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MORTGAGE FOR FUTURE ADVANCES.

We notice a case before the Supreme Court of New York, in which a question very similar to that raised in the case of *Quintal* v. *Lefebvre* (*ante*, p. 347,) was submitted to the consideration of the Court. There is some difference, no doubt, between the registration system in New York and in the Province of Quebec, but the point decided seems to be almost identical. The material question in *Quintal* v. *Lefebvre* was whether a mortgage for a *crédit ouvert* takes effect from the day of its date, or from the time that the advance is actually made by the mortgagee. In the New York case, *Ketcham & Wood*, the facts were these: In May, 1875, the defendant *Ketcham* executed a mortgage to the plaintiff to secure the sum of $300 payable on demand. This mortgage was recorded or registered the same month. But at the time of the execution of the mortgage the plaintiff advanced only $75. Before any further sum was advanced, Ketcham, on the 3rd June, 1875, executed a second mortgage in favor of one Wood for an amount in which he was actually indebted to Wood at the time. This mortgage was recorded June 7th. Wood foreclosed his mortgage, and bought in the property at the sale. It then appeared that the plaintiff had made four additional advances subsequent to June 7th, when Wood's mortgage was recorded. The question then arose whether the plaintiff had priority for more than $75, amount of the first advance.

The case went to the Supreme Court of New York, and in September that tribunal reversed the judgment of the lower court, and restricted the privilege of the plaintiff to $75, amount of the first advance. This is contrary to the ruling of Mr. Justice Mackay in the Canadian case. The New York court admits that the authorities are conflicting. 2 Wash. R. P., ch. 16, §§ 4 and 42 *et seq.*; 1 Jones on Mort., §§ 365-378; Thomas on Mortgages, pp. 61-62; 4 Kent Comm. 175, are referred to. The judge who delivered the opinion says the recorded mortgage to secure future advances "is notice of any advance actually made, for though the record itself conveys no notice that any sum less than that stated therein was advanced, yet it is sufficient to put any one on inquiry, and is notice of any fact which would in the course of business be ascertained upon such inquiry." This reasoning does not seem very conclusive. We should be inclined to suppose that a recorded mortgage for $300 would be notice of the apparent fact, rather than of facts which actually existed, but which it might be extremely difficult to ascertain. For example, a mortgage might be given to cover an indebtedness the amount of which depended on the verification of accounts between the parties, and as to which a third party could obtain no information whatever.

RIGHTS OF MARRIED WOMEN.

At a recent Social Science Congress in Edinburgh, women took a prominent part in the discussion of the rights of property of females. Judging from the utterances of some of the speakers, the case of women would seem to be pitiful indeed. Miss Lydia Becker believed that there were many unmarried women who hesitated to contract matrimony owing to their unwillingness to come under the marriage laws. Miss Becker perhaps implied that she was one of those who stand shivering on the brink, and such an argument will no doubt appeal irresistibly to the chivalrous sentiment of legislatures. Then, some who had taken the fatal leap into matrimony were equally full of complaining. A Mrs. Elmly said that the wife was only a servant who received no wages, and yet she had to perform an immense amount of domestic labor. It was a great grievance in the eyes of another married lady that the husband had the sole legal custody of the children, and she added that this was a matter of life and death to women "whose children were being subjected to the cruelties, brutality and abominations of husbands." In view of these and similar expressions, an advocate present was tempted to betray some curiosity as to what sort of husbands the ladies who had spoken had known, but this impertinence was very properly frowned down. Upon the subject of divorce the ladies were equally frank. While one, a married lady—the same who railed at the "cruelties, brutality and abominations" of husbands—

objected to divorce altogether, perhaps on the ground that a bad husband is better than none, another, not yet coupled in matrimony, was for extending the causes of divorce. She considered drunkenness a good cause, and said if she had to choose "she would rather live with an unfaithful husband than a drunken one." Yet another unmarried lady, Miss Burton, communicated the depressing information to the meeting that "there was hardly a married couple who, at some time of their life, did not wish they had not been married." No doubt those who agree with her will be careful to follow the apostolic admonition to be found in the latter part of 1 Cor., vii., 27. Upon the whole, however, it would appear that the married ladies of Scotland are rather better off than their sisters in England, and, besides, one of the speakers of the male sex gravely submitted "that marriage should not be made too popular; it was too popular already, and women looked too much to it."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 8, 1880.

