., section 80, it is provided that "each shareholder shall be individually liable to the creditors of the Company to an amount equal to the amount unpaid on the stock held by him, for the debts and liabilities thereof, and until the whole amount of his stock has been paid up; but shall not be liable to an action therefor before an execution against the Company has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholder." Mr. Doutre, Deputy Registrar, held a claim due to him as such Deputy Registrar against the Montreal and Bytown Railway, a company incorporated by charter, and under the provisions of the general clauses Railway Act. He transferred the debt to the plaintiff, and judgment was obtained for the amount of it; execution issued, and the return to the execution showed that there was nothing in the hands of the Company; that it was insolvent, in fact. The plaintiff now claims from defendant, a stockholder, an amount equal to his unpaid stock. The defendant is a shareholder to the amount of £500, of which fifty pounds have been paid, so that there are £450 still due. The case therefore comes under the clause of the statute cited above, by which shareholders are individually liable to the amount of their unpaid stock, provided the creditor has done what the law requires of him, viz., levied execution, &c. In this instance the execution against the Company has been returned unsatisfied, so that the right of action is undoubted. The plea sets up a matter of compensation, alleging that Mr. Bellingham, who was a clerk in the employ of the Company, and a privileged creditor for certain arrears of salary, has transferred to defendant the amount of this debt, and, therefore, defendant is entitled to set off this claim. We are of opinion that this exception cannot be maintained, and for this reason:—The defendant is a debtor to the Corporation for the amount of his unpaid stock. This is the capital which the Company use for paying their debts. No debt due by the Company can be offered in compensation by a partner to an action by a creditor of his Company. The defendant has taken up a chirographary debt and endeavours to set it off against a creditor. The statute is clear enough: it says that each shareholder shall be liable individually for the amount of his unpaid stock. The law has resolved the Corporation into its elements, and considers the shareholders individually as divested of any corporate character, in fact, as partners, with the privilege of limited liability to the amount of unpaid stock. Redfield on Railways, p. 608, shows that corporators are held liable as general partners, after the Corporation has become insolvent, for their unpaid stock. Under these circumstances we do not think it right to admit the plea of compensation. We take no notice of Mr. Bellingham. Judgment will, therefore, go for £450, amount of the unpaid stock.

MONK, J.—The Court goes to this extent, that whatever may be the character of this claim, it cannot be put in compensation.

Judgment of the Superior Court confirmed.

CUSHING *v.* HUNTER, and EASTERN TOWNSHIPS BANK, *Tiers saisi*; HUNTER, opposant, and CUSHING contesting.

OPPOSITION TO JUDGMENT.

Judgment was rendered against the defendant by default, for a larger sum than was actually due, and the proper delay between service of summons and return was not allowed.

HELD—*That the rule as to opposing judgments within eight days after service is not law in Lower Canada, and that the defendant had the right (especially under the peculiar circumstances of the case) to file his opposition any time within thirty years after judgment.*

BADGLEY, J.—This is an action brought for $1138, on a bill of parcels. But upon the face of the bill of parcels, it appears that a deduction was made of over $300, leaving a balance of $759 due. Now plaintiff sued for the full amount of $1138, without giving him credit for the sum which he had agreed to deduct. Default was entered against defendant, and judgment was obtained by default for the full amount. $1138, on plaintiff's affidavit that this sum was due. A *saisie-arrêt* was taken out, but nothing was done under it. Then execution *de bonis* and *de terris* issued, but the defendant had no goods and chattels, and the only land he had was under seizure at the suit of another creditor, and it yielded nothing, the proceeds being absorbed by mortgages. After all these proceedings,

the plaintiff seized a sum of money belonging to defendant in the hands of the Eastern Townships Bank. Now the defendant comes in and files an opposition to the judgment, upon the ground of short service of the writ on which the original judgment was rendered. He was entitled to certain delays, and it is evident upon the record that the proper delay was not allowed. He pleads this, and is met on the other side by the allegation that the defendant was aware of this judgment against him, that he took no steps to have it set aside, and thereby acquiesced in the judgment, though it was rendered upon an informal service. The defendant answers that he had thirty years within which to come and make his opposition to the judgment, and that he was not precluded from this by the statute respecting judgments by default. A number of authorities have been adduced on both sides. The rule is laid down in Pigeau, who says that by the Ordinance the judgment is to be opposed within eight days after service of the judgment; but he adds that the requirements of the Ord. have been set aside by the jurisprudence, and are no longer law, and that the full thirty years time is allowed. But if the eight day rule was law in France for default judgments, it is not so here according to our jurisprudence and practice, because such judgments are not served, and here there was no signification of judgment, and, in fact, this rule only applies to judgments in the last resort. The defendant having the privilege of fyling an opposition within thirty years, is not to be held bound by his knowledge of the judgment. Such knowledge did not constitute an acquiescence, which the authors fix by some express or implied affirmative act of the defendant. Taking into account then the extraordinary nature of the judgment, rendered for a much larger sum than was due, on the one hand, and the want of acquiescence on the other, we think the judgment cannot stand, and must be reversed.

Judgment reversed.

Present: BADGLEY, BERTHELOT, and MONK, J J.

GUEVREMONT *v.* PLANTE.—

COURT OF REVISION, POWERS OF.

HELD.—*That a decision of a magistrate under the Agricultural Act is not susceptible of revision by the Superior Court sitting in Review.*

BADGLEY, J.—This is a case from the District of Richelieu. The action was brought under the Agricultural Act for allowing a pig to go at large against the requirements of the law. The case was brought before a magistrate, and the defendant was condemned to pay the fine provided by statute. Very strangely, by the judgment, the penalty was to be enforced within eight days. But the plaintiff at once fyled a paper, saying that he would not enforce judgment till the full delay of fifteen days. This, however, is not the difficulty here. The judgment was then taken by appeal to the Circuit Court, District of Richelieu, and the Circuit Court confirmed the judgment of the magistrate. Application is now made to this Court to revise that judgment, and a motion is put in, as preliminary to any proceeding, by which the inscription for revision is moved to be rejected, because there is no power in this Court to revise the judgment of the Circuit Court. The Agricultural Act provides for an appeal to the Circuit Court, but it provides for nothing farther. The Superior Court sitting in Review can only take up judgments in cases that are appealable to the Court of Appeals. The motion to reject the inscription must be granted, and the record ordered to be remitted.

Inscription rejected.

Ex parte SPELMAN and DAVIS, informant.

COURT OF REVISION, POWERS OF.

HELD—*That the test of a case being subject to revision by the Superior Court sitting in Review is whether it is appealable or not; and the right of appeal to the Queen's Bench on Certiorari being taken away by Statute, there is no right of revision in such cases.*

BADGLEY, J.—There are four cases under this title. A point comes up somewhat similar to that which arose in the preceding case. Davis the prosecutor, had sued a man under one of the clauses of the Revenue Act for a breach of the conditions of the Act, in failing to enter in his Book a larger quantity of malt or grain than was stated, and by that means he had contravened the statute and subjected himself to a penalty. Much pains has been taken to show that the conviction was bad. We shall not proceed to enter into those details at present, because we are met *in limine* by an objection which covers the whole case. The right of appeal to the Queen's Bench on *Certiorari* is taken away absolutely, leaving only an appeal to the Court of first instance. The convictions were brought up before the Superior Court and were maintained. Now the point is this: Is there a revising power in this Court to revise the judgment of the Court of first instance? We are of opinion that there is not, and for this reason: The Judicature Act of 1864 provides that any party aggrieved by a final judgment rendered in the Superior Court, or in any appealable case in the Circuit Court, may have the case reviewed before three judges, &c. See also the 25th section. The test, therefore, of the case being subject to revision is whether it is appealable or not. The statute says there is no appeal on *Certiorari*; we, therefore, say there is no revision. Therefore, the judgment of the Court must stand, and the proceedings in revision must be dismissed. No costs on revision to be allowed.

Appeal dismissed.

DESJARDINS *et ux. v.* PAGE, and DUMOULIN, opposant, and DESJARDINS *et ux*, contesting.

FRAUDULENT SALE.

The defendant, five days before judgment was obtained against him, sold his farm and farm stock to the opposant, who leased the property back to him two days after the judgment.

