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SQUATTERS.

A case of great importance to proprietors of Eastern Townships lands will be found in the present issue. In *Ellice* v. *Courtemanche*, the Court of Appeal has decided that a person squatting upon unoccupied land, without a shadow of title, and clearing the land or building on it, is entitled to demand the value of his improvements before he can be ejected. This decision would afford much cause for regret, did not one or two of the circumstances connected with the case render it one of peculiarity. The question is one which does not require much knowledge of law for its decision. "Am I to put my hand in my "neighbor's pocket," said the CHIEF JUSTICE, "because he is a dishonest man?" But put this in another way. Is (not my neighbor but) some parasitical interloper to take advantage of my back being turned, to fasten upon my property, and then am I to be dragged into a troublesome litigation, and to be subjected to the annoyance and anxiety of an *expertise*, to determine in what sum I am to be mulcted for his voluntary and unasked for services, and then if I cannot pay this sum with heavy costs added, am I lose my property altogether? Surely this would be a monstrous proposition. In the case of *Courtemanche*, however, as Mr. Justice DRUMMOND pointed out, there were peculiar circumstances. The plaintiff had an agent who should have notified him that his land had been trespassed upon, but who, on the contrary, allowed the defendant to pay the taxes year after year for three years, and no steps were taken till the value of the land had been more than quadrupled.

THE LANDLORD'S PRIVILEGE.

The case of *Eastty* v. *Fabrique*, reported in this number, is of much interest to commission merchants and others who have to store goods in bonded warehouses, and who can now do so without fear of a seizure for rent due by the lessee of the premises, so long as the storage has been paid. The owners of goods are in fact placed in somewhat the same position as subtenants who have paid their rent to the party from whom they leased. No doubt of the propriety of the decision could arise, even if it were not fully borne out (as it is) by the authorities.

THE COURT OF APPEALS.

The December term of the Court of Appeals was characterized by unusual vigor on the part of the CHIEF and puisne Judges, and an unusual amount of business was dispatched. Thirty-five cases were taken *en délibéré*, and the old *délibérés* were disposed of. It is probable that some important changes will be made in the members of the Bench constituting this Court before the business of the March term is proceeded with. The Court has been adjourned for judgments to the 28th February next.

FIVE AND TWENTY YEARS AGO.

We have been favored with the perusal of a pamphlet, printed in this city a quarter of a century ago, containing the report of a committee of the Montreal Bar on the state of the administration of justice. It is curious to observe that some of the evils complained of at the present day were in existence in 1842, and specially pointed out in the Report. One of these was the obstruction to business, occasioned by the deficiency of judges in the Montreal District, and the infirmities of one of the judges sitting on the Bench. The Committee also made a sore grievance of the interruptions of counsel by judges during argument. "They "must enter their protest against the tone of "petulance and choler, heretofore assumed by "a part of the judiciary; and as a matter of "right they claim for the bar, both in cham- "bers and in court, entire immunity from of- "fensive language and demeanor."

The charge of offensive behaviour on the bench is one which a judge possessed of tact

and good sense will easily escape. It is true that some of the judges of our day do occasionally appear to forget that, though they may assume the mien of an irate schoolmaster, members of the bar are not to be awed into silence like schoolboys. But upon the whole there is not much to be complained of on this head.

Several of the suggestions of the Committee have since been carried out. One of these was that the judges should be held to record, in every judgment, the grounds of their decision. Also the very proper recommendation to change the tenure of the judicial office, and substitute the words, "during good conduct" for "during pleasure" in the commission of the judges.

Some of the evils pointed out have since disappeared, such as having bankruptcy commissioners or judges practicing before the Courts; exorbitant fees paid to prothonotaries and criers, a joint shrievalty obstructing business, &c. In connection with the office of sheriff, it may be worth while to remark that the Committee recommended "that the "office of sheriff *in civil matters*, should be "abolished, and that the duties of that office "should be performed by the prothonotaries;" and "that the functions of the sheriff should "be confined to the criminal side of the Court, "and he should himself receive a fixed salary."

SUPPLEMENTARY FACTUMS IN THE COURT OF APPEALS.

A rule was laid down by the Court of Appeal during the rendering of judgments on the ninth of this month, of which it is important that the members of the bar should not be ignorant. The CHIEF JUSTICE called the attention of the bar to the practice of sending supplementary notes or factums to the judges during vacation, and observed that he took this opportunity to intimate, that unless the Court gave leave, during the term, to gentlemen to send in supplementary memoranda in vacation, they would not be received; and, further, notice of such supplementary notes must, in all cases, be given to the counsel on the other side. Mr. BETHUNE, Q. C., inquired whether this would apply also to lists of authorities, and whether the fact that the opposite party had received notice should be shown by his receipt of copy on the paper. The CHIEF JUSTICE replied, that this would be the more regular course. The rule would henceforward be that all supplementary memoranda must bear the signature of the opposite party.

Mr. JUSTICE BADGLEY added a few observations respecting the time of sending in the supplementary notes. He said that frequently after the judges had gone through the whole labour of the case, and had made up their minds, they were required at the last moment to go through a long list of new authorities, to the exclusion of other duties. If there were to be any supplementary notes, he said, let them be sent in immediately after the argument.

THE PATENT LAWS.

Some suggestions of importance to Inventors are put forth in a letter recently published by Messrs. CHARLES LEGGE & Co. The fact is pointed out that all the nations of the world, with the exception of Canada, Nova Scotia, Prince Edward Island, Switzerland, Greece, Turkey, China and Japan, grant letters patent for inventions to foreigners on the same terms as to their own subjects. New Brunswick and Newfoundland, among the British Provinces, have thrown off their exclusiveness and admitted foreigners to equal rights with their own citizens. "By this arrangement," says the letter before us, the inhabitants of these colonies, are permitted to obtain Patents in the United States, for the reduced fee of $35, in place of the discriminating fee of $500 charged to the inhabitants of Canada, Nova Scotia, and Prince Edward Island, in return for their exclusiveness in not permitting American citizens to obtain Letters Patent on any terms, even by the payment of an equally large fee. The United States Patent Law is so framed, that as soon as we cease to discriminate against their citizens in the granting of Patents in Canada, their fee at once drops from $500 to $35, without additional legislation." These facts are not very creditable

to us as citizens of that great nation which our 'great men,' are so constantly reminding us we have become. Even in a pecuniary point of view, it is evident that the field presented by the American States to Canadian inventors is far more inviting than that offered by Canada to American inventors. "A United States Patent granted to one of our clients," says the letter, "recently sold for $80,000 in gold, for the six New England States, and for $30,000 in greenbacks for each of several other States." It is recommended that articles patented under Patents issued to foreigners be kept on sale at a reasonable rate for eighteen months, otherwise the Patent to become void, and that no patent continue longer than fourteen years. This period it is proposed to divide into three terms: the first, of three years, to require a payment to Government of $25, the second term of four years, an additional payment of $50, and the final term of seven years $100. "All, or nearly all inventors," says Mr. Legge, "can afford the first payment of $25, and three years will test the value of the invention—if it prove a good one, the next fee can easily be raised, and so on. If it prove of no great value, the Patent may be allowed to become void, by non-payment of next fee, and consequently be open to the public." It is further recommended that all original Patents, already granted in each of the Provinces, be extended over the Dominion, with or without the payment of an additional fee. These suggestions appear to be dictated by experience and knowledge of the subject, and are consequently worthy of the most careful consideration.

NOTICES OF NEW PUBLICATIONS.

Harper's Magazine. December.—A highly interesting article appears in the present number, respecting the nurseries on Randall Island. These 'Nurseries' are a Juvenile Department of the New York Almshouse, and afford a happy home and place of education for about a thousand children of all ages. The progressive and enlightened spirit of the present century has not been slow to perceive how much easier and better it is to prevent crime and disease than to punish the one or cure the other. The institutions on Randall's Island afford a most cheering illustration of the good effect of removing young vagrants from the filth and misery, the impure air, and impure associations of their haunts and homes, and educating both mind and body in a well chosen and well ordered retreat, in a salubrious atmosphere, with abundance of wholesome food, and liberty to indulge in the natural games and sports of childhood. Not a few of the hundreds who every year go forth from Randall's Island, to enter upon an honest and industrious career, will have reason to look back with gratitude to the months or years spent in that retreat.

Procedure Civile, Vol. 1. By G. Doutre, B.C.L., Advocate, Secretary of the Bar, Province of Quebec. This is the most comprehensive and convenient manual of Civil Procedure which has yet appeared. The Preface is by a learned gentleman from whose instructions most of the younger members of the profession have derived no small benefit, we refer to Professor Lafrenaye, of McGill University. The Preface is followed by an Introduction in which Mr. Doutre notices the various changes which have been introduced by the Code of Civil Procedure. These notes will at once direct the attention of the practitioner to a number of points which should not escape his notice. The Report of the codification commissioners is then given, together with the Text of the Code, and authorities cited by the commissioners. The book also includes the Insolvent Act of 1864 and amendments, together with the rules of practice of the various Courts. It is the intention of the editor, we believe, to issue a second volume which will include the Tariffs of Fees. In the meantime, the first volume is complete in itself, and is carefully indexed, the Alphabetical and Analytical Index alone extending over about one hundred and twenty pages. It is unnecessary to dwell further upon the merits of this work which is executed with Mr. Doutre's usual care and accuracy. What we have stated shows that it is well adapted for general use as a *vade mecum*.