Sir A. A. DORION, C.J., MONK, RAMSAY, CROSS, J J., BABY, A.J.

CARREAU (deft. below), Appellant, and McGINNIS, (plff. below), Respondent.

Garant—Subrogation—Costs.

The respondent paid to the appellant a debt due by M. et al., and took a subrogation of the claim. He sued M., and the appellant had knowledge of the action and furnished the names of witnesses to prove the debt; but the respondent obtained judgment for part only. Held, that respondent was entitled to recover the balance from appellant, but as he had not called appellant in as garant, respondent was not entitled to recover the costs incurred in the suit against M.

The appeal was from a judgment of the Court of Review, Montreal, (Mackay, Torrance, Jetté, J J.) Oct. 31, 1878, reversing a judgment of the Circuit Court, Iberville (Chagnon, J.) Jan. 17, 1878.

McGinnis applied to Carreau, a notary, for a copy of a deed of retrocession, but the notary would not give the copy until his bill in connection with the deed was paid. McGinnis paid the bill, $89.50, and obtained a subrogation of the notary's rights against Molleur and others, the debtors. McGinnis sued Molleur alone, and recovered judgment for $30 only. He then sued Carreau for the balance $59.50, together with $54.08, costs which McGinnis had to pay in his action against Molleur.

The judgment of first instance dismissed the action, the judgment being as follows:—

"La Cour, etc.,

"Considérant qu'attendu la nature du transport invoqué et la manière dont il a été fait, le défendeur ne pouvait être garant de rien autre chose que de l'existence de la dette;

"Considérant que le demandeur n'a pas constaté par son action et sa procédure que la créance cédée n'était pas due au défendeur;

"Considérant que les termes du transport, tel qu'accepté par le demandeur, constaté que la créance transportée était due au défendeur par plus d'un débiteur;

"Considérant que le demandeur connaissait, lors du transport, les détails du compte transporté, et le fait qu'il était dû par plus d'un débiteur, en autant que le compte transporté, lui-même, le mentionne, et aussi en autant que dans la poursuite faite par le demandeur contre Molleur, fils, le demandeur, dans le compte qu'il y annexe comme faisant partie de son action, spécifie des dates et des détails qui ne se trouvaient pas dans le compte transporté, et spécifie même le *nom* d'un débiteur de compte, autre que Joseph Molleur, fils;

"Considérant que si le demandeur voulait prétendre qu'il n'était pas obligé de requérir le défendeur de lui donner le nom des débiteurs non spécialement indiqués dans le compte et transport, il eut dû au moins réclamer de ceux des débiteurs qu'il connaissait, quoique non spécialement mentionnés dans le compte transporté, et particulièrement du nommé Julien Lamoureux, qu'il mentionne lui-même dans le compte annexé à la poursuite contre Molleur, comme étant un des co-débiteurs de Joseph Molleur, fils;

"Considérant que le demandeur paraît évidemment être de mauvaise foi, en disant dans son action qu'il a éte forcé de payer $89.50 pour le coût de l'acte de rétrocession en question dans la cause, attendu qu'il appert par les détails du compte transporté et spécialement par l'action intentée par le demandeur contre Molleur, fils,

et par le compte y annexé, que le compte transporté avait pour objet autre chose que le coût du dit acte de rétrocession, et considérant que vû que tout ce que dessus, le demandeur, au moins quant au présent, ne peut répéter du défendeur aucune partie de ce qu'il lui a payé pour ce transport;

"Considérant quant aux frais faits dans la poursuite du demandeur contre Molleur, fils, que le demandeur ne peut les réclamer du défendeur pour les raisons ci-dessus, et de plus parce qu'il n'a pas mis en cause, dans cette poursuite, le défendeur comme son garant;

"Considérant de plus que les conclusions de la présente action auraient dû offrir de remettre au défendeur la créance transportée;

"Déboute l'action avec dépens distraits à Messrs. Carreau & Bernier, avocats du défendeur."