HELD—*That the transaction was fraudulent, and that there was no tradition of the property, Monk, J., differing as to the latter point.*

BADGLEY, J.—This is a matter in appeal from

the Superior Court, District of Terrebonne. The plaintiff, on the 29th Jan., 1862, instituted an action against the defendant on his promissory note for $200. Judgment was rendered on the 13th February, 1862, fifteen days after action brought. On the 8th Feb. of the same year, the defendant sold to the opposant his farm and all his stock on the farm for the consideration stated on the face of the deed. On the 15th Feb. following the opposant leased back to the defendant the very same stock which he had purchased by the deed of the 8th, so that there was only an interval of seven days between the deed and the lease. The consideration was the payment of a *rente viagère*, equal to 4000 livres, a mortgage debt of 4000 livres more and a balance of 600 livres, amounting to 8,600 livres in all. The object evidently was to get the farm and stock out of the reach of the impending judgment. The opposant himself admitted this, he having said at the time, " we must take care of the judgment. If the judgment goes we can do nothing." The defendant, too, had said he would not pay the plaintiff the amount of her judgment because she had treated him badly. After the sale it was considered necessary to remove certain effects to opposant's land which immediately adjoined that of defendant, so that it was merely carrying the things across the dividing line. It was stated by one of the witnesses that the property was not removed to the adjoining land till five or six days after the deed of sale; consequently it could not have been placed on opposant's land till a day or two before the judgment was rendered against defendant. Under these circumstances we do not think the opposant was in good faith in these transactions. The question now comes up with reference to the transfer of the personal property. Two or three days afterwards, the whole of this property was returned to the defendant, and it was the defendant himself who took charge of the cattle while upon the property of the opposant as well as upon his own. Shortly afterwards, with the opposant's privity, he sold part of his property to another person to pay another debt. Under all these circumstances there was fraud in the transaction between the defendant and opposant. We, therefore, think the judgment has hardly gone far enough, because the deed might have been resiliated on the ground of fraud. The judgment is limited to holding that the tradition was not a serious one. We think this correct, for it was never intended between the parties to be a serious tradition. The property sold at a little over 8.000 livres is proved to be of the value of 12,000. The contract was made *in fraudem creditoris*. The judgment of the Court below must be confirmed with costs against the opposant.

MONK, J.—I do not quite concur in the *motifs*. I am of opinion that there was a delivery of the moveable property; but I concur in the judgment, because the case is remarkably conspicuous for fraud throughout. The evidence of collusion between the parties is most decisive, the whole object of the transaction being to prevent the plaintiff from recovering his debt.

Judgment confirmed.

MARCOTTE, *et al. v.* HUBERT.—

Action for work and labour done in making estimates.

BADGLEY, J.—This was an appeal from the Circuit Court, Montreal. The action was brought by architects to recover the value of certain work. The object was to establish and state in detail in writing the value of certain properties on Notre Dame street about to be demolished by the Corporation, that is, the cost of taking down the old buildings and of putting up new ones. Defendant went to the plaintiffs as professional men, and engaged them to do this work. It did not require professional men to make such estimates, but having engaged them he should have been willing to pay a rate corresponding to their position. The difficulty in the case arose from the testimony of record. A certain amount had been offered by the defendant as the value of plaintiff's services. The evidence was very contradictory. Six or seven architects had been brought up, and of course stated the price that they would have charged if they had been employed to make plans and specifications which were the same as if they had been going to superintend the erection of the buildings themselves. This was perfectly justifiable evidence; but unfortunately, upon the other side of the question we had architects and mechanics of good standing who said, after looking at the work, that plaintiffs were not entitled to anything like the amount that was claimed by them. They said it was not a description of work which required an architect at all. It was a work which an architect might do, but it did not require the minute calculations of the value of every window and door, and plank of the floor, &c., that were charged for. Although, therefore, we might have been disposed to go beyond the figure established by the court below, still taking the whole circumstances into consideration, and the fact that the amount of the judgment had been paid, the court would not touch the judgment.

Judgment confirmed.

QUENNEVILLE *v.* MUTUAL INSURANCE CO.

INSURANCE.

Owing to vagueness in the specification, it was difficult to identify the barn destroyed, and the amount insured on it. The decision was based mainly upon the exhibits, but the majority (Badgley, J., differing) appeared to be of opinion that the reception, by the Secretary, of a premium for additional insurance after the fire, was, under the circumstances, an acknowledgement by the Company of plaintiff's pretensions.

BADGLEY, J.—In this case I am obliged to dissent. In 1862 the plaintiff made an application for insurance to the Mutual Insurance Company, and gave in certain statements of the property on which the insurance was to be effected. He had a great number of properties but there was only one to which the contention applied. Upon one lot described as *Terre* No. 1, there were several buildings erected. On the front of the lot was a stone house in which the plaintiff lived; then, adjoining, there was a large *grange* 80x30, a stable and other buildings. In the rear there was a wooden house, and an-

other *grange* 60 x 30. The Court is left in great doubt in this case, because there is nothing to show what the intention of the parties was, with respect to the amount insured on each building, except what can be gathered from the papers of record. The buildings were all numbered, and I am of opinion that the plaintiff, taking into consideration his dwelling houses first, had first insured the dwelling house on the front, and then that on the back of the land; then coming to his barns and outbuildings, again he came to the front and insured for £50 the large *grange* which he considered the most valuable, and then, following out the specification which he himself had given, he took the adjoining *écurie*. Then going again to the back, he insured the *grange* in the rear, at £25. Now, unfortunately for the plaintiff, it was this barn which was burnt. The plaintiff contended that this *grange* was that insured for £50. The only question, therefore, is whether the *grange* which was insured at £50 was the one in the front or that in the rear. The *grange* in the front, which was the most in use, containing his cattle stalls, his farm stock, and much the larger barn of the two, and moreover had an *écurie* stable adjoining, which the rear barn had not, is that which, according to my view, was insured for £50; and the one in the rear, where no cattle were kept, is that which was insured for £25. The fire took place in 1864, two years after the insurance had been effected. The plaintiff who had left his policy in the hands of the Company, went to the office after the fire, and told the Secretary that one of his barns had been burnt. After having referred to his policy, he said the barn which was burnt was the £50 barn. Of course it was his interest to get the larger sum, and this, I believe, was the reason he fixed the £50 insurance on the barn that was burnt. Two or three days after, he returned and made application to have his insurance increased on all his properties by additional sums on each—together $750; and, among them, adding £75 to the insurance on the front barn. This was simply an application made to the clerk of the Company. The clerk had no authority to accept it; it was for the directors to adopt the application. But he left with the clerk the additional premium for the whole increase, £2 7s. 9d. What followed? The Company selected three of their members to go upon the farm, and ascertain the amount of the damage and see which was the barn that was burnt. The three directors having made their examination, reported that the barn that was burnt was the £25 barn. The Company after adopting their report sent a letter to the plaintiff notifying him that the £25, which they alleged to have been the insurance on the barn burnt, was ready to be paid to him, and that he might have the additional insurance; but that it would be necessary for him to call at the office and rectify some errors in the description of the properties generally as stated by him. I can not concur with my colleagues in thinking that the clerk could bind the company without their acquiescence. It was not till the 9th November following that the $750 additional insurance was spoken of, and then it was intimated by the Company that it must be upon the £50 barn. The plaintiff had no right of himself to make his own selection; if his specification was a doubtful one, the fault was his own, and the law in such case cast the difficulty upon the insurer. The additional insurance did not change the original specifications, nor the receipt of the premium for a gross sum of $750 more upon the insurance already effected; each object insured was special; that upon the front barn was upon that barn alone; this in itself could make no change in the relative position of the parties or the subjects insured, or the amounts on each of the two barns as originally taken. I can, therefore, come to no other conclusion than that the judgment ought to be reversed.

BERTHELOT, J., believed that the description of the property sustained the plaintiff's pretensions, and that the judgment was correct.

MONK, J.,—I was much puzzled at first as to which policy applied to the barn burnt, but at last on turning to the evidence of the Secretary, Mr. Letourneau, I found that on the day of the fire, plaintiff went to the office; the policy was produced, an examination took place, and plaintiff told Letourneau that the barn in the rear was insured for £50. Letourneau made no protest, and there the matter rested. About three days afterwards, the plaintiff returned to the office and said he wished to increase the insurance on the front barn from £25 to £100. The Secretary received the application and the premium was paid on the spot. No one would contend that the company would not have been liable for this amount if the barn had been burnt the next day. It was not till some days afterwards, when some of their members went to examine the property that the difficulty was raised for the first time. The action is well founded, and the judgment must be confirmed.