BANKRUPTCY—ASSIGNMENTS.—PROVINCES OF ONTARIO AND QUEBEC.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Armstrong, William		W. S. Williams	Napanee	Nov. 21st.
Atkinson, James	Township of Reach	Alex. McGregor	Galt	Nov. 6th.
Austin, Charles	Ottawa	Francis Clemow	Ottawa	Dec. 3rd.
Banbury, Charles		Jas. McWhirter	Woodstock	Nov. 20th.
Beath, Robert		S. B. Fairbanks	Oshawa	Nov. 26th.
Bedard, Augustin	St. George de Henryville	T. Sauvageau	Montreal	Nov. 20th.
Berthiaume, François	Boucherville	T. Sauvageau	Montreal	Nov. 4th.
Bogart, Irvin D.	Campbellford	E. A. Macnachtan	Cobourg	Nov. 29th.
Bostwick, John Price		Thos. Deacon	Pembroke	Nov. 4th.
Boswell, John S.	Cobourg	E.A. Macnachtan	Cobourg	Nov. 30th.
Boulton, John	Petrolia	George Stevenson	Sarnia	Nov. 2d.
Brown, James	Manvers	E. A. Macnachtan	Cobourg	Nov. 20th.
Capron, Walter	Paris	A. W. Smith	Brantford	Nov. 27th.
Cocker, George		John McDonald	Montreal	Nov. 5th.
Cocker, George	Ottawa	Francis Clemow	Ottawa	Nov. 27th.
Colwell, William		W. Collins	Walkerton	Nov. 23rd.
Dale, John	Township of Tecumseth	Joseph Rogers	Barrie	Nov. 29th.
Dauplaise, Paschal	St. François du Lac	G. I. Barthe	Sorel	Nov. 15th.
Davison, Thomas		W. T. Mason	Toronto	Nov. 16th.
Davy, Benjamin Canning		W. S. Robinson	Napanee	Nov. 29th.
Denner, Theophilus P.		W. S. Robinson	Napanee	Nov. 14th.
Douglass, Henry Joseph		W. S. Williams	Napanee	Nov. 21st.
Edgar, Philip		W. S. Robinson	Napanee	Nov. 4th.
Edwards, R.	Almonte	John Whyte	Montreal	Nov. 7th.
Erritt, Richard William		William Staples	Millbrooke	Nov. 18th
Findlay, Thomas		Richard Monck	Chatham, O.	Nov. 7th.
Flagler, John R.	Brighton	E. A. Macnachtan	Cobourg	Nov. 22nd
Fleak, Henry C.		Jas. McWhirter	Woodstock	Nov. 20th.
Flyn, Daniel		R. M. Rose	Kingston	Nov. 4th.
Forsyth & Pemberton		Wm. Walker	Quebec	Nov. 23rd.
Gauthier, Alexandre	St. Edouard	T. Sauvageau	Montreal	Nov. 29th.
Gilkes, George	Windsor	J. McCrae	Windsor	Oct. 18th.
Gimson, John Foster	Lindsay	Robert Watson	Montreal	Nov. 6th.
Grier, Thomas McKee	Pushlinch	Thos. Saunders	Guelph	Nov. 5th.
Guertin, François Xavier		Isidore Traversy	Ottawa	Dec. 4th.
Harris, Elisha Gustavus	West Oxford	Jas. McWhirter	Woodstock	Dec. 4th.
Hartill & Lockington		Thomas Clarkson	Toronto	Nov. 6th.
Hébert, Octave J.	Montreal	T. Sauvageau	Montreal	Nov. 12th.
Heney, David	Blyth	S. Pollock	Goderich	Nov. 18th.
Kelly, James		Thos. Saunders	Guelph	Dec. 14th.
Kergan, John D., & Co.	Paisley	W. F. Findlay	Hamilton	Nov. 4th.
Lalor, Thomas		Thomas Clarkson	Toronto	Nov. 20th.
Langlois, Léon	Windsor	J. McCrae	Windsor	Nov. 21st.
Lazier, Richard Léonard		J. P. Thomas	Belleville	Dec. 4th.
Lundy, John Stewart	Chingouacousy	John Lynch	Brampton	Nov. 29th.
Macartney, George	Township of North Gower	F. Clemow	Ottawa	Oct. 25th.
McBean, Archibald		E. A. Macnachtan	Cobourg	Nov. 11th.
McCarthy, John A.	Stratford	Thos. Miller	Stratford	Nov. 6th.
McDonald, John		Alex. McGregor	Galt	Dec. 2nd.
McGaffin, James		W. T. Mason	Toronto	Dec. 7th.
McGillivray, John	Ottawa	Francis Clemow	Ottawa	Nov. 29th.
McLaughlin, James	Ainleyville	S. Pollock	Goderich	Nov. 21st.
Mailloux, Isaïe	St. Timothé	T. Sauvageau	Montreal	Nov. 11th.
Methot, Joseph O.		Pemb. Paterson		Nov. 25th.
Mewburn, T. C.	Hamilton	J. J. Mason	Hamilton	Nov. 25th.
Mitchell, William Hall		Thos. Churcher	London	Nov. 14th.
Mulville, Michael	Lennoxville	A. M. Smith	Sherbrooke	Nov. 12th.
Murray, William	Millbrook	James McWhirter	Woodstock	Nov. 20th.
Nelson, Charles	Ingersoll	Jas. McWhirter		Dec. 4th.
Nye, D. T. R.	Phillipsburg	W. Mead Pattison	Freligbsburg	Nov. 27th.
Peebles, Andrew		George Easton	Brockville	Nov. 11th.
Pelletier & Co.	Montreal	T. Sauvageau	Montreal	Nov. 21ts.
Phippen, Robert	Parkhill	Thos. Churcher	London	Nov. 20th.
Pillon, William Dunkon	Township of Hibbert	Thos. Miller	Stratford	Nov. 27th.
Pitcher & Sons, Luther	Compton	A. M. Smith	Sherbrooke	Nov. 15tk.
Reeves, John I.	Montreal	T. S. Brown	Montreal	Nov. 27th.
Riendeau, Jean Bte.	Boucherville	T. Sauvageau	Montreal	Nov. 28th.
Robinson, William	Township Fredericsburgh	W. S. Robinson	Napanee	Nov. 19th.
Rook, Robert		W. S. Robinson	Napanee	Nov. 4th.
Rowell, William		Thomas Clarkson	Toronto	Nov. 13th.
Sénécal, L. A., individually and as partner of Senécal & Weiss	Pierreville	T. Sauvageau	Montreal	Nov. 20th.
Vance, James John		Thomas Clarkson	Toronto	Nov. 6th.
Vézina, Louis D.		A. Fraser	Quebec	Nov. 27th.
Walker, James		William Heron	Ashburn	Nov. 1st.
Wilkes, James		A. W. Smith	Brantford	Nov. 19th.
Workman, George		S. C. Wood	Lindsay	Nov. 21st.

APPOINTMENTS.

Thomas Miller, Esq., of Berlin, Ont., Barrister-at-law, to be judge of the County Court for the County of Halton, in the room of Joseph Davis, Esq., deceased. (Gazetted, Nov. 30, 1867.)

Thos. McCord, Esq., Advocate, to be Law Clerk of the Legislature of the Province of Quebec. (Gazetted, Dec. 20, 1867.)

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

December 9th, 1867.

EASTTY, (Opposant in Court below), APPELLANT; and CURE ET MARGUILLIERS DE LA FABRIQUE DE MONTREAL, (Plaintiffs in Court below), RESPONDENTS.

Landlord's privilege—Bonded Warehouse—Coutume de Paris, Art. 161.

Held, that goods of third parties, traders, stored in a bonded Customs Warehouse, are not liable to seizure for rent due to the lessor by the lessee, under Art. 161 of the Custom of Paris.

This was an appeal from a judgment rendered by *Berthelot*, J., in the Circuit Court, at Montreal, on the 28th June, 1866. The plaintiffs in the Court below, now respondents, on the 14th June, 1865, issued execution against one Curry for $192.65, due for rent, and under this execution ninety-three crates of crockery, belonging to Eastty, the opposant, were seized. He filed his opposition on the 23rd June following, claiming to have them withdrawn from seizure on the ground that they had been put into Curry's warehouse as a Bonded Customs Warehouse, for a certain price or rate per package, and that this rate had been duly paid before the issuing of the seizure. The answer to the opposition set up that the goods were placed in the premises *pour garnir les lieux;* that the opposant was not a sub-tenant, and therefore his property was subject to the landlord's privilege. At *enquête*, the plaintiffs admitted that the premises were leased by defendant as a Bonded Warehouse for the temporary storage of goods *in transitu* to premises of the owners; that the goods seized had been but a few days in the premises, and the rent demanded, with the exception of a few days, had become due before the goods were placed there. Further, that the goods were placed there by the opposant simply for storage, and that the storage was fully paid at the time of the seizure.

The opposition being dismissed by the Court below, the opposant appealed.

BADGLEY, J. The question is one of landlord's privilege upon warehoused goods. It is well established that the landlord's privilege does not extend to all things, otherwise trading would be greatly interfered with. Whatever things are in the house in the way of trade are exempt. A common instance of these exceptions is an auctioneer who receives your property for sale, and who does not hold the goods for himself but for others. [His Honor referred to two decisions, one by Chief Justice Reid, and the second by Mr. Justice Pyke, by which oppositions claiming goods as exempt from seizure had been maintained]. These decisions were upon the ground of public convenience. I think the same principle applies to the goods claimed in this case. They were under the protection of the public Customs Law. The judgment, therefore, should be reversed.

DRUMMOND, J., referred to the lease by which it appeared that the second story of the premises was intended to be used by the lessee as a bonded warehouse. It was held under the old French law that it was merely the *meubles meublans* to which the privilege of the landlord extended; but afterwards it was held that it extended to all the things in the house which evidently did not belong to another person. But as to deposits and articles placed in a store or shop in the course of business by other persons, they were exempt. *Troplong* says, "Lorsqu'il est notoire que les meubles n'appartiennent pas au locataire, les tribunaux doivent, d'après les circonstances, et sans qu'il y ait signification

préalable, admettre que le privilége n'a pas eu lieu." Certainly no notification was required with respect to the property in the present instance, it being well known that it was property belonging to the public, temporarily deposited in the premises. A case has been cited from *Jour. du Palais*, *Savalette* v. *Moriseau*, which applies here. The *considerants* of that judgment were: "Attendu que le privilége s'étend sur tout ce qui garnit la maison; Attendu que ce droit de préférence est fondé sur la présomption que tous les objets sur lesquels il s'étend sont la propriété du locataire: qu'il suit de là, que le privilége doit cesser toutes les fois que le propriétaire a *du savoir* que son locataire n'avait aucun droit, soit par la suite de la connaissance que l'on lui en a donné, soit par la nature même de l'exploitation, &c., annulle," &c. I think therefore, that the goods in this case were exempt from seizure, and that the opposition should have been maintained.

DUVAL, C.J. At the time of the argument I was prepared to reverse this judgment, because it would destroy the whole of the bonded warehouse system. It is a privilege granted to the mercantile community, and it would be utterly unavailing if parties were to be told that their goods would be liable for the whole rent due. I concur in reversing the judgment.

CARON, J., concurred.