The judgment in Review reversed the above judgment for the following reasons:—

"La Cour, &c.,

"Considérant qu'il y a erreur dans le dit jugement du 19 Janvier dernier (1878), lequel aurait dû maintenir l'action du demandeur pour le montant demandé, pour les raisons mentionnées dans la déclaration du demandeur, les allégations de laquelle déclaration ont été prouvées vraies;

"Considérant qu'il est en preuve que le demandeur a payé au défendeur la somme de $89.50 pour le coût d'un acte de rétrocession par L. A. Augé, Esqualité à Joseph Molleur, fils, passé 16 Mai, 1876, devant le dit défendeur, notaire public, pour laquelle somme le défendeur a là et alors subrogé le dit demandeur dans ses droits contre le dit Joseph Molleur, fils, et que le dit défendeur ayant institué une action contre ce dernier pour le recouvrement de la susdite somme, il n'a pû recouvrer qu'un montant de $30, sa dite action étant déboutée pour le surplus, avec dépens contre lui, par le jugement de la Cour de Circuit du district d'Iberville, rendu le 6 Juillet, 1877, dans la cause portant le No. 1842, où le dit demandeur était demandeur contre le dit Joseph Molleur, fils, défendeur; de laquelle cause le défendeur avait connaissance;

"Infirme et annule le dit jugement, et procédant à rendre celui qu'aurait dû rendre la dite cour en cette instance, condamne le défendeur à payer au demandeur la somme de $113.58, savoir: $59.50, balance restant dûe sur la somme de $89.50 transportée au demandeur par le défendeur comme susdit; et $54.08 pour frais taxés sur le dit jugement du 6 Juillet, 1877, tant en faveur de l'avocat du dit demandeur qu'en faveur des avocats du dit Joseph Molleur, fils, avec intérêt," &c.

RAMSAY, J., (*diss.*) This action involves a very small amount of money, but that it is an intricate case will be gathered from the fact that the Court of Review reversed the judgment of the Circuit Court in first instance, and now this Court is very much divided in coming to the conclusion to modify the judgment in Review.

A Mr. Molleur and other persons passed a deed of retrocession before the appellant Carreau. The respondent, not a party to the deed, required a copy of this deed for some purpose. Carreau, who had not been paid for his services in drawing the deed, refused the copy unless McGinnis would pay his bill, amounting to $89. This McGinnis paid, being subrogated in the rights of Carreau against Molleur and others. He then signified the transfer to Molleur by notary, and Molleur answered he would not pay it because it was an overcharge. McGinnis then sued Molleur alone for the $89. Molleur, we are told, tendered some $30 and refused to pay more as not being due. His plea was maintained, and the action was dismissed for the balance, with costs against McGinnis, and McGinnis sued Carreau for the balance and the costs in the former case. Carreau put in a plea to this action which does not raise his pretensions very clearly; nevertheless, it seems to me it is sufficient. The action was dismissed on the ground that McGinnis had shown no right of action. Mr. Justice Baby and I are of opinion that this judgment was correct, and should have been maintained. The majority of the Court will, I believe, hold that in dismissing the action for the costs the Court of first instance was right, for a *garant* cannot be liable for the costs of an action to which he was not a party. I cannot understand why there should be a distinction between the costs and the action, unless it be made to appear in this case that Molleur's defence was a good one. There is no proof of this sort. We know nothing of the case of McGinnis and Molleur; but we do know the obligation of Molleur by the deed of retro-