Judgment confirmed.

JOSLYN *v.* BAXTER.

The action was brought on a guarantee given by the defendant.

HELD—*That there was no consideration for the guarantee, and that fraud had been practised by the plaintiff.*

BADGLEY, J.—This case, from the Superior Court, St. Francis, is of considerable importance because it involves the decision of a new point. The action is based upon a written guarantee of the defendant Baxter, to the plaintiff, to pay what was owing to plaintiff by one Chamberlin, a man who is now dead. The defendant, Baxter, a merchant in Vermont, was joined in business there by Chamberlin, the firm being Baxter & Chamberlin. This firm became insolvent, or, at all events, embarrassed, and in order to carry on their business they united themselves with two or three other persons, under the name of Cox, Robins & Co. The creditors of Baxter & Chamberlin pressed them for a settlement of their affairs, and obliged them to make an assignment of their estate. Baxter & Chamberlin then separated, and each carried on a separate business During the time of this separate business, Chamberlin borrowed money from the plaintiff, and led

an irregular and intemperate life, till his death in 1865. Baxter, on the other hand, established himself in business on his own account, and took a strong interest in realizing the assets of the estate of Baxter & Chamberlin, and from his own means paid large sums of money for the benefit of the estate. It was evident that Chamberlin never assisted to pay any of the co-partnership engagements, and it was also evident that Baxter had never derived benefit from the funds of the partnership, nor held any of the property of his partner Chamberlin. The plaintiff in 1856, long after the limitation period for the notes had expired, being the holder of Chamberlin's individual liabilities by his three notes made in 1846, 1847 and 1848, at Barnston in Lower Canada, obtained from Chamberlin, then in a dying condition, an acknowledgment of the amount of these notes, and also obtained a guarantee from the defendant, dated 30th Sept., by which it was agreed that all sums due to Joslyn by Chamberlin should be paid. The action was upon this guarantee of the defendant, which, it was alleged in the declaration, had been entered into by him for valid consideration, given by Chamberlin. The consideration, therefore, on the face of the declaration was a consideration passing from Chamberlin to the defendant. The plea sets up that the true date of the document was the 20th September; that the law of Vermont recognizes the Statute of Limitations, and the Statute of Frauds is part of its municipal law; third, that the guarantee by the defendant was a foreign contract made in Vermont, subject to the Statute of Frauds. Fourth, that the promissory notes in question were subject to the Statute of Limitations of that State, and the time had run out; in other words they were prescribed, and payment could not have been enforced against Chamberlin, either in Vermont or in this country under our own Statute; and further denying that any consideration had been given. As to the alteration of date, the document itself showed that the date had been tampered with, and that 20th had been altered to 30th, consequently making it appear that the guarantee was given on the 30th Sept. Otherwise it would be of no use to plaintiff, for if the legal date was the 20th, there was then no debt in existence to guarantee; but if the date was the 30th, there would then be the new debt on the part of Chamberlin. Now, the Statute of Limitations does not touch the contract; it only prevents proceedings at law to enforce it; the statute goes *ad ordinationem litis non ad decisionem contractus*. This point only comes up incidentally. The main ground of objection rests upon the want of consideration for the guarantee. It was stated by defendant that there was no consideration, that it was a foreign contract requiring consideration and that the *lex loci contractus* governed, consequently the law of Vermont. A great deal of professional evidence of this has been adduced. Mr. Redfield, a distinguished lawyer of Vermont, and others, have given the Court at Sherbrooke the benefit of their professional experience. The professional evidence of record has established the absolute necessity that there should be consideration for a guarantee by the law of Vermont. Much other testimony has been adduced by plaintiff, but it does not go in any manner to support the allegation of his declaration, that the guarantee was entered into for valid consideration. The rule as to consideration is that it must either be of benefit to the defendant or detriment to the plaintiff. There was no such evidence. On the contrary, it is clear beyond contradiction that the defendant received no consideration for the guarantee, and it is also quite clear that on his part the plaintiff had suffered no injury which could have been proved as a consideration. Moreover, the law requires a present consideration; a past consideration was of no use. There was nothing of the kind in this case. But there was also fraud practised by the plaintiff, for shortly before Chamberlin's death, the plaintiff stated in conversation with defendant that Chamberlin only owed him $150 or $250; that he had owed him $1,000, but had paid him almost the whole of the debt. In the face of this evidence the plaintiff is now endeavoring to enforce this guarantee, not only for the capital of the old promissory notes, but for all the interest accumulated on them. Added to all this, the acknowledgment of the notes was obtained by fraud from Chamberlin when on the verge of death. Upon the whole it is evident that there was no consideration of any kind, and that the law of Vermont, under which the guarantee was made, requires consideration. The judgment dismissing the plaintiff's action must, therefore, be confirmed.—*Judgment confirmed.*

SEYMOUR *v.* SINCENNES.

SHORT DELIVERY.—DEMURRAGE.

There was a deficiency in the delivery of oats from three barges. The barges had been delayed; and it appeared that a portion of the cargo had been improperly placed on deck.

HELD.—*That under the circumstances it was doubtful whether the plaintiff could claim for short delivery; and if he had any such claim, it was extinguished by the defendant's claim for demurrage.*

BADGLEY J.—This is an action brought in the Superior Court, Montreal, by the plaintiff, as the shipper of a large amount of oats in barges belonging to the defendant. The plaintiff paid the freight, but, after the money had been paid, discovered that there was a deficiency in the delivery from the barges, and he claimed the value of the oats not delivered, which he contended he would have been entitled to deduct from the freight. The facts are simply these: In June and July, 1864, the plaintiff shipped upon three barges belonging to the defendant a large quantity of oats—11,000 bushels in each. They were to weigh a certain amount, and the freight was to be paid for them at the rate of 40 lbs. to the bushel. The barges were numbered 27, 26 and 25. No. 27, the first loaded, was detained by the plaintiff two days at Laprairie for the purpose of effecting an insurance. Then she proceeded to Burlington, but there being there many barges of a similar

kind, it was impossible for her to reach the wharf to unload. Thirteen days elapsed before she unloaded. Deducting three days allowed by the custom of the trade and one for day of arrival, there was a detention of nine days. No. 26 was also detained for a shorter period; then No. 25 came in without any detention. On the delivery of the oats from these three barges No. 27 was found 25 to 30 bushels deficient; No. 26 145 bushels; and No. 25 256 bushels short. The defendants had an agent at Burlington, Mr. McNaughton, who saw to the delivery of the barges. He, at the same time he was receiving the grain, made frequent representations as to the delay that was occurring, and protested against it, but the difficulty was to get the barges to the wharf. The defendant in his plea set up that the deficiency was caused by the heating of the oats during the time of detention, which made them diminish in weight by loss of moisture, and that if he was responsible for the deficiency, plaintiff's claim was offset by demurrage due to defendant, because the delay was not caused by him. Now, with reference to the question of heating, on the delivery of No. 27, which was most heated, there was a deficiency of 25 or 30 bushels; in No. 26, which was less heated, the deficiency was several times greater. When No. 25 was delivered, which had not been delayed at all, and was not heated, there was a still larger deficiency. How was this to be accounted for? It is presumed the difficulty arose in this way: each of the barges had a large bin on deck, covered over by a tarpaulin. Every one knows that a tarpaulin lying on oats, and exposed to the sun in July, will attract a great deal of heat, and so it turned out, each of these bins being affected by the heat. But going beyond this, I find proof in the record that plaintiff admitted that demurrage was due; that it should have been paid; and that he had begged the defendant not to stop the delivery, and there would be no difficulty about the demurrage. Taking then, the demurrage at the rate proved, it amounts to a sufficient sum to extinguish the whole amount claimed by plaintiff for short delivery. There is proof that there was no tampering with the oats. The action was dismissed in the Court below, and this Court is of opinion that the judgment must be confirmed. But there will be an alteration in the *motifs*, because the Court below held that if there was a deficiency, it was the fault of the plaintiff, in which opinion this Court does not concur. But it concurs in the judgment in holding the plea of compensation to be established. *Judgment confirmed.*

SUPERIOR COURT—JUDGMENTS.

MONTREAL, Feb. 28th, 1866.

GAULT *v.* DONELLY, and DONELLY, Petitioner.