Judgment: Considering that the premises in which lay the goods seized in this cause were leased by the respondents for the purpose of being used, and were in fact at the time of the seizure used as a bonded warehouse established by law for the temporary storage of goods belonging to merchant and trader indiscriminately, and were not by the terms of the lease destined to be exclusively furnished with moveables belonging to the lessee: considering that the goods so seized belonged to the appellant, a trader in the city of Montreal, who had deposited them there for temporary storage a few days before the seizure thereof, and that they were so seized for rent, the greater part of which had become due before they had been so deposited: considering that the privilege granted to the proprietor by the 161st article of the *Coutume de Paris* over moveables found in the premises leased by him is founded on the presumption that such moveables are the property of the lessee: considering that such privilege does not extend to such goods as the proprietor must have known not to belong to the lessee: considering, therefore, that the said privilege did not extend to the goods seized in this cause, &c. Judgment reversed.

A. & W. Robertson, for the appellant.

Jetté & Archambault, for the respondents.

Dec. 9, 1867.

ELLICE, (plaintiff in the Court below) APPELLANT; and COURTEMANCHE, (defendant in the Court below) RESPONDENT.

Squatters Act—C.S.L.C. cap 45—*Improvements—Civil Code, Art.* 417.

The defendant squatted upon land of an absentee (who was represented, however, by an agent), cleared and improved the land and paid the taxes for three years:—

Held, in an action under C.S.L.C. Cap. 45, that the defendant was entitled to the value of his improvements, less the estimated value of the rents, issues and profits during his occupation.

This was an appeal from a judgment rendered by *Short, J.*, in the Circuit Court for the district of St. Francis, on the 15th of December, 1866. The action was instituted under C. S. L. C. Cap. 45, commonly called "the Squatter's Act," to recover possession of the south one-third of Lot. No. 13, in the 9th range of Clifton. The defendant admitted that the plaintiff was the proprietor, but urged that he, the defendant, had had peaceful possession from the 14th of February, 1860, during which time he had made considerable improvements, and had paid the municipal taxes, to the knowledge of the plaintiff, and he claimed to be paid the value of the improvements.

The Court below, *avant faire droit*, ordered an *expertise* to estimate the value of the improvements, and rents, issues and profits; and the *experts* reported the value of the improvements at $350, and the rents, issues and profits at $50. The report was homo-

located, and judgment was rendered awarding to the defendant $300, with costs of the contestation. It was from this judgment the plaintiff appealed, submitting that the defendant, possessing in bad faith, could not recover from the proprietor compensation for improvements made by him unasked.

BADGLEY, J. Although I concur with my colleagues, my judgment is upon a different ground. I look upon the question of good or bad faith on the part of the defendant as immaterial here, because in either case, I think the judgment should be confirmed. It is a petitory action under the Squatters' Act, Cap. 45 C. S. L. C. The substance of the evidence is to the following effect: that Ellice owned a number of lots in the township, which were entered in the books of the municipality as his land. The taxes were paid by the defendant for three or four years. The present action was brought in 1864. The defendant had squatted upon this land without obtaining permission from any one; he set to work, ditched, and erected buildings upon it for his own convenience, but in fact casting upon the owner all the expense. The result after his six years occupancy is shown by the $300 awarded to him. The question is whether squatters have the right to act thus, and then demand the value of their improvements. If so, the only way to prevent it would be to warn them off, otherwise, the pockets of the owners would be depleted without their consent. In this case, Ellice, the landlord, was well known throughout that part of the country. Every possible facility existed for ascertaining the name of the owner; and in fact the defendant knew both one and the other, because he alleges in his plea that he paid the road and school taxes upon the land, which he could not have done unless he knew the lot on which he paid. From all this evidence, it is clear to my mind, that the defendant was in bad faith. The plaintiff has urged that the bad faith of the defendant is a bar to his demand, and has referred to the 417th article of our Code as having finally settled the law upon this subject. The objection of bad faith is not one to be proved by the land owner; the *onus* would be cast upon the occupant to prove his good faith. The defendant has not proved good faith, his evidence is almost exclusively upon the value of the improvements, and that he paid the taxes, which he would do for his own advantage. I have no hesitation in stating my conviction that he was a squatter to whom the Squatters' Act applies, and that Act was passed for the very purpose of obtaining possession of lands squatted upon in this way; further, I am convinced that he was in bad faith. The 417th article of the Code contains no explanation or definition of the meaning of the terms good or bad faith; this must, therefore, be sought in the common law. Assuming that the defendant was in bad faith, does the 417th article apply? The 416th article provides that the land owner who has constructed buildings with materials which do not belong to him must pay their value, but the owner of the materials has no right to take them away. The 417th article provides that when improvements have been made by a possessor with his own materials, the right of the proprietor to such improvements depends on their nature, and the good or bad faith of such possessor. The second clause says, that if the improvements were necessary, the proprietor of the land cannot have them taken away; he must, in all cases, pay what they cost, even when they no longer exist; saving, in the case of bad faith, the compensation of rents, issues and profits. The provisions of this article apply only to constructive improvements, and not to any other class of improvements whereby the land has been increased in value. Improvements which cannot be removed must be valued, and paid for by the land owner. The *experts* in this case made their report with great care, and I think the judgment was right and should be confirmed.

CARON, J., after stating the facts, said he did not think the defendant was in such bad faith as to be subjected to the provisions of the last paragraph of the 417th article.

DUVAL, C. J. A great deal has been said about good and bad faith. It is a rule that he who talks about bad faith on the part of his adversary should show good faith himself. Now, the plaintiff has not shown bad faith, but he is answerable for the actions of his agent. The defendant occupied this land in broad day and paid the taxes upon it for several years. The plaintiff's agent allowed the land to be improved and increased in value, and when he brings it into the market, he will get the increased price for it. Under these circumstances, should it be said that, because the defendant is in bad faith, the plaintiff should be allowed to put this money in his pocket? What was the agent doing all this time? The Roman law says that even in the case of bad faith, those expenses which really increased the value of the land, must be re-imbursed. Is this not a principle of equity? Am I to put my hand in my neighbor's pocket because he is a dishonest man? The plaintiff himself was not on the spot, but he is liable for the acts of his agent. If he does not choose to attend to his own interests, he has only himself to blame if he suffers loss.

DRUMMOND, J. What led me to come to the decision I have arrived at, and to feel sure that I was not committing an act of injustice, was the fact that for four or five years, the defendant was allowed to pay taxes on this land. Now, no more convincing proof that he was there with the consent of the proprietor could be given. Whether the plaintiff was absent or not, he was bound to know what were his duties in the municipality. It is true that some taxes were paid by Ellice, but the defendant had been paying the taxes for several years, and the mere fact of the defendant having paid the taxes is full proof to my mind that he was there with the knowledge and consent of the proprietor. There are many persons who hold back, and let squatters pay the taxes till the value of the property has been doubled or trebled. At the same time I should be sorry if this case should be confounded with the other case in which the land is taken possession of without the knowledge or consent of the proprietor.

Judgment confirmed.

Sanborn and Brooks, for the Appellant.

H. C. Cabana, for the Respondent.

November 28th, 1867.

WIGGINS *v.* THE QUEEN INSURANCE COMPANY.

Insurance—Making Claim in due form.

One of the conditions in a policy of fire insurance required that the claim should be made in due form. The plaintiff having sued on the policy to recover for loss by an accidental fire, the jury, in answer to special questions, found that the plaintiff had made his claim without fraud or false representation, but not *in due form*:—

Held, that the words *but not in due form* could not be treated as surplusage, and that the defendants were consequently, by law, entitled to judgment in their favor.

BERTHELOT, J. The plaintiff sues for $1000, on a policy of insurance dated 21st June, 1866, for loss by an accidental fire in his house on the 29th of November, 1866, which destroyed effects to the value of $1272. The plaintiff states that he put in his claim, accompanied by a statement under oath, of the amount of his loss as soon as possible after the fire, and that he was prepared to prove the amount by documents and papers or otherwise, according as the Board of Directors of the Company might reasonably require; and that within three months subsequent to the fire, he claimed from the Company the sum of $1000, the amount of his insurance, and that he has observed all the conditions of the policy.

The defendants by their pleas have invoked the 12th condition of the policy by which the insured was bound, within fourteen days subsequent to the loss by fire, to present a detailed statement of his loss duly sworn, or supported by proof, in such manner as the Company or their agents might require, and that if there was any fraud in the plaintiff's claim, he would lose the benefit of his policy. The defendants conclude by averring that the plaintiff had failed to satisfy the requirements of the 12th clause within 14 days after his loss; and that there was fraud according to the 12th condition, the plaintiff having claimed for effects not totally destroyed, and that he was

guilty of fraud which precluded him from recovering on his policy.

The case was submitted to a jury on a suggestion of facts. The questions that require attention are the 8th, 9th and 10th, which are in the following terms:—

8th. Did plaintiff forthwith, and within the delay required by said policy, to wit, the 12th of December, 1866, at Montreal, give notice to defendants, and deliver an account, giving particulars of the loss, under oath, and offer all information to defendants, and make claim to the payment of the sum of $1000 of and from defendants?—Answer. We consider the claim made, *but not in due form.*

9th. Did the plaintiff, by his claim in writing, claim from the defendants the sum of $1000, and was and is there fraud in said claim?—Answer. He did make his claim, and we consider there was no fraud.

10th. Was there a false statement in said claim?—Answer. *We think not.*

These three answers may be summed up as follows: The plaintiff did not commit fraud nor produce a false statement, but did not make his claim in conformity to the requirements of the condition of his policy. By their answer to the 7th question, the jury, or rather nine of them, replied that the loss sustained by the plaintiff was $900. The difficulty of reconciling these answers arises from the fact of the verdict not being general. The question which is usually the last, namely, "Do you find for the plaintiff or the defendant," was not put to the jury in this case. Two motions have been made on the part of the plaintiff, one that the words in the 8th answer "but not in due form," be struck out, as useless, and having no bearing on the contestation, contrary to evidence, and illegal, and a second motion for judgment for $900 on the verdict. On the part of the defendants three motions have been made; 1st, for a new trial; 2nd, in arrest of judgment; 3rd, for judgment in their favor, because the answers of the jury do not sustain the allegations of the declaration, and do sustain the allegations of the defendant's plea.