cession, by which it would appear, that if Molleur's defence be what we incidentally learn it was, the judgment was bad. His obligation in the deed of retrocession is, "*de payer les frais encourus et ceux à encourir* POUR ARRIVER AUX PRESENTES *et à leur due exécution y compris les frais d'enregistrement.*" I can hardly agree that this amounts only to an undertaking to pay the naked cost of the act. But be this as it may, it was clearly the duty of McGinnis to establish by positive testimony that Molleur had a good defence to the claim for the amount of which McGinnis was subrogated. To say "*My* action was dismissed" is to say nothing at all, for he might have mismanaged his action. It was contended that Carreau had agreed to be bound by McGinnis' proceedings, but there is no evidence of this. All that is proved is that Carreau suggested the names of certain witnesses. The majority does not, I understand, hold that this binds him for the costs. It is not, then, appreciable to my mind how it can bind him as to the merits. I would, therefore, reverse the judgment in Review and dismiss the action.

Sir A. A. DORION, C.J., said that he was disposed to maintain the judgment, but two of the judges (Monk and Cross, JJ.) thought that McGinnis should not get the costs of his action against Molleur, and his Honor sided with this section of the Court, which held the view nearest his own. McGinnis committed the mistake of not calling in his *garant*, but in his Honor's opinion there was sufficient evidence of an implied agreement between Carreau and McGinnis, that the action by McGinnis should decide the matter, and he would therefore be disposed to allow McGinnis the costs; but his colleagues held that if a party wishes to have his costs he must call in his *garant*. The judgment would, therefore, be reformed to make it accord with this view.

The judgment is as follows:—

"Considérant que par la subrogation consentie par l'appelant à l'intimé, au bas du compte produit en cette cause, sur lequel a été portée cette action, le dit appelant a subrogé l'intimé dans le droit de recouvrer la somme de $89.50 due par Joseph Molleur, fils, pour les items mentionnés au dit compte, ainsi que par les autres personnes qui pouvaient être tenues au paiement de cette somme, sans préjudice au droit du dit appelant à l'augmentation suivant le tarif et à toutes réclamations contre M. Lamoureux, c'est-à-dire, contre le failli Julien Lamoureux, fils;

"Et considérant qu'il est prouvé que sur une poursuite faite par l'intimé contre le dit Joseph Molleur, fils, ce dernier a plaidé qu'il ne devait que partie du dit compte, et a offert la somme de $30, lesquelles offres ont été déclarées valables;

"Et considérant que l'exception de l'appelant, que l'intimé aurait dû se pourvoir contre les autres personnes qui peuvent devoir le surplus du dit compte, est mal fondée, attendu que l'appelant a subrogé l'intimé dans le droit de recouvrer de Joseph Molleur le montant entier du dit compte, la dite exception est rejetée; mais considérant que le dit intimé aurait dû, dans l'action qu'il a portée contre Joseph Molleur, dénoncer à l'appelant la défense du dit Molleur, et l'appeler comme son garant à faire cesser l'exception du dit Molleur, ce qu'il n'a pas fait, et qu'il ne peut en conséquence recouvrer du dit appelant les dépens encourus sur la dite contestation, et que l'intimé a été obligé de payer;

"Et considérant que sous ces circonstances l'intimé n'a droit de recouvrer de l'appelant que la somme de $59.50 qu'il n'a pas pu recouvrer du dit Joseph Molleur, fils, et qu'il y a erreur dans le dit jugement rendu par trois juges de la Cour siégeant en révision à Montréal le 31 jour d'Octobre 1878;

"Cette Cour réforme le dit jugement, et procédant à rendre le jugement qu'aurait dû rendre les juges siégeant en révision, casse et annule le jugement rendu par la Cour de Circuit le 19 janvier 1878, condamne le dit appelant à payer à l'intimé la somme de $59.50 avec intérêt, &c.; et cette Cour condamne l'appelant à payer à l'intimé les frais encourus en Cour de Circuit et en révision, et condamne l'intimé à payer à l'appelant les frais encourus sur cet appel." (*Dissentientibus* Ramsay & Baby, JJ.)