HELD.—*That a fraudulent preference given by a debtor to one of his creditors by selling him goods as security for a debt, is not a secreting and does not constitute sufficient ground for a capias.*

BADGLEY, J.—This case comes up upon the merits of the petition to quash the *capias*, on the ground that the allegations of the affidavit have not been established. The affidavit sets out the grounds for the arrest; that the defendant had been for some time previously insolvent; that he had been recently married, and informed deponent that his wife desired him to go to the United States. This desire on the part of his wife was of course no justification for a *capias*. She was entitled to her opinion, and so long as her desire was not carried out, it went for nothing. There were also allegations as to defendant having borrowed money without having repaid it. This was, unfortunately, often done, and of itself afforded no ground for a *capias*. The principal ground alleged was the following: That on the previous day deponent was in the store and place of business of defendant, and was informed that he had just got through stock taking, and the estimate of value was $5,000, which figure was correct. Defendant visited the same place the following day, and found that a large part of the stock had been taken away; and deponent saw an entry in the books of two pages in length as of goods sold to one Walsh. It was further alleged that defendant had secreted these effects. It certainly had a bad look that to-day the stock should be there, and to-morrow there should be less stock upon the shelves. But the circumstances were these: On the afternoon of the day on which Gault, the deponent, first visited the premises, Walsh, who had formerly been in partnership with the defendant, and had advanced him $1,100 or $1,200, seeing that proceedings in bankruptcy were being adopted against him, went to him and proposed to take goods to cover this debt, with the security of a person who was perfectly competent to be security, that the goods should be returned in case of any trouble. Goods were then put aside to the amount of $800 or $900, which were entered in the books as sold to Walsh. The goods were not taken away that night, but were removed the next morning, and within twenty-four hours afterwards, the insolvent writ was issued. Then Walsh found it necessary under the circumstances to restore the goods, and they were placed in the hands of the assignee, so that the creditors suffered no loss. The point which comes up, then, is whether under the allegation of this fraudulent sale the plaintiff would be entitled to arrest the defendant—whether the sale to Walsh, who is himself a creditor, was actually a secreting of the goods. This sale bears all the appearance of a fraudulent preference, but it has been already decided that a fraudulent preference is not a secreting. The word secreting conveys the meaning of concealing, hiding, putting aside in unfrequented places. Fraudulent preference, therefore, does not in any way come within the meaning of the legal term secreting. The act of secreting his effects would be a selfish act for his own advantage; while a preference given to a particular creditor is not for the debtor's own advantage but for that of the creditor. Nothing is shown in this case by which an intention to abscond can be discovered. The *capias* being, therefore, based

merely on the preference, the petition of the defendant must be granted, and the *capias* quashed.

Capias quashed.

POITEVIN *v.* MORGAN.

The plaintiff was discharged by the defendant, his employer, on strong suspicion of dishonesty. The defendant stated his reasons for dismissing the plaintiff to the other clerks, and also to a friend of the plaintiff who requested to be informed of them.

HELD.—*That the communication made to plaintiff's friend was privileged, and that the Jury should have been instructed to find for the defendant, unless they believed that express malice on his part had been proved.*

BADGLEY, J.—This case having been tried before a Jury, a verdict was found for plaintiff for $300. The case now comes up on motions. The plaintiff moves that judgment be entered up according to the verdict of the jury, and the defendant meets this by two motions, first, to enter up judgment in his favor notwithstanding the verdict, and, secondly, for a new trial, if the first application should not be granted. The plaintiff was a discharged clerk of Morgan & Co., large haberdashers in this city, and the action was brought against H. Morgan, one of the firm, to recover damages for verbal slander. The declaration sets out that plaintiff is an honest man, a clerk, and was never guilty of the malversation imputed to him by the defendant. That on or about the 12th of November, 1864, in relation to his conduct as merchant's clerk, in the presence of several persons, defendant said, "I took him in the act, it is not the first time that he robbed me. He did the same at Walker's. I think I will have him arrested. It is a sore thing that Poitevin should cheat me in this way. After this I trust nobody." These are the charges. Defendant meets them by alleging that plaintiff had been in his employ, and was in the habit of appropriating to himself the goods of the firm; that defendant received an intimation of this, and spoke to plaintiff about it. That plaintiff then and there openly admitted his guilt, and entreated his employer not to expose his conduct; that thereupon defendant informed plaintiff that the matter would be investigated, but the plaintiff must not remain in his service; that the words used by defendant were occasioned by plaintiff's own conduct, and were privileged. The case was submitted to a jury who found that plaintiff had suffered damage to the extent of $300. The evidence shows that plaintiff was in the service of defendant and his brother composing the firm of Henry Morgan & Co. They had established certain rules for the guidance of their clerks, which were, that goods purchased and not paid for, should be entered in a book, and then be placed in a box to be called for by the express. One morning defendant was informed by one of the clerks that plaintiff was in the habit of sending out goods without entering them, and that he had done the same at Walker's where he had previously been employed. In the course of the morning, 12th Nov., the plaintiff made up a parcel of goods addressed to one Derochers, placed it at hand under the counter, and just as the express car was receiving the last parcel from the box, the plaintiff handed this parcel to the carter. The entire transaction, it must be observed, was contrary to the rules of the establishment. The defendant then and there asked plaintiff whether he had entered the parcel, or had charged it, and for whom it was? Plaintiff told him the purchaser, and that he had not entered or noted it, and he then proceeded to note it. In order to test the honesty of the transaction, the defendant ordered one of the clerks to go immediately to Derochers, and present the invoice of the goods for payment. Derochers replied that it was a matter between him and Poitevin; that he would pay Poitevin; his manner was suspicious. A little later, towards one or two o'clock, the plaintiff having returned from his dinner at his own house, on entering defendant's store, at once commenced an altercation with the clerk, asking him why he had gone so prematurely for payment of the goods. Whilst they were speaking together, the defendant came into the shop and enquired of the matter, then said to plaintiff in the presence of the other clerks, that he had heard rumours respecting him, and that he would not be permitted any longer to remain in his service; that if he had not seen it himself, he would not have believed it. But he had caught him in the act, and he had heard that he had done the same at Mr. Walker's. Then he said he would have the matter investigated, and he had an idea of sending him to jail. Thereupon plaintiff begged and prayed him not to do it, as it would bring disgrace upon his family. These events occurred between plaintiff and his employer in consequence of the events of the morning. But the action was brought, not so much upon that as upon what occurred afterwards. For the same afternoon, a little after the plaintiff had left the service, Mr. Morgan again came to the shop where several clerks were present and said, Is it not a hard thing that Poitevin has robbed me in this way? One of the clerks said to him, Are you really sure it is so? Why, answered Mr. Morgan, I have heard it, and Poitevin has acknowledged it himself. Then he said to his clerks, it is a sore thing that Poitevin should cheat me in this way; after this I trust nobody. After this, don't be surprised if I do dirty things to the clerks. Defendant was speaking, it must be borne in mind, to his clerks, the fellow servants of plaintiff. It is in evidence that there was no stranger in the shop at the time, or possibly one, but he was at such a distance that he could not hear what was passing in the rear of the store. After plaintiff was dismissed from defendant's employ, Mr. Rodier, a friend of his, called upon the defendant to enquire the cause of his dismissal, and the reason why he would not be taken back. Now, it must be observed that Mr. Rodier came there as plaintiff's friend, and in his interest to see why he should not be taken back. The rule of law is, that where a party comes and seeks an answer and obtains it, there is no publication in a communication of this kind. The statements made to this wit-

ness I consider to be in all respects privileged, and the plantiff's counsel at the argument frankly admitted this. The case rests upon the conversation in the store. The defendant had detected the irregular conduct of the plaintiff in delivering parcels of goods to the carrier without having entered them, and having asked unsuccessfully for payment of the bill, he at once charged the plaintiff with the thing openly, and the latter was discharged the same day between two and three o'clock. The question is not whether the imputation was true or not, but whether it was justified. Mr. Walker, it appeared, had refused to certify the plaintiff's honesty; the plaintiff himself went to him to get the word "honest" added to the character written by Mr. Walker, but the latter refused because he believed him to be dishonest. Mr. Merrill, another employer, had proceeded to indict him for dishonesty. The circumstances justified strong suspicion and instant dismissal. The alleged slander was spoken immediately after the plaintiff's dismissal, and was addressed to his fellow clerks, as an explanation of defendant's, the employer's, reason for dismissing the plaintiff. There are two points to be considered: whether the communication was privileged; and whether there was malice. Defendant's remarks were addressed to his clerks, who were in the same position as the discharged clerk, and were made by the employer in the interest of himself as such employer, as well as in the interest of the clerks. If the defendant shewed that there was no malice in his remarks, it would be a bar to the action. It was a part of the moral duty of the employer to caution his servants against the act of his clerk. He was therefore in the legitimate exercise of a duty which he owed to himself as an employer, in making use of these observations to his clerks; he was privileged in the communication. Then comes in the next principle of law that express malice must be proved before the jury could take the case out of the protection of the law. The defendant seemed to be pained by the misconduct of the plaintiff. The whole case went to the jury; under all the circumstances of the case there should have been express malice proved and express malice found; and the jury should have been told that Mr. Rodier's testimony could not be admitted at all. There was nothing on the face of the record to show that the Court charged that the defendant's remarks, or any part of them, were privileged communications. The court should have gone beyond that and told the jury that unless they found express malice there could be no verdict for the plaintiff. I do not feel myself quite at liberty to grant the first motion of defendant, but I will grant the motion for a new trial.