It is clear that the plaintiff's first motion cannot be granted, the jury having a perfect right to restrict the first portion of their answer by adding the clause in question. A similar motion was rejected in the case of *Clark* v. *Fitts.* When the suggestions of facts have once been settled, and submitted to the jury, they must have full effect. If the judgment of the 26th June, 1867, which determined the suggestion of facts, was erroneous in leaving it to the jury to say whether the claim was made in due form, the plaintiff should have complained of that judgment. It was, perhaps, a mixed question of fact and law which might have been reserved by the Court; but this was not done, and the parties did not complain. As I remarked in the case of *Racine* v. *The Equitable Insurance Company,* to what end was this question submitted to the jury if their answer is to be disregarded by the Court? It is, perhaps, an inconvenience of the system of suggestions of facts, that in all cases the jury are not asked lastly in favor of whom they find. The plaintiff's first motion must therefore be rejected, and for the same, or nearly the same reasons, the first two motions of the defendants cannot be granted. It is impossible to pretend that the evidence was insufficient, or illegal: on the contrary, it was sufficiently voluminous and contradictory on both sides, to permit the jury to decide the pretensions of the parties in one way or the other; and in fact we see that one of them wished to give $1000, two of them $800,—whilst nine fixed the loss at $900. Nor is it a case in which a new trial can be granted, for independently of the oral evidence, we have in the record the report made by the two *experts,* named by the parties the day after the fire to ascertain the amount of the loss, so that the jury on the proof made could have no difficulty in deciding on the judgment they should render and the amount of that judgment. Besides the jury found that there was neither fraud nor falsehood in the statements presented by the plaintiff.

These two motions being also rejected, the Court comes to the consideration of the second motion of the plaintiff, and the third motion of the defendants. The plaintiff pretends that the motion of the defendants is presented too late, but this pretension is unfounded. The defendants, contending that from the answers of the jury to the suggestion of facts—it result-

ed that judgment should be given in their favor—were at liberty to present the motion in question on the 26th of September, the same day that the plaintiff presented his to the same effect. Both parties have in this respect the same delay and the same right.

It is necessary, therefore, to consider the effect of the answer of the jury to the 8th question, as it presents itself, and to see whether the condition contained in clause 12, should have its full effect, not having been observed by the plaintiff, inasmuch as his claim (though in the opinion of the jury neither false nor fraudulent) was, nevertheless not made "*in due form*," before the 14th day after the fire, or even afterwards.

The presentation of the claim within the delay and according to the form prescribed by the conditions of the policy, is a matter required both by English and French law, and if these forms and conditions are not strictly observed and fulfilled, within the prescribed time, the result is a forfeiture, and a prescription in favor of the insurers, and the insured cannot bring his action. I have to repeat here what I cited from *Quenault*, when I rendered judgment in the case of *Racine* v. *The Equitable Insurance Company*, (6 Jurist 89). In France the conditions of insurance policies, of the same nature as that which creates the difficulty in this case, are regarded as strictly binding on the insured. Quenault, Assurance Terrestre, No 252. "Si les assureurs ne satisfont point à la demande que l'assuré leur fait à l'amiable, il doit intenter contre eux l'action en paiement de l'assurance avant l'expiration du delai fixé pour la prescription de cette action." Further on, in his translation of the work of Marshall, chap. 5, p.377-384, he cites several judgments of the English Courts, which leave no doubt as to the necessity of the insured making proof of the production of his claim in due form before he can recover, even in the event of a *formal verdict* in his favor. It must be the same, and with a great deal more reason, in a case like this where the verdict is only special and qualified. It admits the claim and fixes the amount; but it expressly finds the fact that the insured did not make his claim in due form "according to the conditions of the policy," unless no meaning be attached to the answer to the 8th question, which is neither reasonable nor possible.—The Court cannot but give effect to this verdict, which, although as to the fact, and to a certain point is in favor of the plaintiff, is in law in favor of the defendants. I regret that it should be so, and that the plaintiff should fail on a point which may seem weak, after obtaining from the jury answers favorable to the real merits of the case, since the jury exonerates him from the reproach of fraud or false representation. But the mode in which I have viewed the case and framed my judgment, will have this advantage, that the case being reduced to a question of law, the plaintiff may have it reviewed at small cost without having recourse to a new trial. The second motion of the plaintiff is rejected, and the third motion of the defendants (for judgment) is granted.

Perkins & Ramsay, for the plaintiff.

Torrance & Morris, for the defendants.

SUPERIOR COURT.

November 28th.

DORWIN et al. v. THOMSON.

Promissory Note—Forgery of Endorsation—Proof.

Held, that the genuineness of the signature to or endorsement upon a promissory note ceases to be presumed the moment the defendant denies it in his plea supported by affidavit; and the plaintiff must make proof of the same.

Held, also, that in the circumstances the plaintiffs were guilty of negligence in accepting the note without sufficient caution.

Mondelet, J. This is an action for the recovery of $2500, being the amount of a promissory note dated 2nd March, 1866, signed by Daniel McNevin, to the order of Johnston Thomson, the defendant, payable at the Bank of Montreal. The defendant admits having signed as endorser a note which was then for $500, but adds that since he so endorsed it, it was made into a note for $2500, and pleads that this forged note is null and void. The defendant has supported his plea by a special affidavit embracing an absolute traverse and denial of the genuineness

of the note, which the defendant swears has been forged and altered as above mentioned in his plea, and has been so forged and altered since he endorsed it.

It is hardly necessary that I should premise by stating that in the investigation of this case, I have altogether, to use a familiar expression, thrown overboard whatever remained on my mind of the evidence and circumstances as they were proved before me in the Queen's Bench when the trial of McNevin took place in the Criminal Court, which I presided over. I am, as in duty bound, solely governed by the present case as it comes up.

The first question to be determined, and it is a very important one to the plaintiffs, is, whether in the face of defendant's plea, supported by his above mentioned affidavit, the genuineness of the note is still to be presumed, and as a consequence, whether the plaintiffs were or were not absolved from the obligation of proving their case, in all its bearings. Here is the section (86 of ch. 83, C.S.L.C.): "If in any such action (on a bill of exchange or promissory note, &c.,) any defendant denies his signature, or any other signature or writing to or upon such bill, note, *cedule*, check, promise, act or agreement, or the genuineness of such instrument or of any part thereof, or that the protest, notice and service thereof (if any be alleged by the plaintiff) were regularly made, whether such denial be made by pleading the general issue or other plea, such instrument and signatures shall nevertheless be presumed to be genuine, and such protest, notice and service to have been regularly made, unless with such plea there be filed an affidavit of such defendant, or of some person acting as his agent or clerk, and cognizant of the facts in such capacity, that such instrument or some material part thereof, is not genuine, or that his signature or some other to or upon such instrument is forged, or that such protest, notice and service were not regularly made, and in what the alleged irregularity consists." From the precise wording of the above recited section, it is evident that the genuineness of the note now in question ceased to be presumed the instant the defendant specially denied it in his affidavit. It is also evident that the plaintiffs had to prove that the note they sued upon is a genuine note, and not a forged one in part, as solemnly sworn to by the defendant. The defendant might have rested his case there. Our law is precise and imperative; there is no choice for plaintiffs, but to make out their case, the *onus probandi* being upon them, with respect to the genuineness of the note. Singularly enough, the plaintiffs have not considered their case in that light, and since they are advised to rest it upon what they have done, I presume, they either view the section of the statute to be in their favour, or that the defendant has made such admissions as to exonerate them from the obligation of proving their case. The Court is, therefore, called upon to adjudicate upon the case as it now presents itself for consideration.

In ordinary cases, when the signature is not denied, when the genuineness of a note or of any instrument is not gainsaid, the same are presumed to be genuine and true. It is also certain that in pleading to such an action as the present, the defendant might have made such admissions as would have taken the *onus probandi* off the plaintiffs. Principles governing such cases are as well known as they are obviously elementary. But to the application of such general principles, so sound, so reasonable in themselves, and so practically wise, our Provincial law has very wisely also, and most logically, appended an exception which is equally wise and logical; and by our own law and not by any other, and much less by decisions which are not under its provisions, is this case to be governed and decided. The Court must, therefore, in obedience to the law, declare that the plaintiffs have, in all respects, failed to prove their case, and that were there no evidence whatever adduced by the defendant, in support of his plea, supported by his affidavit, there would be no other alternative for the Court than to dismiss the plaintiff's action.

The features of this case, however, are

such, that the whole commercial public, the Banks, and individual members of the community are deeply interested in knowing what the Court is prepared to decide, and how such transactions as those disclosed by the evidence in he record, are to be viewed in a legal, as well as in a moral and social aspect.

It is clearly proved, not only by Dr. Girdwood, that the note in question has been tampered with, as will be shown, but by Daniel McNevin himself, and other evidence in the case, which has not and cannot be controverted, that this note has been altered and in part forged, since the defendant appended his signature as an indorser thereto. I should now properly observe that the very appearance of the note would naturally catch the eye of an observing, careful and prudent man, and although we have had statements made by most respectable and intelligent men to the contrary, I must be permitted to say, that it tells more for their confiding disposition, than for their discrimination. Cashiers of Banks, who have such enormous and diversified numbers of notes sent for discount, may either go over such arduous work hastily, liberally, if you choose to use such an expression, or they may be greatly influenced by the fact of the signature of such a person as the defendant being found on the back of a note, as endorser. This, however, does not alter the case, and surely any one who has no interest in the matter, cannot, in my opinion, so far be blind as not to see, even without the use of a miscroscope, that the word "twenty" was written at a different time from the words which immediately follow it, and at a period different and subsequent to the writing of the other words. It is plain to the eye that the word "twenty" is written on a higher level than the words "five hundred." As to the figure "2" at the head of the note, it appears to the eye to be written with a pen less full of ink than the figures "500" which folthe figure "2," and much lighter than the figures "500." The word "twenty" also appears to be written a little higher than the words which follow. I wish to be clearly understood as to what immediately precedes. The decision of this case does not, of course, rest upon what I have just above stated as to the appearance of the note. I have taken the trouble to make myself sure in that respect, and to justify my inference, that any careful, close-observing person may, at once, not precisely determine that the note has been tampered with, but suspect or suppose that such has been the case. This is not without its importance as to the application of what the plaintiffs have maintained to be the law with respect to negligence in such matters. Let us now probe the evidence and ascertain how the merits of this case stand. I start from this, that, as well by the evidence of Dr. Girdwood, who scientifically and with the assistance of a microscope, not only fully bears out what by the naked eye must be suspected, but actually reduces to the certainty of facts, such surmises,—as well, I say, by the evidence of Dr. Girdwood, as by other circumstances in this case, the note now before us has been interfered with, altered and forged, subsequently to the endorsation thereof by the defendant. This note was originally made for $500, by Daniel McNevin, it was endorsed as such by the defendant, and subsequently it was transformed into a note for $2500, by the insertion or addition of the word "Twenty," without the consent or knowledge of the defendant. It would not matter whether the forgery was or was not committed by Daniel McNevin, the maker of the note, since it turns out not to be the genuine note endorsed by the defendant, but a forgery. However, can any one doubt that it must have been so altered by Daniel McNevin? The note is signed by the latter, endorsed by the defendant, who is not proved, and is not presumed to have altered it, and who could not have effected such alteration, since it was taken away, kept and used by McNevin, who went to the plaintiffs whose endorsation appears on the back of the note, and who, of course, are not to be presumed to have altered and forged it, but who were guilty of gross negligence in readily and without suspicion,

taking and accepting of such a suspicious looking paper, especially as it was offered to them for discount by the maker of the note himself.