Judgment reformed.

Duhamel, Pagnuelo & Rainville for appellant.

Archambault & David for respondent.

MONTREAL, November 8, 1880.

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

DIXON et al. (petrs. below), Appellants, and PERKINS es qual. (respdt. below), Respondent.

Sale of insolvent estate — Liability of assignee where a part of the assets sold is not delivered.

The assignee of an insolvent estate sold it en bloc, by an inventory, in which certain shares of a company were set down at $5,642.76. *The purchaser paid the total amount of the purchase on the condition that the assignee would pay for any deficiency in the assets sold, according to the pencil estimate on the inventory. It appeared that the* $5,642.76 *represented the amount paid on* $15,000 *of stock, that the balance was unpaid, and that paid up stock could not be delivered to the purchaser. Held, that the assignee was bound to return the proportionate value of paid up stock to the amount of* $5,642.76, *and in the absence of any allegation that* $2,000, *the pencil estimate on the inventory, was not a fair estimate, the assignee was condemned to return that sum.*

The appellants petitioned in the Court below that the assignee of the insolvent estate of L. J. Campbell & Co., of which they had purchased the assets, be compelled to pay over the sum of $2,000, being the estimated value per inventory of a certain asset consisting of 150 shares of the Railway & Newspaper Advertising Company. It appeared that the 150 shares were not fully paid up, only $5,642.76 being paid thereon, and the petitioners, appellants, claimed that they were entitled to fully paid shares, or that the estimated value per inventory be returned to them.

The judgment of the Court below, Superior Court, Montreal, Torrance, J., dismissed the petition, the judgment being as follows:—

"Considering that the petitioners have not proved that they are entitled to the conclusions of their petition; considering that their remedy if any they have, is under the Civil Code to obtain a reduction of price, doth reject such petition with costs, *distraits*, &c."

Cross, J. (*diss.*) was of opinion that the judgment should be confirmed. The purchaser should have inquired into the value of the assets, and ascertained whether the stock was fully paid up. His Honor remarked, moreover, that there was no proof that the $2,000, in the pencil memorandum, was the value of paid up stock.

Ramsay, J. The sale was of the effects of a bankrupt estate *en bloc*. A statement furnished by the assignee purported to set forth in detail what it consisted of. One of the items was: "Railway and Newspaper Advertising Company stock, $5,462.76." The appellants understood this to mean that this was the value of paid-up stock, as set forth in the inventory. What the assignee had to give was 150 shares of $100, equal to $15,000, on which $5,462.76 had been paid up, a liability instead of an asset. I think it will scarcely be seriously contended that this is the regular way of describing unpaid stock. It is certainly not the mode in which the assignee set forth a similar transaction, for we find that the next item is: "Dominion Building Society, 60 shares, paid on, $582." But it is said that the purchaser could not have been deceived, because the unequal amount could not represent any certain number of shares. But it is not necessary it should. The figure might very well be taken to be a valuation of the asset, to which the purchaser may have attached little or no importance. But now it turns out to be a liability to pay nearly $10,000.

But it is said appellant took the whole estate *en bloc*. and if he was in error as to part he ought not to have accepted it, and that at all events he cannot keep a part and refuse a part. This may have some truth in ordinary cases, but there is a peculiarity in the case before us. Appellants refused to accept and pay for the assets till they had verified the existence of the items contained in the statement; and they only waived their right to make this verification upon the express undertaking of the assignee in writing, that if appellants would pay the whole price he would pay back any deficiency according to a certain rate. The assignee, therefore, waived this right. Under the arrangement with him it became impossible to hand back the estate, and it was agreed that the settlement should be for the deficiency. There is, therefore, no inconvenience in carrying out the sale for part, as that is specially provided for. It is said the assignee had no authority to write this letter or to enter into this arrangement. This seems to me to be very questionable ground. The assignee was acting for the trustees in the whole transaction, and through him the money was collected. Could he be presumed to be their agent for a bit of the transaction and not for the whole?