New trial ordered.

BEAUCHAMP *v.* CLORAN.

NEGLIGENCE—CHILDREN OF TENDER AGE.

HELD.—*That a person is liable in damages for the slightest negligence in respect to a child of tender years, the want of capacity in the latter rendering extreme care and watchfulness necessary.*

BADGLEY J.—This is an action of damages brought by the plaintiff for an injury inflicted on his child, seven years of age. It appears that defendant's bread cart ran over the leg of the child and broke it. The case involves some nice questions with reference to negligence. The accident occurred between five and six o'clock in the afternoon, when it was perfectly light. Plaintiff's two children were carrying planks from the opposite side of the street to their father's yard. As the cart approached, the child appeared to be standing waiting till the cart had passed. He had a plank in his arms, and the end of the plank projected beyond the sidewalk. As the defendant's cart passed, the wheel struck the plank and knocked the child down off the sidewalk into the street; the wheel passed over his leg and broke it. The baker had just served bread at Mrs. Moffatt's, and she says she saw the wheel strike the end of the plank, which she says overlapped the sidewalk by four or five feet. There were only two other witnesses who spoke as to the facts of the case. The oldest boy of the plaintiff says that, seeing the approach of the cart, he called to the driver to stop, but that the driver took no notice of this. The driver says that he never heard the cry, and did not see anything in the street. He did not perceive anything till he heard a noise as if a plank had got between the spokes of the hinder wheel. He then turned round and found that the waggon had run over the child. The question here is a question of negligence, and in addition a question with reference to the imputation of negligence on the part of a child of that period of life, because the principle of law is that the sufferer is only bound to exercise care and prudence equal to his capacity. The plaintiff's action does not set up properly any of the circumstances of the case, except as to the fact of the injury done to the child. It is alleged that the child was sitting at his father's door. This is not true; for it is proved that he was standing on the other side of the street. But the main fact that the defendant's bread cart did the injury, is sufficiently established. Defendant pleaded that the *étourderie* of the child led him by inexperience to pass the plank between the spokes of the wheel, and the plank being pressed by the wheel, acted upon the child and caused the injury. Taking all the circumstances into account, the tender age of the child, which bound the driver to a proportionate degree of watchfulness, and to extreme circumspection, I do not consider that the defendant's driver acted with the necessary care. The tender years of the child entitled him to unusual protection; for what would be ordinary negligence with respect to a grown person, would be gross negligence towards a child. The plaintiff must have damages. The doctor's bill was $18; and there were extra expenses in nursing, &c. Altogether judgment will go for $60, with costs as of lowest appealable class, Circuit Court.—*Judgment for Plaintiff.*

BONNELL *v.* MILLER *et al.*, and WOODS, T. S., and plaintiff contesting.

HELD.—*That where the plaintiff has been led to contest the declaration of a garnishee, owing to its vagueness, he may discontinue the contestation without being subjected to pay costs.*

BADGLEY, J.—The plaintiff had obtained a judgment against Miller & Co., who afterwards dissolved, and Woods, one of that company, became a partner in another firm. Plaintiff being informed that he had taken a large quantity of goods from the old firm to the new one, put an attachment into the hands of the new firm. The *tiers saisi* came up and made a general declaration that gave no information at all. The consequence was that plaintiff contested the declaration, and the question came up whether on this contestation the plaintiff should have costs or not. I am of opinion that the *tiers saisi* having invited the contestation by the vagueness of his declaration, he ought not to have costs against plaintiff discontinuing that contestation.

JOHNSON *v.* WATTS, and WATTS, opposant.

Amendment of opposition after argument.

MONK, J.—There was an opposition in this case to a judgment, and after the argument on the opposition, certain receipts were found, shewing that the whole amount has been paid. The opposant now asks to be allowed to amend his opposition on payment of costs. It is urged that no amendment can be allowed after the case has been taken *en délibéré*, but as the motion is sustained by the production of documents found, the Court is of opinion that the motion must be allowed, on payment of full costs.

OBITUARY.

CHARLES RICHARD OGDEN.

The Hon. Charles Richard Ogden, for many years Attorney-General for Lower Canada, was the first who held that office after the Union of the Provinces, a member of the first Parliament of Canada, and of the first Canadian Ministry. Mr. Ogden was the son of the Hon. Isaac Ogden, a judge of the Court of King's Bench, at Montreal, one of those loyal men who, on the secession of the now United States from the mother country, preferred the British to the American flag, and cast their fortunes in Canada. He was born in Quebec, about the year 1790, and was called to the Bar of Lower Canada in 1812. In 1815, he was elected a member of the Assembly for Three Rivers, and continued to represent that constituency during seven successive Parliaments, until he was advised by Lord Aylmer that, in the opinion of the Colonial Office, it would be better that the public officers of the Province should exercise "a cautious abstinence" from the great political questions of the day. On this hint, Mr. Ogden, being Attorney-General, resigned his seat in the Assembly, and retired from political life, as he supposed, for ever. In 1815 he had received a silk gown from Sir Gordon Drummond, and in 1818, the Duke of Richmond had appointed him to act as Attorney-General for the District of Three Rivers. In 1823, Lord Dalhousie recommended him for the office of Solicitor-General, and His Majesty was pleased to confer that office on him, accordingly. In 1833, he was appointed Attorney-General for Lower Canada, and was re-appointed by her present Majesty on her accession. Until 1837, Mr. Ogden resided in Quebec; but in that year the breaking out of the rebellion made it his duty to proceed to Montreal, where he continued to reside until the union of the Provinces in 1841. In 1838 the Constitution of Lower Canada was suspended by the Imperial Parliament, and the special Council for the affairs of that Province was created. As Attorney-General, and a leading member of that Council, Mr. Ogden, who had declined to accept the office of Chief Justice of the District of Montreal, bore a large part in conducting the Government under Sir John Colborne, the Earl of Durham and Mr. Poulett Thomson, and in the measures necessary to bring into operation the Act for the Union of the Canadas. He officially countersigned the proclamation by which the two Provinces were made one on the 10th February, 1841, the first anniversary of Her Majesty's wedding-day. The opinions held at the Colonial Office had by this time undergone a remarkable change, and instead of being enjoined a "cautious abstinence" from politics, Mr. Ogden was informed that he was expected to take a most active part in them, to obtain a seat in the Legislative Assembly, and to form part of the Canadian Ministry; that his emoluments were to be reduced; that he would have to reside at Kingston, the new seat of Government; and he was possibly not without a presentiment that his tenure of office might depend upon the will of a parliamentary majority. These were not the terms upon which he accepted office, and he remonstrated against them; but he was told that H. M. Government held this change to be necessary to the success of the policy they had adopted, and he submitted, and was again returned by the electors of Three Rivers. He and his colleagues conducted the Government through the first session, and brought that session to a successful close, carrying many important and useful measures. The untimely death of Lord Sydenham turned the administration of the Government upon Sir Richard Jackson, the Commander of H. M. Forces, from