So far, it is made out that the note is not that which was originally endorsed by the defendant. The certainty of the alteration is more glaring when we come to the calm consideration of other circumstances, which are of a remarkable character. The maker of the note, Daniel McNevin, is examined, and what do we learn from him? We have it out of his own mouth, that all that was filled in in the note, at the time the defendant endorsed it, was what is therein written, as follows: the date, the words "five months," the letter "S," and the words "Johnston Thomson, Esquire," and nothing else; and that there never was pen or ink to the amount till after. There is an answer by McNevin to a question which has more significance than to a superficial observer would perhaps appear. He is asked: "When was the word twenty written in the body of the note?" He answers: "On the same day that the rest of the sum was filled in." He might have stopped and gone no further, though this answer is anything but satisfactory, since it may be true that he wrote the word "twenty" on the same day that the rest of the sum was filled in, and still it may be equally true that at a different hour of the same day, the word "twenty" may have been written, and thereby the forgery consummated. But, as if disturbed in his mind and troubled in his conscience, and possibly losing his balance, he verifies the adage, "*Mentitio est sibi iniquitas*;" he adds, "Sometimes it was on the same day; sometimes a week after." What does this indicate? It clearly shows what that man McNevin's mode of operation was. That is the key which leads us into the secret of his doings. What next? McNevin is shown a bill book produced in the case by his assignees, and he acknowledges that the entries have reference to the note presently sued upon. He adds that the notes do not precisely correspond, but that the entry refers to the same note. Now, let us see what the entry is in the bill book of which the blank sheets are cut out and marked B. It is as follows:

Date	Drawn	In favor of	
March 3	D. McNevin	Johnston Thomson.	
Time	When due	Dollars	Remarks.
5 months, 1866	3-6 August	500	Dorwin

The same thing appears also on the sheet marked C, which McNevin identifies, and adds that the notes therein mentioned, (and the note in this case is one of them) are filled up for larger amounts than what appears on the said paper or sheet C. It is also acknowledged by McNevin that the figures "2,500," and the name "Dorwin," filled in on paper D, also identified by McNevin, are in his own handwriting. This last acknowledgment has reference to several entries in paper D, and amongst these, one concerning the note in this case, which is one of several notes acknowledged by McNevin himself in writing to have been by himself altered, after receiving the defendant's endorsation to the original amounts. An objection was made by the plaintiffs to the filing of this paper, which objection is unfounded. This paper is not the ground work of the defence, but is a piece of evidence proved by McNevin himself, which must assist us in coming to a right conclusion.

It is right I should give the plaintiffs the benefit they, at the hearing of the case, appeared to expect to derive from an explanation given by McNevin of a statement he made in his deposition, that the "defendant, when he endorsed his name on the said note, took a note of the amount thereof;" and what explanation does McNevin offer? The saying of Horace, "*In culpam ducit culpae fuga, et caret arte,*" is quite in point. "I mean," says he, "that he [Thomson] took note of the amount that I verbally stated to him." What? Thomson took a note of the amount! And in the same deposition you tell us that the amount was filled up subsequently to the endorsation, and that "sometimes on the same day, and sometimes a week after," which must refer to others, and, no doubt, the notes enumerated in paper D, which you acknowledge to have altered as to the amount after you

had obtained Thomson's endorsation, and you would fain make us believe that the defendant, who is proved to be a cautious and intelligent man of business, would have followed a course which no man of sense would pursue even with respect to a single note? Why, the attempt is so flimsy, so absurd, that it requires only to be mentioned to be at once disregarded.

An ingenious, perhaps, but unavailing effort was resorted to, for the purpose of breaking down the conclusive evidence of Dr. Girdwood. That, again, defeated itself, inasmuch as Dr. Girdwood, without even the assistance of the microscope, and having but his own eye to enable him to examine and probe the writings submitted to him as a test, was mistaken solely as to one particular, and turned out to be right in every other respect. The process, to be on an equal footing, should have had as its medium, the same microscope which was used with respect to the note in question in this case. However, the fact that the unassisted eye of Dr. Girdwood led him to a correct conclusion in every particular but one, even according to the witness Clarke, who, by-the-by, is not a scientific man, tells highly in favor of the correctness of Dr. Girdwood when he states, as the result of his scientific probation, what by the naked eye any one may, with perfect safety, testify to. This is so plain, so glaring, that I think it useless to dwell any further upon it. I would merely remark that upon the whole, the evidence of the witness, Clarke, who, as already mentioned, is not a scientific man, and who has made no pretentions to science, is anything but satisfactory. At all events, it would be altogether out of place, to compare the evidence of Clarke to that of Dr. Girdwood.

Another line of warfare against the defendant has been resorted to, for the purpose of showing him up, either as wanting in memory, or in truth and honesty, when he stated he never endorsed for McNevin, for any amount exceeding a certain amount. Mr. Auldjo was brought up as a witness. His evidence amounts to this and no more: That he showed Thomson, who was ill, a note by him endorsed, purporting to be for $2,475, and one for $2,500, made by McNevin. Defendant looked at them, turned them over and refused to discount them. That is all. Auldjo was sent to ascertain merely if defendant's signature on the back of the note was genuine, and the way he went about it was to ask Thomson if he would discount them. Any inference drawn by Auldjo from Thomson having looked at the notes and refused to discount them, is altogether gratuitous, and is of no weight whatever. As to inferences, surmises, or suppositions, one not altogether unreasonable, judging from what we have already in evidence, is that these notes so shown to Thomson by Auldjo were not improbably also forged notes, and some of those which McNevin has acknowledged to to have altered, and that Thomson considered it prudent to be silent about that at the time.

It does not seem to me that I should advert to the mortgage any more than to state that it shows very clearly what the relative position of the parties was: $8,000 was the agreed maximum of defendant's assistance by indorsation, which amount was by the fraudulent acts of McNevin swelled to $40,000.

Much was said about the pretended negligence of the defendant in leaving a blank space before the words "five hundred," that it was an occasion and a temptation to people to alter the amount. To what end is this urged? Is it to palliate the enormous crime of forgery? Is it because an object is left lying any where, that the thief is excusable, and less a thief? Is it because an honest, obliging man, kindly assisting a supposed honest friend, by endorsing largely for him, leaves a blank space before the amount specified in the note, that this dishonest friend is to be the object of the commiseration and sympathy of others who either have loose principles, or who are to lose something from carelessness in discounting such notes? I cannot for a moment suppose, much less suspect, that there is amongst the highly respectable body of our merchants, in Montreal, a dis-

position to act upon such principles, not only opposed to all notions of right and decency, but highly dangerous to the interests of every man of business, and to those of the community at large. *Honesty is the best policy*, in theory nothing truer; practically no truth more glaring. This brings us at once to what has been presented as a question of law, the negligence of the defendant who, it has been pretended, should suffer. Thomson has acted like many others, as is proved in this case, who leave such vacant spaces before the amount specified in notes or checks, and are not the less men of business, and are not noted as negligent, careless men. If there has been negligence in this matter, it is brought home to the plaintiffs, who, from the appearance of the note presented to them, not by the endorser but by the maker himself, (thereby showing it was an accommodation note) should have looked into it, and inquired, instead of discounting it so readily, tempted, it is to be presumed, by the consideration they obtained therefor, from a man on the verge of bankruptcy, and fast drifting to his utter ruin.

The law is plain on this point, and the doctrine of Scacchia is, as is very judiciously remarked by Pothier, to be restricted to the case of the fault lying with the *tireur de la lettre de change*, but such a fault as that the falsification might deceive *une personne attentive et intelligente*. It is, moreover, to be borne in mind, 1st, that either from not having sufficiently reflected upon Scacchia's extreme propositions and equally extreme and forced deductions, most of those who have written after him, have crudely copied him. 2nd, Pothier, as we all know, was a great casuist, an admirable moralist, and essentially an honest man. We are all aware that many of his decisions apply more to the moral than to the strictly legal obligations. If, then, Pothier himself restricts the decision of *Scacchia*, to such falsification as was effected through the fault of the *tireur*, and that we apply the same principle, or rather, the same reason, to the endorser, how can we in justice, refrain from applying it against the Banker or Broker, or whoever he is or may be, from whom the discount is obtained, of a promissory note which bears the very plain and striking appearance of alteration? The plaintiffs have no excuse; it is their own fault, their own negligence, or their anxiety to derive a considerable discount or commission, which has blindfolded them. Is it for a moment to be seriously maintained that they must be preferred to, and more indulgently treated than a kind-hearted friend to an ungrateful and heartless forger, in whom he had placed such confidence as to endorse to the amount of $10,000 or $11,000, and every principle of justice and morality to be set aside, in order to victimize an honest man, and enrich imprudent lenders of money to such a man as the maker of the note in question, who has acknowledged himself to be a forger, and who so clumsily did alter the note, that any one but the money making (by loaning) plaintiffs should either have at once detected the alteration, or suspecting it, should have declined having any thing to do with McNevin and the note. There should have been hesitation on the part of the plaintiffs. The Court can entertain no doubt in this case, and could there be any doubt, the Court would follow the judicious rule laid down by Pardessus, *les tribunaux ne peuvent décider que par les circonstances.* This rule applied to the present case is decisive. Upon the whole, I am clearly of opinion that not only have the plaintiffs failed to prove their case, but that the defendant has made out his own case, and proved the forgery, and that plaintiffs' action should be dismissed.

Mackay, Q.C., & Austin, for the plaintiffs.

Bethune, Q.C., for the defendant.