We are, therefore, to reverse and grant

the prayer of the petition to the extent of the value at which it seems to have been taken by the appellants. It is contended that this is not evidence of value, and that it is only a private memorandum of the appellants. I think this is hardly a fair appreciation of the matter. The valuation was made in presence, or at all events with the knowledge, of the inspectors, and expressly concurred in by one of them. This would be a complete admission, if Mr. Thomas had not had any other capacity than that of an inspector, and even though he had another interest there, I cannot think his positive concurrence in the value is not evidence of the value. It only exposed his admission to an easier repudiation by the creditors. This they have not attempted. Again, we have the assignee's letter. If it was not by the pencil memorandum, how was the subsequent adjustment promised by him to be arrived at? I have already expressed the opinion that the action of the assignee was adopted by the creditors, and therefore his undertakings for the creditors in taking the step by which they profited bind them. This, however, does not affect the principle, but only the extent of our judgment; for if we had not taken the pencil memorandum as evidence we should have ordered an *expertise*.

One other point remains. At the last argument it was urged that the action was too late, because appellants had only five days to object. There seems to me to be no force in that argument. The term of ten days was departed from and a general undertaking to adjust deficiencies was substituted, which could only be met by an answer at common law. There was no such acquiescence or waiver of the right to claim adjustment.

Sir A. A. Dorion, C.J., said the grounds of the judgment were fully set out in the recorded judgment, which is as follows :—

"Considering that on the 25th day of September, 1876, the respondent in his capacity of assignee to the insolvent estate of L. J. Campbell & Co., sold to the appellants for the sum of $34,000, payable within ten days, the assets of the said estate, including an item described as 'Railway and Newspaper Advertising Company stock, $5,642.76';

"And considering that on the 30th of September, 1876, the appellants through the Molsons Bank paid to the respondent the sum of $33,500, being the balance of the price of the said assets, which payment was made before it became due, on the express condition contained in the letter of the same date by the respondent to the appellants, that he, the respondent, would pay them for any deficiency that might be found to exist in the goods and assets sold, in the proportion of the estimates made in pencil by the appellants on the inventory annexed to the deed of sale;

"And considering that the stock belonging to the insolvent estate of L. J. Campbell & Co. in the R. & N. Advertising Company at the time of the sale consisted of 150 shares of stock of $100 each, making a total of $15,000, of which $9,357.24 were still unpaid, and that no transfer could be effected of said shares or of any portion thereof, except subject to the liability of paying the calls made or to be made on the capital of the said stock, which liability was never known to the appellants and formed no part of the consideration which they agreed to pay for the said Railway & Newspaper Advertising Co. stock;

"And considering that although there was no warranty stipulated at the time of the sale, yet the respondent, being unable to deliver to the appellants the stock sold, is by law bound to return to them a portion of the price of sale which he has received, in the proportion that the value of said R. & N. A. Co. stock bears to the value of the whole assets sold;

"And considering that the respondent has neither alleged nor proved that the estimate made by the appellants at the sum of $2,000 on the list or inventory mentioned in the letter of the respondent of the 31st December, 1876, and which was concurred in by the said respondent, is not a fair and just estimate of the proportionate value of such an amount of paid up stock as was represented in the said list as consisting of $5,642.76, and that under such circumstances the appointment of experts to establish the proportionate value of the said stock would lead to unnecessary expenses to the parties;

"And considering that the Superior Court sitting at Montreal in matters of insolvency had, under the provisions of sect. 125 of the Insolvent Act of 1875, jurisdiction to adjudicate on the claim of the appellants arising out of the acts of the respondent when acting in his

said capacity of assignee, and having reference to the disposal of the assets of the said insolvent estate;

"And considering that there is error in the judgment rendered by the said Superior Court sitting in matters of insolvency on the 23rd of December, 1879;

"This Court doth reverse the said judgment, and proceeding to render the judgment which the Superior Court should have rendered, doth declare the sale of the stock in the said R. & N. A. Co. null and inoperative, and doth condemn the said respondent in his said capacity to pay to the appellants out of the funds of the estate the said sum of $2,000, with interest from this date and costs of both Courts (Cross, J., dissenting)."