whom Mr. Ogden obtained leave of absence for six months, subsequently extended to a year, in order to make a voyage to Europe for the recovery of his health, which had suffered severely from the great labours to which he had been subjected. On his return, he found that during his absence, he and the ministry of which he formed part, had been removed from office by Sir Charles Bagot, and that Mr. Lafontaine and his friends held the reins of the Government. He represented that he had accepted the appointment of Attorney-General when the tenure of that office was virtually during good behaviour, and claimed redress, but in vain. Sir Charles sent a message to the Legislative Assembly, recommending him for a superannuation allowance of £625 per annum; but no motion was made to refer the message to the Committee of Supply, until the day next before that fixed for the prorogation, when it was met by an amendment that it should be considered in the next session, and it was never renewed. Mr. Ogden felt that as a public man, his connection with the Province was at an end. He retired to England, and appealed to the Imperial Government, but was told that his claim was against that of Canada. His services were acknowledged, and he was offered several colonial appointments which he declined; but having been called to the English Bar, he eventually accepted the Attorney-Generalship of the Isle of Man, and was afterwards appointed to the office of District Registrar at Liverpool, and held both these appointments at the time of his decease. Mr. Ogden performed his duties ably, fearlessly and impartially; and that he fulfilled them to the satisfaction of the Sovereign and her advisers is manifest from the important offices successively conferred upon him. In the conduct of cases before the courts of criminal jurisdiction he was singularly successful, and this mainly because while he was in earnest in enforcing the law, he never forgot that justice should be administered in mercy. On the dark and troublous days and deplorable events between 1837 and 1841, and Mr. Ogden's relations to them, it is unnecessary to comment here; a quarter of a century has since passed away, and we may leave them to the historian; he had a most painful duty to perform, and we believe few could or would have performed it better. Whatever differences of opinion may have existed as to the policy which he was called upon to carry out, one thing is at least beyond a doubt—in the re-adjustment of affairs after the storm wa past, he exerted himself strenuously to secure just rights to all classes of her Majesty's subjects. In private life Mr. Ogden was an amiable and estimable man, of a genial and fun-loving temperament, fond of frolic, and happy at a joke. Kind and liberal to all under him or about him, and never forgetting a friend or a service rendered, he had that power most essential to a public man, and possessed most remarkably by the greatest, of distinguishing those able to do good service and attaching them firmly and affectionately to him. He was twice married; first to Mary, daughter of General Coffin, by whom he leaves no children living, and secondly to Susan, eldest daughter of the late Isaac Winslow Clarke, Deputy Commissary-General, then in charge in Montreal, and a niece of the late Lord Lyndhurst. By this lady, who died before him, Mr. Ogden leaves five children, four sons and a daughter, surviving him.

CHIEF JUSTICE EDWARD BOWEN.

The Hon. Chief Justice Bowen, of the Superior Court, died at Quebec on the 12th April, 1866. We learn from Notman's sketches that the late Chief Justice was born on the first of December, 1780, at the town of Kinsale, situated on the south-west coast of Ireland. The father of the deceased was a doctor of medicine and a surgeon in H. M. forces, and died, while very young, in the West Indies, whither he had accompanied his regiment. Having completed his education in Ireland, Mr. Bowen accepted an invitation from his great-aunt, Mrs. Caldwell, the wife of Colonel the Hon. Henry Caldwell, Receiver-General of Lower Canada, then a resident of Quebec, and arrived in this country on the 12th October, 1797. In the summer of the following year he was articled to their son, Mr. John Caldwell; but afterwards, in consequence of Mr. Caldwell retiring from the bar, he transferred his articles of indenture to the then Attorney-General, the Hon. Jonathan Sewell, and while yet a student, was appointed Deputy Clerk of the Crown for Lower Canada. In May, 1803, Mr. Bowen was called to the Bar, and was the first who received a patent of precedence as King's Counsel in Lower Canada. In 1807, he married Eliza, daughter of Dr. James Davidson, Surgeon of the Royal Canadian Volunteers. Their married life continued unbroken for the long period of 52 years, Mrs. Bowen having died in 1859. The issue of this marriage was sixteen children—eight sons and eight daughters. On the preferment of Mr. Sewell, 1808, to the office of Chief Justice, Mr. Bowen became Attorney-General, without passing through the earlier degree of Solicitor-General. He sat for the two following years as

member of the Assembly for Sorel. On the 3rd May, 1812, he was appointed a judge of the King's Bench, and in 1849 he was promoted to the office of Chief Justice of the Superior Court of Lower Canada. For nearly forty years this Methusaleh of the Bench did not feel it necessary to absent himself from his duties, or even apply for the customary three months' leave of absence. Regarding his political life, we learn that he was summoned by Royal Mandamus, in 1823, to a seat in the Legislative Council of Lower Canada, and in 1837 he was appointed Speaker of that body. During the fourteen years in which he sat in the Legislative Council, we believe, he took his part in the discussions of the time; and, from his own view of duty, he sought to influence public affairs with wisdom and patriotism. After the re-union of the Provinces, he withdrew altogether from political as well as parliamentary life, and gave his undivided attention to the duties of his judicial office. He was, it may be added, one of the members of that important court which was specially appointed for the consideration of the vexed Seignorial Tenure question.

Adverting to his qualities as Judge, Mr. Fennings Taylor says:—"The Chief Justice has, we believe, always been regarded as a conscientious and pains-taking judge, and in matters of criminal jurisprudence particularly, the professional promise which attached to him as a barrister has, we believe, been fulfilled by him on the bench."

Recalling Sentence.—At the Middlesex Sessions recently, a young man named Charles Harmsworth, was convicted of stealing a watch. The prisoner was only 21, but there was a melancholy list of previous convictions against him, showing that from the age of 16, he had no sooner been liberated after confinement under one conviction than he committed a fresh offence. We extract the following from a London newspaper report:—

The Assistant Judge sentenced Harmsworth to penal servitude for seven years. As the prisoner was being passed out of the dock he struck the prosecutor a violent blow under the left ear, which was heard throughout the court. Upon this the Assistant Judge ordered the prisoner to be brought back, and again placed in the dock, and, addressing him, said: "You have had the audacity to strike the prosecutor a violent blow within the very walls of the court, when he came here to perform a public duty. I shall therefore alter your sentence, and the sentence I now pronounce upon you is that you be kept in penal servitude for ten years." Then, addressing the prosecutor, he said, "As we believe you have sustained some injury, we order you to receive £1 in addition to your ordinary allowance for attendance."

Delays of Justice.—The delays and waste of time in our Montreal Circuit Court have long been bitterly complained of. It appears that in Jamaica, the delays in the petty Courts had some influence in leading to the recent insurrection. Mr. Justice Kerr, one of the Judges of the Supreme Court, being asked by the Royal Commission why the negroes did not appeal to the law for justice when their wages were kept back, gave the following explanation:—

"It is not worth their while, on account of the difficulties thrown in the way of redress by our defective management. There is the expense. The least that a suit at petty sessions costs is 7s. 6d., and it may cost a great deal more. I knew a trespass case where the costs amounted to upwards of £10. 2nd. The tax upon their time. They may have 20 miles (one way only) to walk to lodge their complaint; and the distance to attend the hearing. 3rd. The uncertainty of the result. 4th. The certainty of intolerable delay; no more inveterate abuse clings to the administration of justice at petty sessions; there is great difficulty in getting the court constituted at all, but once constituted, *there immediately seems to be a sort of enchantment upon it to postpone the business.*"

And then he proceeded to give actual instances within his personal cognizance. Finally, he sums up:—

"I know of nothing more standing in need of reform than the delays of the petty court; the vexation and waste of time which they cause to the humble class of suitors are a perfect scandal. When I said that the magistracy did not possess that confidence of the lower orders which is necessary to the security of the country, I was thinking of unpaid magistracy. I have reason to believe that the stipendiaries give satisfaction."

Danger of Being Buried Alive in France.—The French law requires the burial of a deceased person to take place, at the outside, 36 hours after the decease. A petition has been laid before the Senate, pointing out that the delay was insufficient, that there were many cases of "suspended

animation;" and, to avoid the risk of being buried alive, urging some modification of the law. The representative of the Government, M. Rouland, and Viscount de la Gueronnière opposed the prayer of the petition, and it no doubt would have been consigned to the waste paper basket, but the petitioner found an unexpected supporter in the person of Cardinal Donnet, the Archbishop of Bordeaux. It seems that upwards of 40 years ago, soon after he had taken orders, he fell into a kind of trance, which, although he retained consciousness, all those about him mistook for death. The doctor regularly certified to his demise, he heard and felt the carpenters taking the measure for his coffin, he witnessed, without being able to move, his own funeral service, but luckily awoke in time. He, therefore, warmly supported the prayer of the petition, which was thereupon referred to the Government, with the hope that measures would be taken to render impossible the recurrence of such fearful mistakes. There can be no doubt that a great many people are literally put to death by being interred while only in a trance. A well-known anatomist (Bruhier) specifies 181 cases of premature burial. There are several historical instances—among them that of a Spanish nobleman, who was aroused from his lethargy by the point of the knife of Andrew Vesale, as his body was on the point of being laid open; there is also the tradition of Cardinal Espinosa, who seized hold of the bistoury after a crucial incision had been effected on his stomach. But even at the present day a well-known practitioner estimates that about ten people per annum are thus consigned to their last resting place whilst full of life. If, as in the case of Cardinal Donnet, they retain consciousness, it is difficult to imagine death under a more appalling form.