[Wood v. Thomson.—The same decision applied to this case, in which a note for $500 had been altered to $2,500.

Ogilvy v. Thomson.—The same decision applied here also, in which the note had been changed from $447 to $3,447.]

PRIVY COUNCIL.

SCOTT v. PAQUET ET AL.

The decision of the tribunal of last resort in this celebrated case, pending for so many years, will be read with deep interest. The judges present at the re-argument on the 28th and 29th of June, and at the rendering of judgment, were Sir John Taylor Coleridge, Sir James William Colvile, Sir Edward Vaughan Williams, Sir Fitz-Roy Kelly, (the Lord Chief Baron,) and Sir Richard Torin Kindersley.

The Counsel for the plaintiff in Montreal were Cross & Bancroft, and for the defendants, Cartier & Berthelot.

Construction of Ordonnance 1639, *Art.* 6—*Marriage in extremis.*

Art. 6. of the *Ordonnance* of Louis XIII. (26th Nov. 1639,) in force in Lower Canada, is in these terms:—"Voulons que la même peine (de la privation des successions) ait lieu contre les enfants qui sont nés de femmes que les pères ont entretenues, et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie:" Held, first, that as the above article of the *Ordonnance* was a restrict of natural liberty, and penal in its nature, it was to be strictly interpreted, and only when the fact of a party being *in extremis* at the time of the solemnization of the marriage was clear and beyond doubt, could it be applied. Second, that although death had taken place two days after a marriage had been celebrated, such Article of the *Ordonnance* did not affect the validity of the marriage, unless the party was at the time sensible that he was in his last illness, and in immediate danger of dying.

Suit for nullity of marriage, and to set aside a marriage contract, on the ground that at the time of its celebration the husband was delirious and of unsound mind, arising from an attack of *delirium tremens*, from which disorder he died two days afterwards. The evidence in chief of one of his medical attendants being to the effect that he was unconscious, and, in his opinion, from the nature of the disease, incapable at any time of contracting such marriage:—

Held, on a general review of the evidence, to be rebutted especially by the conduct of the same medical witness in speaking of the probability of deceased's recovery; and by the evidence of the Priest, Notary, and witnesses at the marriage, of his capacity; and the judgments of the Courts in Lower Canada sustained.

This was an action brought by the appellant in the Superior Court, District of Montreal, against the Respondents, Paquet and others, the widow and children of William Henry Scott, late of the Village of St. Eustache, county of Two Mountains, merchant, deceased, to have the marriage of Scott with the respondent, Paquet, declared null and void, as regarded its civil effects, and also to set aside the marriage contract executed on the occasion thereof. The appellant claimed as his sister and heiress-at-law. The Superior Court, by its judgment, sustained the marriage and contract, and that judgment was confirmed on appeal by the Court of Queen's Bench in Lower Canada. Hence the present appeal.

The facts were these:—Scott, a member of the Presbyterian Church, had for many years cohabited with the respondent, Madame Paquet, a Roman Catholic, by whom he had a family of five children, whom he recognized and treated as his own children. In 1845 a marriage was contemplated and intended between Scott and Madame Paquet, which was to be celebrated according to the rites of the Roman Catholic Church, and all necessary preparations were made for that purpose, but the completion was prevented by Scott's refusal to give a preliminary engagement, required by the Priest before celebration, that he would cause his children to be educated in the Roman Catholic religion.

On the 15th of December, 1851, Scott went to the house of Madame Paquet, who resided in the village of St. Eustache, just opposite to his own, and there sent for a Roman Catholic Priest, for the purpose of proceeding to a marriage; and finding that no other engagement was now demanded of him than that he would leave his wife and children free in point of religion, he caused a marriage to be celebrated between himself and Madame Paquet on the evening of the following day, the 16th, according to the rites of the Roman Catholic Church. By the act of marriage, the consorts acknowledged as legitimate their five children. The marriage was accompanied by a contract or settlement prepared

by a notary. Scott was of intemperate habits, and had indulged in drinking during the course of a contested election which took place three days previous to his marriage. He was unwell at the time, and his physician, Dr. Jamieson, was with him during the greater part of the day of his marriage. His illness increased, and according to the medical testimony, although the nature of his disorder had not been originally understood, yet it ultimately declared itself to be *delirium tremens.* As late as the 17th of December, Dr. Jamieson considered that the disease, though of an aggravated character, would give way to the treatment which he and Dr. Fisher, another physician, recommended. But the prescribed treatment was not followed, and Scott sank and expired on the 18th of that month.

From the death of Scott to the period of the institution of the action, his children publicly enjoyed the character of being his legitimate heirs, and were judicially admitted to accept his succession with benefit of inventory. The respondent, Paquet, had also, since Scott's death, been in possession of the immoveable property which he by the marriage contract settled on her in case of her surviving him, and which contract was, in April, 1852, duly registered.

On the 4th of March, 1854, the appellant brought an action against the respondent, Paquet, and the five children of Scott, in the Superior Court for Lower Canada, District of Montreal. The declaration stated that Scott had died intestate, leaving three sisters, his only surviving relations and heirs-at-law, two of whom had renounced his estate, the appellant accepting it as sole heiress-at-law; that in December, 1851, he fell ill of the malady that caused his death; that his disease became so aggravated that, on the 15th of December, he was delirious, and so continued up to his death; and that, while in that state, he was quite incapable of entering into any contract or granting any valid consent; that he had lived many years in a state of concubinage with the respondent, Paquet, without marrying her or acknowledging her as his wife; that while in a state of delirium, and incapable of consent, she, profiting by his condition, on the 16th of December, 1851, procured a pretended marriage to be solemnized between her and Scott, and, on the same day, procured a pretended marriage contract to be executed; that by the register of the marriage it was endeavored to recognize as legitimate the children of the illicit connection and the provisions of the contract; that Scott was at the time of the marriage in a state of delirium, and *in extremis*, and afflicted with the malady whereof he died, and the pretended marriage was clandestine, celebrated without the knowledge or consent of Scott's relations, and was neither publicly solemnized, nor accompanied by the necessary formalities, nor followed by consent on his part, and that the respondent, Paquet, and the other respondents, had assumed to be the heirs of Scott, and had taken his estate into their possession, and the declaration prayed that the pretended marriage and contract of marriage might be declared null and void.

The respondents filed their pleas, consisting of two sets of exceptions *peremptoires* and a *defense en fait.* The first set of exceptions referred to the capacity of the appellant to maintain her action, and was, in substance, to the following effect: That the appellant being only a collateral relation, could not maintain such an action; that ever since the death of Scott, the respondents had assumed the character of his representatives, and that their right to that character had been publicly recognized, and had been acquiesced in by the appellant; that the appellant had recognized their right to such character by transferring to Barbara and Jane Scott her rights as one of the legatees of Scott's father, in a sum of money due on a judgment obtained by Scott's father, on the 24th April, 1824, against Scott and another, and that the appellant could not maintain her action without joining her sisters as co-plaintiffs. The second set of exceptions referred to the merits of the case, and was to the following effect: That for many years Scott and the respondent, Paquet, lived toge-

ther as husband and wife, under promises frequently reiterated by Scott, that he would marry her; that the appellant and her sisters were aware of this, and recognized the position of the respondent, Paquet, and her children: that about twelve years previously Scott had intended to fulfil his promise of marriage, and had assembled his friends and the priest for that purpose, but was prevented from so doing by understanding that the priest required him to make oath that he would allow his children to be brought up as Roman Catholics; that it was with the view of carrying this intention into effect that he contracted the marriage complained of; that such marriage was contracted legitimately and lawfully in the presence of a Roman Catholic Priest, duly authorized to celebrate such marriage; and that Scott was at the time sound in mind. The *defense en fait* put in issue all the statements contained in the appellant's declaration.

Witnesses were examined on behalf of the appellant and respondents. The appellant objected to the reception of the evidence of the respondent's witnesses, so far as it went to prove that a marriage had been celebrated, on the ground that verbal evidence of a marriage was inadmissible by law, and such objections were reserved, but the evidence was afterwards admitted. The evidence as to the capacity of Scott was conflicting. On the part of the appellant, Scott's medical attendants, Dr. Jamieson and Dr. Fisher, declared as their opinion, that in the case of a person suffering from *delirium tremens* there could be no lucid interval during which he could have the use of his faculties, or be fit to contract any kind of business, that Scott was in a state of *delirium tremens* just before and immediately after the alleged ceremony, and that it was a scientific fact that this disease never leaves the patient until it leaves him finally; that there may be times at which it is more intense than at others, but that the patient is never perfectly sane. The evidence for the respondent consisted of the depositions of the Notary, Priest, and others who were present at the marriage ceremony, and they deposed to the perfect sanity of Scott, at that time. It was proved that Dr. Jamieson had said, when attending the deceased, that he considered that the disease would give way to the treatment he and Dr. Fisher recommended. No medical evidence was produced by the respondents in answer to evidence given by Drs. Jamieson and Fisher.

The cause came on to be heard, and by the judgment of the Superior Court, delivered on the 30th May, 1856, the action was dismissed with costs, on the ground that the appellant had failed to establish the material allegations of her declaration. The appellant appealed from this judgment to the Court of Queen's Bench for Lower Canada. The appeal was heard before Aylwin, Duval, Caron, and Meredith, JJ., and on the 5th October, 1857, the Court delivered judgment, dismissing the appeal with costs. Duval and Caron, JJ., considered that all the questions raised by the pleadings ought to be decided in favor of the respondents, and Meredith, J., agreed with them so far as related to the questions put in issue by the declaration. Aylwin, J., dissented from the opinion of the rest of the Court, and considered that all the questions raised on the pleadings ought to have been decided in favor of the appellant. The present appeal was brought from this judgment of affirmance. It was twice argued.*

Mr. *Garth*, Q. C., for the appellant:—Three questions arise:—First, we insist that the marriage has never been celebrated with the forms and ceremonies required by the ancient law of France, in force in Lower

* This appeal was first argued in June, 1861, but their Lordships not being satisfied, directed the case to be re-argued. It was stated at the Bar that the re-argument was delayed by the poverty of the parties not enabling them to bring it on for hearing. On the case coming on, application was made by the Counsel for the appellant for the admission of fresh evidence said to have been obtained since the former hearing, relative to the mental capacity of Scott. A petition shortly after the first hearing had been lodged in the Council office for that object. The Respondent's Counsel objected to the affidavit in support of the application being read, or the reception of new evidence after the long delay, and their Lordships were of opinion that in the circumstances such an application could not be entertained.