Judgment reversed.

Abbott, Tait, Wotherspoon & Abbott for appellants.

Geoffrion, Rinfret & Dorion for respondent.

SUPERIOR COURT.

MONTREAL, Nov. 8, 1880.

Ex parte McLAUGHLIN, petr. for certiorari, LALONDE et al., J.P., McMASTER et al., distrayants, and SOUCHEREAU, opposant.

Certiorari—Service upon Prosecutor—Costs.

The prosecutor cannot, upon a petition for writ of certiorari, be condemned to pay costs, unless he has been made a party to the proceedings.

Souchereau, the opposant, was the prosecutor in certain proceedings before Justices against the petitioner McLaughlin, in which the latter was condemned to pay a fine of $3 and costs. He then petitioned for a writ of certiorari, and the conviction was quashed, Souchereau being condemned to pay costs. Subsequently, an execution having issued for these costs against his effects, he filed an opposition, alleging that he had never been made a party to the cause, nor called upon to answer any of the proceedings; that no service of the writ of certiorari or of any of the other proceedings in the cause had been made upon him, and he was left in ignorance of the proceedings until his effects were taken in execution.

The petitioner answered that it was not necessary that the opposant should be served with a copy of the writ of certiorari, or that he should have notice of the proceedings.

CHAGNON, J., maintained the opposition, the judgment being as follows:—

"Considérant qu'il appert par toute la procédure dans l'instance du *certiorari*, dans laquelle instance jugement fut rendu condamnant l'opposant à payer les frais, que jamais, ni avant ni après l'émanation du dit bref de *certiorari*, l'opposant n'a été rendu partie dans l'instance, en y ayant été appelé;

"Considérant que c'est un des premiers principes de l'ordre judiciaire que personne ne peut subir de condamnation, ni être privé d'aucuns de ses droits, sans qu'il ait été mis à portée de se défendre;

"Considérant en conséquence que le jugement rendu dans la dite instance de *certiorari*, condamnant l'opposant à payer les frais accrus sur la dite procédure, n'est pas justifié, et doit être déclaré sans effet et non avenu quant à lui dit opposant, et considérant que l'opposition faite à l'exécution du dit jugement par l'opposant, tiers non partie à la dite instance, doit être déclarée bien fondée;

"Déclare la dite opposition bien fondée, déclare le dit jugement non avenu et sans effet contre l'opposant, quant à la partie d'icelui jugement prononçant une condamnation en frais contre le dit opposant; déclare l'exécution faite du dit jugement, à la demande des avocats distrayants contre les biens du dit opposant, de nul effet et illégale, et en conséquence déclare la saisie pratiquée sur les meubles du dit opposant en vertu du dit jugement, nulle et non avenue, et en donne mainlevée au dit opposant, le tout avec dépens contre les avocats distrayants, messieurs Macmaster, Hall & Greenshields, &c."

Davidson, Monk & Cross for opposant.

Macmaster, Hall & Greenshields for petitioner and *distrayants*.

MONTREAL, Nov. 8, 1880.

CARDINAL v. DOMINION FIRE AND MARINE INSURANCE CO.

Fire Insurance—Breach of Condition—Leaving premises unoccupied.

The insured cannot recover upon a policy which contains a condition making the contract void if the premises be left unoccupied for more than fifteen days without notice to the Company, and it appear that the premises were vacant at the time

of the fire and had been so for a much longer time than fifteen days without notice.

The action was brought to recover the sum of $500, on a policy of fire insurance.