JUDICIAL KEENNESS.—"It is only one hour or two since I left Lewes, the work of the Assize being over, and to me it was rather a wearisome work. Yet I do not regret having had this office (that of chaplain to the Sheriff) this year, for it has given me an insight into Criminal Court practice, which I never should have had but for this occasion, for nothing else would have compelled me to sit twice for four or five days together through every case. The general result of my experience is, that although Burke says, "the whole end and aim of legislation is to get twelve men into a jury-box," yet the jury system, beautiful as it is in theory, is in itself neither good nor bad, but depends upon two things,—first, the national character; secondly, the judge; and on this last almost entirely. The chief justice, Sir John Jervis, was the criminal judge this time, and his charges to the jury surpassed in brilliancy, clearness, interest, and conciseness, anything I ever could have conceived. The dullest cases became interesting directly he began to speak,—the most intricate and bewildered clear. I do not think above one verdict was questionable in the whole thirty-six cases which he tried. One was a very curious one, in which a young man of large property had been fleeced by a gang of blacklegs on the turf, and at cards. Nothing could exceed the masterly way in which Sir John Jervis untwined the web with which a very clever counsel had bewildered the jury. A private note-book, with initials for names, and complicated gambling accounts, was found on one of the prisoners. No one seemed to be able to make head or tail of it. The chief justice looked it over, and most ingeniously explained it all to the jury. Then there was a pack of cards which had been pronounced by the London detectives to be a perfectly fair pack. They were examined in Court; every one thought them to be so, and no stress was laid upon the circumstance. However, they were handed to the chief justice. I saw his keen eye glance very inquiringly over them, while the evidence was going on. However, he said nothing, and quietly put them aside. When the trial was over and the charge began, he went over all the circumstances, till he got to the objects found upon the prisoners. "Gentlemen," he said, 'I will engage to tell you, without looking at the faces, the name of every card upon this pack.' A strong exclamation of surprise went through the Court. The prisoners looked aghast. He then pointed out that on the backs, which were figured with wreaths and flowers in dotted lines all over, there was a small flower in the right-hand corner of each like this—*.*.***

The number of dots in this flower was the same on all the kings, and so on, in every card through the pack. A knave would be perhaps marked thus:—*** *** An ace thus:—*.* And so on; the difference being so slight, and the flowers on the back so many, that even if you had been told the general principle, it would have taken a considerable time to find out which was the particular flower which differed. He told me afterwards that he recollected a similar expedient in Lord DeRos's case, and therefore set to work to discover the trick. But he did it while the case was going on, which he himself had to take down in writing." *Rev. F. W. Robertson, Brighton.*

FORESTALLING.—"There had been a loud cry against forestallers and regraters. There had been in the month of July preceding a trial upon this subject in the Court of King's Bench. Mr. Rusby, an eminent cornfactor, was indicted for having purchased in Mark Lane ninety quarters of oats, at 41s. per quarter, and sold thirty of them again on the same day and in the same market at 44s. The "heinous charge" being fully proved, the Jury brought in a verdict of guilty; upon which the Chief Justice, Lord Kenyon, thus addressed them: "You have conferred by your verdict the greatest benefit that ever was conferred by any Jury!"

The law laid down on this occasion did not altogether pass current. It was afterwards discussed in full Court, and the Judges being equally divided in opinion, the benefit of their doubts was allowed to Mr. Rusby."—*Stanhope's Life of Pitt, vol. III, p.* 251.

ENGLISH LAW REPORTS.

In the first number of the Law Journal, we published an extract from an article in *Frazer's Magazine*, referring to a scheme for the amendment of the system of law reporting in England. In pursuance of this scheme a Council of Law Reporting, of which Sir Fitzroy Kelly is chairman, has been organized, and has commenced the publication of a series of reports, which is expected to supersede the various separate and independent sets hitherto issued. The object is announced to be "the preparation, under pro- "fessional control, through the medium of "the Council, by barristers of known abil- "ity, skill and experience, acting under the "supervision of editors, of one complete set "of Reports, to be published with prompti- "tude, regularity, and at moderate cost, in "the expectation that such a set of Reports "will be generally accepted by the profes- "sion as sufficient evidence of Case Law; "so that the judge in decision, the advocate "in argument, and the general practitioner "in the advice he gives to his client, may re- "sort to one and the same standard of au- "thority."

About thirty barristers are engaged in reporting for the Series, and the style of execution and printing is very superior. The reports are paged and indexed to form separate volumes for the various Courts, under the three following classes:—

1. *The Appellate Series.*—This will comprise the decisions of the House of Lords and the Privy Council, not including Indian Appeals.

2. *The Equity Series.*—This will comprise the decisions of the Lord Chancellor and the Court of Appeal, in Chancery, Lunacy, and Bankruptcy, and also those of the Master of the Rolls, and the Vice Chancellors.

3. *The Common Law Series.*—This will comprise the decisions of the Queen's Bench, Common Pleas and Exchequer, including Writs of Error, and Appeals to the Exchequer Chamber; also the decisions of the Courts of Probate, Divorce, and Matrimonial Causes; the Admiralty and Ecclesiastical; and the Court of Criminal Appeal.

It is evident that this Series, if successful, and if it be conducted with unabated vigour and ability, must prove of great utility to the profession, and make the study of case law a much easier task to the student. As many of the English decisions are of interest here, we propose to notice from time to time, beginning in the present number, the leading cases and most important holdings, giving the reference to the Law Reports, so that those interested in any case may readily find it in the English Series.

Ejectment—Title by mere Possession—Devisable Interest in Land.—A person in possession of land without other title has a devisable interest, and the heir of his devisee can maintain ejectment against a person who has entered upon the land, and cannot shew title or possession in any one prior to the testator. Possession is good title against all but the rightful owner. Asher *v.* Whitlock, Q. B. 1.

Railway Company.—Breach of Contract.—A by-law of the defendants, a railway company, required each passenger to shew his ticket when required. The plaintiff took tickets for himself, his servants, and horses, by a particular train, on the defendants' railway. The train was afterwards divided into two. The plaintiff travelled in the first train, taking all the tickets with him. When the second train, with the servants and horses, was about to start, the plaintiff's servants were required to produce their tickets, and on their being unable to do so, the defendants refused to carry them:—

Held, in an action by the plaintiff for not carrying his servants, that as the defendants contracted with the plaintiff, and delivered the tickets to him and not to the servants, the defendants could not, under the by-law, justify their refusal to carry. Jennings *v.* Great Northern Railway Co., Q. B. 7.

Railway Company.—By-law, validity and construction of.—Travelling without a Ticket.—By a by-law of a railway company, no passenger was to be allowed to enter or travel in a carriage without having paid his fare and obtained a ticket, which the passenger was to shew whenever required, and give up on demand before leaving the Company's premises. And any passenger not so producing or delivering up his ticket was to be required to pay the fare from the place whence the train originally started, or forfeit a sum not exceeding forty shillings—

Held, that this by-law only applied to the case of a person having and wilfully refusing to produce or give up his ticket, and not to the case of a person travelling without having paid for and obtained a ticket, with no intention to defraud the company.

Held, also, that if the by-law extended to the latter case, it would have been illegal and void under 8 Vict. c. 20, s. 109, as repugnant to section 103, which makes a fraudulent intention the gist of the offence of travelling without having paid the fare. Dearden *v.* Townsend, Q. B. 10.