Canada, so as to constitute a valid marriage. [The Lord Chief Baron. If there was a marriage *de facto*, it lies on you to show it was invalid in law.] To be valid it ought to have been performed by the Parish Priest: *Dagusseau, Tom.* v. pp. 150—153; *Pothier*, verbo "*Mariage*," Partie 1. Ch. i. No. 3; *Pothier, du Contrat de Mariage*, Partie IV. Ch. 1. sec. 3, Art. 1, par. 5, No. 350 [Ed. 1781]; *Danty*, p. 102; *Durand de Maillanne*, Dict. Can. *voce* "Clandestin," *Tom.* 1. p. 523 [Ed. *Lyons*, 1770]; De Hericourt, *Loix, Eccles.* Ch. v. Art. 1, No. 27, p. 474. [The Respondent's Counsel objected to this point being now raised, as in the declaration the appellant had admitted the marriage, and only sought to avoid it as being celebrated when Scott was *in extremis* and unconscious, and submitted that it was not for the respondents, to give formal proof of the *factum* of such marriage; but that if it were necessary, the proofs were sufficient according to the Provincial Statute, 35 Geo. 3, c. 4, sec. 4, which only requires the presence of two witnesses.] This point was not further argued. Second, the evidence of the medical attendants of Scott shows that at the time the marriage took place between Scott and the respondent, Paquet, which was only two days before his death, Scott was *à l'extremité de la vie*, so as to render such marriage null and void by the *Ordonnance* of Louis XIII. of 1639, Art. 6, and the Edict of the year 1697; depriving of civil effect marriages *in extremis; Pothier, Tom.* v. p. 238, *Partie* 5, Ch. II, p. 429; *Ib.* 239; *Merlin's Rep. de Jur, verbo* "*Mariage*," Tom. XIX. Sect. 9, Art. 3; *Ib. Tom.* VIII. Sec. 19, par. 1, No. 3, p. 47; [Quarto Ed.] Third, the evidence establishes the fact, that at the time of the pretended marriage Scott was delirious and unconscious from an attack of *delirium tremens*, and then incapable of entering into any valid contract.

The Counsel for the respondents were not called upon.

July 10th.

The Lord Chief Baron: This is an appeal from a judgment by the Court of Queen's Bench for Lower Canada, affirming a decision of the Superior Court of that Province, in an action brought by the appellant against the respondents, and in which the question to be determined was, whether a marriage between William Henry Scott, deceased, and the respondent, Marie Marguerite Maurice Paquet, on the 16th of December, 1851, was valid or void. Several questions were raised (but disposed of during the argument) upon the alleged non-compliance with the formalities essential to the validity of a marriage by the law of France, which prevails in Lower Canada. The objections to the marriage upon these grounds (which appeared when duly considered to be unsupported by the authorities) were abandoned by the Counsel for the appellant. Two questions alone remain: The first, whether this marriage was contracted while Mr. Scott was "*à l'extrémité de la vie*," within the meaning of the 6th article of the *Ordonnance* of 1639; the second is whether, at the time when the marriage was so contracted, Mr. Scott was of sound mind and in possession of his faculties. Both these questions have been decided in favour of the respondents, unanimously by the three Judges of the Superior Court, and by three Judges out of four of the Court of Queen's Bench in Lower Canada. And we think that this Court ought not, unless there be manifest error in the judgments under appeal, to over-rule these decisions so pronounced in the Country in which the law of France, by which the first question must be determined, prevails and must be known and continually acted upon by the Courts of Law; and in which, also, the witnesses on both sides reside, and may have been more or less known to, or seen, when under examination, by the judges, or some of them, who likewise are familiar with the usages and customs of the place in which all the circumstances which formed the subject of the evidence occurred. The language of the *Ordonnance* is this: "*Voulons que la même peine (de la privation des successions) ait lieu contre les enfans qui sont nés des femmes que les pères ont entretenues, et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie.*" Pothier, (No. 430) says: "*Il faut que ceux qui attaquent ces mariages prouvent deux*

choses:—1. *Le mauvais commerce qui a précédé le mariage.* 2. *Que la personne était in extremis lorsque le mariage a été contracté. Le mariage est censé contracté in extremis lorsque la personne était au lit, malade d'une maladie qui avait un trait prochain à la mort, quoiqu'elle ne soit morte que quelques mois après.*" Several cases appear to have been decided upon this *Ordonnance*, the effect of which is well expressed in Merlin's "*Répertoire,*" *verbo* "*Mariage,*" sect. 19, par. 1, No. 3, p. 47, vol. VIII. in quarto:—"*Le véritable, l'unique cas d'appliquer l'Ordonnance est lorsqu'un homme se marie dans un temps où il se sent frappé de mort, ou la violence du mal et l'impuissance des remèdes lui fait sentir que la vie est prête à lui échapper.*" It seems from this commentary upon the law, that the patient must himself feel that he is dying, or that the violence of the disease, and the inefficacy of all remedies, impress him with the belief that life is about to depart. There is nothing in the evidence to show that Mr. Scott thought he was a dying man. Neither Dr. Jamieson nor Mademoiselle Paquet thought so—at least, until after the day of the marriage. Dr. Jamieson himself says:—"From the beginning of his disease, I expected that he would recover from his disease." "On the first, second, and third day, I did not look upon the disease as a decidedly mortal one."—"I never conveyed to Scott the idea that he was or might be in danger." And in another part of his deposition he says: "On the morning of the 17th, the defendant, Miss Paquet, inquired of me as to the state of the late Mr. Scott. I informed her that he was in a dangerous condition, and she appeared surprised that the disease was at all connected with danger." Besides, this law is in restraint of natural liberty, and it must, therefore, be clear, beyond doubt, that it is applicable to the particular case, before a Court of Justice can hold it to be of force and effect to avoid a marriage.

The great question in the case, however, is, whether Mr. Scott was in a state of mind, memory, and understanding, to enable him lawfully to contract marriage. On the one hand, we have the evidence of Dr. Jamieson who visited him first on the afternoon of the 15th of December, and found him suffering under erysipelatous inflammation in the face, arising, as it appears, from his having come in contact with a heated stove while dozing or sleeping in a chair. Strong aperients were administered, and at a late period of the afternoon, the Doctor concluded that *delirium tremens* was approaching. At this time he quitted the house in which he resided with his sister, and proceeded to the house of the respondent, Paquet, showing signs of great excitement and irritability, with delusions, as he went along. At a later hour he was again visited by the Doctor, who remained with him during the greater part of the night; saw him again the next morning, and left him about two in the afternoon, when, as he says, he was labouring under *delirium tremens*, developing itself by mental hallucinations. He then again left him in the house of the respondent for some hours, and returned in the evening; and from this time until the morning of the 18th, it is asserted he was wholly incapacitated by this disease from doing any act whatever requiring the exercise of his faculties; and in the night of that day, the 18th, he died. If Dr. Jamieson be correct as to the existence of *delirium tremens*, and the consequent incapacity of Mr. Scott, although he does not expressly declare that it was impossible he should have been competent to exercise his faculties in a rational manner, either on the afternoon of the 15th, or during an hour or more on the 16th, it is certainly to be inferred from the whole of his evidence, taken together, that no such intervals of capacity could have existed, and that it was only during the time necessary to answer one or two questions, or some other very short period of tranquility, that he can be said to have been capable of exercising his reason and understanding.

On the other hand, we have the testimony of at least three witnesses of unimpeached character, and having no interest whatever in the perpetration of a fraud, or in the misrepresentation or suppression

of the truth, who depose to a series of acts done by the deceased, which, if truly narrated and described, prove incontestably that Mr. Scott was, during the space of an hour and more, within which the marriage was solemnized, and the marriage contract prepared under his instructions and executed by himself, in a perfect state of capacity, memory and intelligence. We may pass by the communication between Ancey, the Roman Catholic Priest, and Mr. Scott, on the afternoon of the 15th, merely observing that the deceased, upon this occasion, expressed himself rationally while informing the Priest of his having had an altercation with his sister, that he was desirous that he should marry him to Mademoiselle Paquet, that he had sent to him for that purpose, and when told that a dispensation was necessary, he desired that a bishop should be written to immediately in order that it might be obtained. The following day, the 16th, upon the arrival of the dispensation, the Priest proceeded again to the house of Mr. Scott, and found him, as he positively and distinctly swears, in perfect possession of his understanding; and here begins a series of acts on the part of the deceased, which, if really done, prove to demonstration a state of perfect mental competency and capacity. He received the priest's explanation of the oath or engagement required, that his wife should be left to the free exercise of her religion, and that the children might be brought up in the Roman Catholic faith; he observed that at a former period, (and in this statement he is confirmed by Père Martin, the Priest), he was about to marry Mademoiselle Paquet, but objected to this engagement on the ground that he was required to pledge himself that the children should be so brought up, and not merely that he would permit them to use their own free will as to their religion; he gave the necessary information as to the names of his relatives, and the ages of his children, in order that the usual registration should be made; he took the pen in his hand and wrote the name of one of his parents, because the priest was unable to spell it; he sent for a notary and his clerk; he gave instructions for the marriage contract, informing the notary that his wife was to be required to give up the *communauté de biens*, and that in consideration of this renunciation he conferred upon her and her heirs all his immoveable or real estate, which he described as situate in the several parishes of St. Eustache, and St. Martin; he also gave to his wife, but in trust only, in equal thirds for two of his sisters, Anne Scott and Jane Scott, and his daughter by Paquet, Caroline Scott, a large sum of compensation money to which he was entitled by reason of losses sustained in the rebellion of 1837; and, besides disposing of the remainder of his property under this marriage contract, it is sworn upon the evidence of Archambault, the notary, that upon a suggestion that he should dispose of his property by will, he himself declared that he had determined to do so by a marriage contract; and the contract was drawn up and executed accordingly. All this, together with the celebration of the marriage itself, is confirmed by the independent testimony of Mr. Feré, a friend of the deceased, residing at St. Eustache. It is impossible, unless these witnesses are guilty of deliberate perjury, that the deceased was at this time otherwise than in perfect possession of his mind, memory, and understanding, and of perfect capacity to contract a lawful marriage. It is true that, during this proceeding, upon a noise being heard from the agitation of the shutters by the wind, he is proved to have cried out, "They are coming! they are coming!" If this were, as suggested by the respondents, an expression uttered under an idea that the intelligence of the result of his election had arrived, it requires no comment. But if it were, as insisted by the plaintiff, the manifestation of a delusion created by *delirium tremens*, it appears to have been dispelled, and to have ceased upon his being convinced, a few moments afterwards, that the noise was occasioned by the wind.