The defendants, besides other pleas, pleaded breach of the following condition of the policy: "Or if the premises hereby insured shall become vacant or unoccupied, ... and so remain for a period of more than 15 days without notice to the Company and consent endorsed hereon .....then and in every such case this policy shall be void."

CHAGNON, J., maintained the plea: "Considérant que la preuve constate que la dite maison a cessé d'être occupée un mois et demi ou deux mois, avant l'incendie, et spécialement qu'elle était inoccupée lors de l'incendie en question." The Court also found evidence that the risk had been increased by the premises being unoccupied. Action dismissed.

R. & L. Laflamme for plaintiff.

Davidson, Monk & Cross, for defendants.

RECENT ENGLISH DECISIONS.

Contract—Impossibility of performance.—By an ante-nuptial settlement, dated August, 1873, and made in the Scotch form, A bound himself on or before the 2nd July, 1875, to take out and effect upon his life for the full term thereof, in the name of the trustees therein mentioned, a policy or policies for the total amount of £10,000. On the 1st July, 1875, A was so ill as to be unable to insure, and continued in a similar state of ill-health until his death in Sept., 1878. *Held*, that there was no implied condition in the covenant that A's life should be insurable, and that damages for non-performance of the covenant were payable out of his estate. In *Bailey* v. *De Crespigny*, L. R., 4 Q. B. 185, it is said "where the event is of such a character that it cannot be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bourd by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterward happens." It is put in a very similar way in *Taylor* v. *Caldwell*, 8 L. T. (N.S.) 357.—*Re Arthur's Estate*, 43 L.T. Rep. (N.S.) 47.

Fire Insurance—Ownership of money for insurance as between Vendor and Purchaser.—After the date of a contract for the sale of a house, and before completion of the purchase, the house was damaged by fire, and the vendors received the insurance money from the insurance company under a policy existing at the date of the contract. The contract contained no reference to the insurance. In an action by the purchasers against the vendors, *held*, that the purchasers were not entitled to recover the moneys from the vendors, or to be allowed to have the amount deducted from their purchase money, or to have the moneys applied in reinstatement of the premises. (English High Court of Justice, Ch. Div., April 19, 1880.)—*Raymond* v. *Preston*.

RECENT UNITED STATES DECISIONS.

Homicide.—P. having horse-whipped C. between 9 and 10 o'clock in the morning, for an alleged insult to a lady to whom P. was engaged to be married, between 11 and 12 o'clock of the same day, C. sought P., with a friend and a good-sized hickory cane, found him at his place of business, demanded an apology, which being refused, he attacked P. with the cane. P. had retreated to the wall; and told C. if he hit him with the cane he would shoot him. C. said he was unarmed, but being told by his friend, who was standing by, to "hit him, knock him in the head," struck P. several blows with the cane. P. fired, and the blows and shots continued until C. fell mortally wounded by the last shot fired by P., and died the same evening. P. put in the plea of self-defence, but was convicted of voluntary manslaughter, and sentenced to the penitentiary for two years. *Held*, he was properly convicted.—*Poindexter* v. *Commonwealth*, Supreme Court, Virginia.

Marine Insurance—Unseaworthy Ship.—To render a ship "seaworthy" within the meaning of a contract of insurance, she must be sufficiently furnished with proper cables and anchors. 1 Kay's Shipmasters, 90. In *Wilkie* v. *Geddes*, 3 Daw. 57, a ship was held to be unseaworthy where it appeared that the best bower anchor and the cable of the small bower anchor were defective. Lord Eldon, in his opinion in the House of Lords, says nothing is more clear than that there is an implied warranty, in every contract of marine insurance, that the ship is seaworthy at the commencement of the risk, or at the time of her sailing on the voyage insured, and is provided with sufficient ground tackle to encounter the ordinary perils of the sea. The law seems to be perfectly well settled on this point.—*Lawton* v. *Royal Canadian Insurance Company*, Wisconsin Supreme Court, Sept. 21, 1880.