Poor.—Irremoveability.—Break of Residence.—A woman, having resided for sixteen years in the parish of S., was obliged through poverty to sell her furniture and give up her lodgings; and being destitute, she slept for one night on doorsteps in the same parish, and after that, for twenty-one successive nights, in a refuge for the houseless poor in an adjoining parish; during the day-time she wandered about, chiefly in the parish of S. She then applied to be admitted into the workhouse of S.; but being refused, she slept for two nights in the parish, and after that was received into the workhouse, and an order for her removal applied for:—

Held, that the pauper had not ceased to reside in the parish of S., and was therefore irremoveable. Queen *v.* St. Leonard, Shoreditch, Q. B., 2I

Carrier—Contract to carry partly by land and partly by sea.—When there is one entire contract to carry partly by land and partly by sea, the contract is divisible, and as to the land journey, the Carrier is within the protection of the Carriers' Act, 11 Geo. 4. and 1 Wm. 4, c. 68. LeConteur *v.* London and South-Western Railway Co., 1 Q. B., 54. The remarks of the judges in this case are of interest, as showing that the Company would have been liable but for the special protection afforded by the Carriers' Act, which says "No carrier by land shall be liable to the loss or injury of certain articles above the value of £10, unless the value is declared, and the increased charge paid."

The facts were these: The passenger, a master mariner, on arriving at the station at Southampton, took his chronometer, valued at £25, in his hand, gave it to the porter of the defendants, and the porter then, in his presence, placed it upon the seat. The passenger went away for some purpose; while he was gone the chronometer was stolen. The judges were all of opinion that carriers are liable for small articles carried by passengers into the cars, unless the case comes as this did, under the special provisions of the Carriers' Act. Chief Justice Cockburn remarked: "I cannot help thinking we ought to require very special circumstances indeed, and circumstances leading irresistibly to the conclusion that the passenger takes such personal control and charge of his luggage as to altogether give up all hold upon the company, before we can say that the company, as common carriers, would not be liable in the event of the loss; if, therefore, the case had depended upon the question whether or not the company were liable upon the general issue, I should be of opinion that the plaintiff was entitled to recover."

Statute of Frauds, 29 *Car.* 2, *c.* 3, *s.* 17:—*Letter to an agent sufficient memorandum.*—A letter signed by the party to be charged, written to his own agent, referring to letters of the agent stating the terms upon which the latter has made a contract on his behalf with the other party for the purchase of goods, is a sufficient note or memorandum of the bargain to satisfy the 17th section of the Statute of Frauds. Gibson *v.* Holland. C. P. 1. In this case the defendant had commissioned a person to purchase a horse for him, and, on hearing that it had been purchased, wrote to his agent, saying, "I only returned home yesterday evening, or I should have at once answered your first letter, and sent you a cheque for the mare *which you were kind enough to buy for me.*" The Court was of opinion that it was not necessary that the document should be addressed to the person who was to take advantage of it. "Provided you have in writing an admission by the party to be charged of the bargain having been made, the requirement of the statute is satisfied, though the memorandum does not show a contract in the sense of its being a complete agreement."

Bankruptcy—Deed of Arrangement—"Value" of Creditors—Secured and unsecured Creditors—Section 192 of the English Bankruptcy Act, 1861, requires that a deed of arrangement between a debtor and his creditors shall, in order to bind non—assenting creditors, be assented to or approved of in writing by a majority in number, representing three-fourths in *value* of the creditors of such debtor, whose debts shall respectively amount to £10 and upwards:—

HELD.—*That in determining whether the requisite majority in value of the creditors have assented to the deed, the value of securities held by secured creditors is not to be deducted. Whittaker v. Lowe, Ex.* 74.

CROWN CASES RESERVED.

Bigamy—Absence during seven years.—Upon a trial for bigamy, when it is proved that the prisoner and his first wife have lived apart for the seven years preceding the second marriage, it is incumbent on the prosecution to shew that during that time he was aware of her existence; and, in the absence of such proof, the prisoner is entitled to be acquitted. Queen *v.* Curgerwen, C. C. R. p. 1. In this case the prisoner had been convicted by the jury, but Willes, J. let him out on bail till the opinion of the Court for Crown Cases Reserved had been taken. Pol-

lock, C. B., who rendered the judgment of the Court quashing the conviction, observed: "This question has arisen more than once before; and we are now asked to settle the law on the subject. The term "burden of proof" is an inconvenient one, except when a person is called upon to prove an affirmative. Our attention has been called to a note by the editor of Russell on Crimes, (Mr. Greaves) known as a gentleman of great learning, ability, and research, who appears to have adopted the view that the burden of proof lies on the prisoner. We think, however, that it is contrary to the general spirit of the English law that the prisoner should be called on to prove a negative; and that it is better, and more in agreement with the general doctrine and principles of our criminal law, to adopt the rule laid down by Wightman, J., in *Reg. v. Heaton.* (3 Fost. & Fin. 819.)"

Attempt to have carnal knowledge of a girl under the age of ten.—Consent.—The offence of attempting to have carnal knowledge of a girl under the age of ten years may be committed, notwithstanding the girl consents to the acts done. Queen *v.* Beale, C. C. R., p. 10. The case stated shewed that the girl "was nearly ten years old; that she lived with her father and mother; and that the prisoner was a lodger in their house. On the day in question she went into his room, when he pulled her between his knees, raised her clothes, took down his trowsers, and indecently assaulted her. He hurt her a little; on which she cried out. But she did nothing to prevent him, and made no objection to the act. He told her not to tell her mother, and she did not in fact tell of it until some days after." The jury found the prisoner, "*Guilty*, for that the child was too young to know what it was she was doing, and therefore consented to the act done by the prisoner." Pollock, C. B., in giving judgment affirming the conviction, observed: "The learned judge who tried the case seems to have thought that a full and ample consent on the part of the girl would have prevented the completion of the crime, and that a consent of a different character would not have had that effect. That opinion, in reality, was utterly unfounded. Consent was altogether unimportant. The jury said the prisoner was guilty, but found that there had been a qualified consent on the part of the girl; and, if the nature of the consent had been material, it might have been necessary to analyze the facts of the case. Those facts, however, shew an attempt to commit a crime, where consent was immaterial. Of course, if the indictment had been merely for an indecent assault, the question of consent would have become material."

Malicious Injury.—The prisoner plugged up the feed-pipe of a steam-engine, and displaced other parts of the engine in such a way as rendered it temporarily useless, and would have caused an explosion, if the obstruction had not been discovered, and, with some labour, removed:—

HELD—*That he was guilty of damaging the engine with intent to render it useless, within the meaning of the 24 and 25 Vict. c. 97, s. 15, which enacts that, "Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed or moveable, used or intended to be used for sowing, reaping, &c. shall be guilty of felony." Queen v. Fisher C. C. R., p. 7. Pollock, C. B., observed: "It is like the case of spiking a gun, where there is no actual damage done to the gun, although it is rendered useless. The case falls within the expression 'damage with intent to render useless.'*

The conviction was affirmed.

A PURE JUDICIARY.—In a forcible speech at the Cooper Institute, New York, in 1863, Mr. Brady, an eminent lawyer of that city, made use of the following language:—"Why, gentlemen, let me tell you, as one who began the profession of law at twenty-one years of age, such a change has occurred in the administration of justice in this city that when a man walks into my office with a bundle of papers, and says to me, 'Mr. Brady, here is an injunction granted to prevent my carrying on my regular business,' and, in one of the very latest cases I tried, there was an injunction to prevent a man from continuing to act as the foreman and cutter in a merchant tailoring establishment in this city—an injunction from a judge to prevent him from carrying on his lawful trade for the maintenance of his family. How do you think I received those papers? When I first entered the profession, I would never have asked what judge granted it, but I would have looked to the merits of the case, and tried to tell my client what I thought. But, gentlemen, the question, before even looking at one word written on that paper, was, 'What judge granted this injunction?' Next, 'What judge is to hear this case?' And when that latte question is answered, in many cases I have handed the papers back and told my friend, 'I can be of no service to you—you must employ such a man, between whom and the judge, or judge's partner, friend, agent, or huckster, there exists a great affection—employ him and you will have some chance to maintain your rights in a court of justice.' Is this any fancy picture? It is the language of the most sober and dreadful reality."

THE JURY SYSTEM.—On the 13th April instant, Mr. Justice Mondelet called attention to the anomalous state of the Jury Law, by which the first panel of jurors were allowed to go at the end of one week, while the second panel must do their duty for the rest of the term. The latter had been here now for about a fortnight, and there was every prospect of their being here for a considerably longer period. It was a great hardship, and ought to be rectified by the Government amending the Jury Law.

Mr. Ramsay said that he had drawn the attention of the Government to the subject.

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