We think, therefore, on the whole, that whatever degree of suspicion may naturally arise from the very cogent and circum-

stantial evidence of Dr. Jamieson, coupled with the testimony of the witnesses who spoke to the wildness and excitement of his demeanour during certain portions of the three days in question, that all this together is insufficient to outweigh the positive and distinct evidence of so many witnesses to the whole scene of the solemnization of the marriage, and the preparation and execution of the marriage contract, or to warrant us in setting aside the united decisions of the Superior Court and the Court of Queen's Bench in Lower Canada, by which the judgment in favcr of the respondents, and now under appeal, has been pronounced. Their Lordships will, therefore humbly report to Her Majesty as their opinion that the judgments of the Court of Queen's Bench of Lower Canada and of the Superior Court ought to be affirmed, and this appeal dismissed; but under all the circumstances of the case, without costs of this appeal on either side. Law Rep. 1 P. C. 552.

MONTHLY NOTES.

SUPERIOR COURT.

Oct. 5.

LEPROHON v. McDONALD, *et al.*

Action for Compensation—Title.

MONK, J. This was a case of rather an extraordinary nature. It appeared that Mr. Leprohon, the father, owned a bridge. He died leaving five heirs, and one of these heirs, the present plaintiff, on the 4th November, 1864, sold one-fifth part of this bridge to the defendant. The consideration was $1000 and certain lands. On the 22nd of December, the parties entered into a written agreement, and in this the price was stated to be $2000, without any mention of lands. But the plaintiff immediately proceeded to say in his declaration that this was not the true consideration at all; that the real consideration was $1000 and lands which were worth $1200. Then he proceeded to say that McDonald was unable to convey these lands, because on the 12th October, 1864, previously, he had sold them to Col. Ermatinger. This was a fictitious sale for the purpose of qualifying Ermatinger to defend the frontier as a Police Magistrate.—The latter gave a *contre lettre* explaining it all. There was a sale from McDonald to Ermatinger, and from him to the plaintiff. But the latter now said that neither McDonald nor Ermatinger could give him a valid deed to the lands, as they belonged to the Land Company, and he now brought his action against McDonald and Ermatinger, claiming the value of the lands. In the first place His Honour had to determine what was the real consideration. He thought it was fair to say that it was probably $1000 and the land. The defendants pretended that it was $900 and the land; that the land was worth only $100, and that even if the plaintiff was entitled to be compensated to the amount of this $100, they held a note against him for $180. The next consideration was, could the Court determine upon the validity of the Land Company's title? Could it declare to the parties, you can never give a title, because it belongs to the Land Company? The Court could not do that. There was another difficulty; the plaintiff did not say that the deeds held by McDonald and Ermatinger were null and void, nor did he pray that they should be set aside. Therefore upon the one hand, His Honour could not adjudicate upon the validity of the Land Company's title, and on the other hand could not annul these deeds, but must leave them in force. It might be that the title of the Land Company was worthless; His Honour had some doubts of it. The Court therefore was in an embarrassing position. But, further, coming to the real consideration for the sale; supposing it was $1000 and the lands: What were these lands worth? Some of the witnesses said they would not take them as a present, and even if the Court could award compensation there was no real value proved. Of the $1000 notes for $900 had been paid; against the balance, tho defendants had a note for $180, which was due before the plea was put in.—The Court upon the whole must dismiss the action, the plaintiff having titles which the Court could not annul.

Day & Day, for the Plaintiff.

J. J. C. Abbott, Q. C., for the Defendants.

BEAUDRY v. TATE, *et al.*

Contract—Putting en demeure—Diligence.

MONK, J. It appeared that the steamer *Iron Duke* had run aground a little below Longueuil in 1865. On the 11th August the plaintiff entered into an agreement with the defendants to have this boat launched or taken off the rocks. The contract was that the vessel should be removed within fifteen days from that date, the defendants to be allowed $500. This would bring the period for fulfilling the contract to the 27th. The defendants went to work in pursuance of this contract. Some of the witnesses said there were sufficient labourers at work, and some said there were not. Some of the witnesses stated that the boat was stuck in such a way on the rocks that it was impossible to get her off. Whether that was the case or not, the fact was that they did not get her off; and on the 28th the boat took fire, and was burned to the water's edge. It did not appear that after this they exercised any great diligence to get her off. The boat remained there till the month of December, when she was carried off by the ice, floated down, and sustained great damage. Mr. Beaudry now brought his action for the damage done. The only questions for the Court were, first, did the defendants do diligence? They contended that they had not been put *en demeure*. Mr. Beaudry had never protested them. Mr. Beaudry was there frequently, and if they were not doing what they should have been doing, they say he should have protested them. Now, this putting *en demeure* was generally necessary, but in this case there was a precise limit of time fixed, and this just happened to be one of those contracts where time was of the essence of the contract, and in all such contracts putting *en demeure* was not necessary. Again, it was contended on the part of the defendants, that Mr. Beaudry, being present while the work was going on, acquiesced in the manner in which it was proceeding. But it was not his business to interfere. It was not to be supposed that Mr. Beaudry could judge what was necessary. Then, the Court came to the question, whether in point of fact, the defendants did do diligence. It was pretty well established by the evidence which they had adduced, that they had three, five, ten men on the spot, and sometimes more. They found that they had made a hard bargain; but if the job was one of such difficulty, they ought to have employed more men. Powell, one of the witnesses, stated that they had all the men they could usefully employ; but the evidence of Lesperance was to the effect that thirty men at least should have been employed; that thirty men would hardly have been sufficient, and that there was no diligence done at all. The witnesses for the plaintiff concurred in saying that the number was altogether inadequate, and it might be easily understood that three or four men were not enough to raise a vessel. His Honour therefore came to the conclusion that the defendants did not do diligence, and that they did not employ sufficient force. The Court came now to another important point in the case, which was of real difficulty. His Honour did not know how far, as a matter of law, the parties employed to launch the boat would be considered to be in possession of her, but he did not think that for all purposes whatever they could be considered in possession of her, especially as Mr. Beaudry had a man in charge of the boat—a man who was described as an idle, drunken loafer, cooking his victuals there. It might be said that the plaintiff had possession of the boat through this man, and the boat having been burned while in his possession, the defendants were not responsible, the accident having rendered it impossible for them to fulfil the contract. On the other hand, if the defendants had launched the boat on the 27th, the fire might not have occurred. The fire, however, not being directly connected with the failure to launch her, the plaintiff could not claim damages for the loss by fire. Even admitting that it was more difficult to launch her after than it was before the fire, the defendants must be held liable for the damage caused by her being carried away, because they should have launched her before the 27th. But there was other evidence that this was not the case, and it stood to reason, inasmuch as nothing but the woodwork was burned and she did not sink any deeper on the rocks, that there could be no greater difficulty in getting her off before the fire than after it. The

defendants had referred to some trifling considerations, but they were not worth considering for a moment. They had from the 28th of August till late in December to launch her, and His Honour supposed that if they had launched her on the 1st September Mr. Beaudry would not have said anything about it.—But they seemed to be working a little at her from time to time till the ice carried her away. It was preposterous to say that the defendants were not liable, under the particular circumstances. They had shown a want of diligence and a want of skill. The only question, then, was what amount of damage was to be awarded? This was in the discretion of the Court; the evidence was conflicting, and His Honour was not disposed to be severe in the assessment of damages He would not be justified in condemning them to pay more than $1000 damages.

Jetté & Archambault, for the Plaintiff.

J. J. C. Abbott, Q. C., for the Defendants.

CIRCUIT COURT.

Waterloo, Sept. 24, 1867.

Cole v. Williams, and Wood, Intervenant.

Landlord's Privilege—Insolvency of Tenant.

This was an action upon a Notarial lease for rent, instituted by process of *Saisie Gagerie.* The household furniture in use by defendant upon the leased premises was taken in attachment, and the intervening party filed an intervention claiming the property seized as guardian under T. S. Brown, the Assignee of defendant, who was an Insolvent, and had made an assignment with one William Wood to said Brown in 1865, the year previous to the lease of plaintiff to defendant.

Plaintiff contested this intervention upon grounds of insufficiency and irregularities, and, more particularly, for the reason that, by law, the plaintiff had a special *lien* and *privilege* upon the property seized, it being upon the leased premises and with the knowledge and consent of the intervenant, where it had remained over eight months previous to seizure. There was also a general denegation.

At the trial, the witness of the intervening party, his son, proved that the furniture seized was carried by intervenant's team, driven by his son, from West Shefford to Granby, and put into the house leased by defendant from the plaintiff.

Johnson, J. Judgment for intervening party, contestation dismissed with costs.

J. B. Lay, for plaintiff.

G. C. V. Buchanan, for intervenant.

(Authorities cited by plaintiff:—*Code Civil*, Art. 1619 and 1622: *Jones and Anderson*, 2 L.C.R. 154; *Aylwin et al.* v. *Giloran*, 4 L.C.R. 360; Pothier *Louage*, Nos. 233 and seq.)—(J.B.L.)

Singular Divorce Suit.—In the Rolla *Herald of Liberty* are published the proceedings in the suit of Aaron Van Wormer *v.* Margaret Van Wormer. The plaintiff is Judge Wormer of the Eighteenth Judicial District. He sat in his own case, and on the pleadings entered a decree dissolving the bonds of matrimony between himself and wife. The petition alleged "that the defendant, wholly disregarded her duties as wife of the plaintiff, offered such indignities to the plaintiff as to render his condition intolerable in this, to wit, that the defendant said she would stay in no such place as Rolla; that the defendant has frequently left the bed of plaintiff, and refused to lodge with him; that said defendant has, during most of the time since said marriage, been ill-tempered, and even at times malignant, and for three days at a time had the mad dumps silently." Margaret, in her answer, "admits that the matters and things as stated in said petition may be all true," and filed a written consent that the plaintiff might sit in this case; whereupon it was "considered by the court and decreed that the bonds of matrimony heretofore contracted between the plaintiff and defendant be dissolved, and that the plaintiff be restored to all the rights and privileges of a single person." The trial took place at a special term ostensibly called for the purpose of trying criminals.

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